

Managing Compliance with *Environment Protection and Biodiversity Conservation Act 1999* Conditions of Approval

Department of the Environment

© Commonwealth of Australia 2014

ISSN 1036-7632

ISBN 0 642 81474 0 (Print)

ISBN 0 642 81475 9 (Online)

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Canberra ACT
18 June 2014

Dear Mr President
Dear Madam Speaker

The Australian National Audit Office has undertaken an independent performance audit in the Department of the Environment titled *Managing Compliance with Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*. The audit was conducted in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit to the Parliament.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's website—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee', is positioned above the printed name.

Ian McPhee
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

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Abbreviations

ANAO	Australian National Audit Office
CEB	Compliance and Enforcement Branch
CEMS	Compliance and Enforcement Management System
CEPN	Compliance and Enforcement Practitioners Network
CMP	Compliance Management Panel
CoP	Communities of Practice
EACD	Environment Assessment and Compliance Division
Environment	Department of the Environment
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
FTE	full-time equivalent
KPI	key performance indicator
Minister	Minister for the Environment
MNES	matter(s) of national environmental significance
NCA-PM decisions	not controlled actions ‘particular manner’ decisions
NESTRA	National Environmental Significance Threat and Risk Assessment
OSS	one-stop-shop
PBS	Portfolio Budget Statements
RCDP	Regulatory Compliance Development Program
REC	Regulatory Enforcement Committee

Glossary

Action	Includes a project, development, undertaking or activity (or series of activities).
Approved controlled action	A controlled action that has been approved by the Minister (or delegate) under Part 9 of the EPBC Act.
Conditions of approval	The conditions attached to an approved controlled action that the proponent must adhere to.
Controlled action	An action that the Minister (or delegate) considers requires approval under Part 9 of the EPBC Act before it can proceed (as it may significantly impact on one or more matters of national environmental significance).
Matters of national environmental significance (MNES)	Matters protected under Part 3 of the EPBC Act.
Not controlled action 'particular manner' (NCA-PM) decision	An action that the Minister (or delegate) considers does not require approval if undertaken in accordance with the manner specified by the proponent.
Proponent	The entity undertaking the approved controlled action.

Summary and Recommendations

Summary

Introduction

1. 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 Department of the Environment (Environment)¹, is the Australian Government's primary legislation to protect Australia's environment and conserve its biodiversity.

2. The EPBC Act (Part 3) prohibits the undertaking of an action² without approval from the 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).³ 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.

3. 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 using one of a number of prescribed methods.⁴ 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.⁵ Examples of the types of conditions that may be attached to approvals include:

-
- 1 In September 2013, the Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) became the Department of the Environment as part of changed administrative arrangements.
 - 2 An action includes a project, development, undertaking or activity (or series of activities) (s523(1) of the EPBC Act).
 - 3 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 agency.
 - 4 The most common assessment methods are by preliminary documentation, state/territory process and environmental impact assessment or public environment report.
 - 5 The Australian Government intends to enter into agreements with the states/territories to assess and approve controlled actions under the EPBC Act.

- 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.

4. 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.⁶ Compliance with approval conditions underpins the effective operation of Part 9 of the EPBC Act and the public's confidence that approved actions will not detrimentally affect MNES.⁷

Approved controlled actions

5. 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.⁸ 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.

6 s142(1) of the EPBC Act.

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

8 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.

Administrative arrangements

6. Compliance monitoring and investigation/enforcement activities associated with approved controlled actions are managed by the Compliance and Enforcement Branch (CEB) within the Environment Assessment and Compliance Division (EACD) of the department, with oversight provided by a number of internal forums.⁹ As at March 2014, CEB had three sections comprising approximately 24 staff with responsibility for monitoring compliance with the conditions attached to approved controlled actions. There were also two sections (approximately 21 staff) with responsibility for investigating allegations or incidents of non-compliance and initiating enforcement action for breaches of the EPBC Act (involving approved controlled actions, as well as other matters).

7. Compliance monitoring by departmental officers primarily involves desk-based reviews of actions as they progress (commonly by phone and email), and includes assessing/approving management plans/reports/compliance returns that proponents submit as required by their controlled actions' conditions of approval.¹⁰ Compliance monitoring staff also undertake inspections of sites of controlled actions and compliance audits (which can be desk-based or involve site visits) to assess proponents' compliance with all relevant approval conditions. Any allegations of, or incidents relating to, non-compliance may be subject to investigation by Environment and may result in the department taking enforcement action against non-compliant proponents. These enforcement actions include variations to conditions and the issuing of infringement notices requiring the payment of a fine.

Previous reviews and audit coverage

8. Over recent years, there have been a number of reviews and audits of aspects of the operation of the EPBC Act by independent reviewers, Committees of the Parliament, the Australian National Audit Office (ANAO) and Environment's internal auditors. Among these, an ANAO audit in 2006–07 (*The Conservation and Protection of National Threatened Species and Ecological Communities*) found that, at that time, Environment had a well-designed

9 The internal forums are the EACD Panel, the Regulatory Enforcement Committee, and the Compliance Management Panel.

10 Documents reviewed by officers can range from simple reports numbering a few pages to lengthy and complex plans and reports containing hundreds of pages.

compliance and enforcement strategy, but did not have sufficient information to determine whether conditions on the approved controlled actions were generally met and there was little effective management of the information that had been submitted by proponents. In response to the findings of the 2006–07 audit, the department established the previously mentioned Compliance and Enforcement Branch in 2007 ‘to promote awareness of, and compliance with, the EPBC Act’.

One-stop-shop arrangements

9. In the lead-up to the 2013 Federal Election, the incoming Government announced its commitment to establishing a one-stop-shop (OSS) for environmental approvals covering both Commonwealth and state/territory legislation. Under proposed OSS arrangements, the assessment and approval of most projects against Commonwealth environmental requirements, which are currently undertaken by Environment, would be undertaken by the states/territories using existing processes once accredited. The states and territories would also be responsible for monitoring and enforcing proponents’ compliance with the conditions of approval related to the EPBC Act attached to actions that they approve.¹¹ Subject to the successful negotiation of agreements within planned timeframes (September to December 2014), the department anticipates that the number of approved controlled actions monitored by Environment will peak during 2014–15 and gradually reduce over subsequent years as actions are completed.

Audit objective and criteria

10. 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*.

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

- a structured risk management framework to assess and manage compliance risks has been developed;

11 The Australian Government would retain responsibility for monitoring and enforcing proponents’ compliance with conditions attached to controlled actions it has approved.

- a risk-based compliance program to effectively communicate regulatory requirements and to monitor compliance with regulatory objectives has been implemented;
- arrangements to manage non-compliance are effective; and
- appropriate governance arrangements are in place to effectively support EPBC Act Part 9 regulation.

Overall conclusion

12. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was introduced to protect Australia's environment and conserve its biodiversity. The provisions of the EPBC Act related to the assessment and approval of projects (controlled actions) are designed to facilitate Australia's economic and social development while mitigating significant impacts on matters of national environmental significance (MNES).

13. Since the enactment of the EPBC Act in 2000, the Australian Government has approved over 600 controlled actions under Part 9, many with conditions attached¹² that are designed to ensure that MNES are not adversely impacted by the controlled actions. As at September 2013, there were almost 8000 conditions attached to approved controlled actions that were established to protect around 1300 MNES. Ongoing compliance with established conditions of approval over the life of controlled actions, which can extend over decades, underpins the protection of MNES while allowing economic development.

14. The Department of the Environment (Environment) is responsible for regulating controlled actions approved under Part 9 of the EPBC Act. Environment's regulatory activities involve the monitoring of proponents' compliance with conditions attached to approved controlled actions, including the assessment/approval of management plans, reports and compliance returns submitted by proponents, supplemented by monitoring inspections and compliance audits. Any allegations of, or incidents relating to, non-compliance may be subject to investigation by the department and may result in enforcement action being taken, such as the issuing of infringement notices,

12 Conditions may involve the establishment and implementation of plans of management and offset areas. Offset areas are areas set aside for preservation and/or rehabilitation to compensate for the potential damage to MNES in other areas.

against non-compliant proponents. However, nearly 14 years after the enactment of the EPBC Act, Environment is 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 has regarding proponents' compliance with action approval conditions, which are designed to address the risks posed to MNES, is limited.

15. In particular, Environment is not well placed to demonstrate that it is effectively targeting its compliance monitoring activities to the areas of greatest risk. The department is 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 can be assessed and ranked. The absence of a sound risk-based approach has meant that compliance monitoring undertaken by the department has, 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 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 2013.¹³

16. The increasing workload on compliance monitoring staff over time has resulted in Environment adopting a generally passive approach to monitoring proponents' compliance with most approval conditions. As a consequence, the department has 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). Environment has recently established a compliance monitoring strategy that has been designed to coordinate its various compliance activities.

17. Environment's passive approach has also been evident in its approach to the management of non-compliance. In many cases, instances of proponent non-compliance (mostly of a technical nature—such as, a missed deadline to

13 The ANAO examined 64 approved controlled actions—10 per cent of approved controlled actions as at September 2013—that were selected broadly in proportion with key parameters of the population.

submit a management plan¹⁴) were either not identified by staff, or were identified but not referred for assessment and possible enforcement action. 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. Also, 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 is 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.

18. The extent of the shortcomings in, and challenges facing, Environment's regulation of approved controlled actions—particularly in relation to compliance monitoring—does not instil confidence that the environmental protection measures considered necessary as part of the approval of controlled actions have received sufficient oversight over an extended period of time. In this regard, Environment is working to improve its internal performance reporting arrangements to provide greater visibility of the compliance monitoring function to senior departmental managers. While Environment dedicated additional resources in 2007 to monitor and enforce EPBC Act compliance, effective arrangements to administer its regulatory responsibilities are yet to be established.

19. 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. 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.¹⁵ Establishing

14 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.

15 During 2013–14, Environment worked in collaboration with the Commonwealth Scientific and Industrial Research Organisation to develop the National Environmental Significance Threat and Risk Assessment (NESTRA) model that the department expects to implement from 1 July 2014.

mature administrative arrangements to effectively regulate approved controlled actions will, however, require a sustained effort from Environment to address identified shortcomings. To inform Environment's program of work, the ANAO has made five recommendations 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.

Key findings by chapter

Compliance intelligence and risk assessment (Chapter 2)

20. Compliance intelligence received and analysed on a timely basis should inform the periodic assessment of the risks posed by approved controlled actions to MNES. However, some 14 years after the EPBC Act came into force, Environment is yet to establish an effective compliance intelligence and risk assessment capability. The department collects, to varying extents, intelligence information primarily through its compliance activities (that includes, but is not limited to, allegations/incidents of non-compliance). Nevertheless, there is scope to improve the collection of intelligence through improved monitoring of approved controlled actions and from other environmental regulators. The department's approach to storing most compliance intelligence on hard-copy files established for each approved controlled action makes the analysis and the sharing of information difficult. Further, as the department does not regularly or periodically analyse the intelligence it gathers, it is not well placed to assess the risks that controlled actions pose to MNES.

21. While the department has identified a small number of risk factors against which all approved controlled actions are to be assessed, it is yet to identify an appropriate set of relevant factors against which risks can be assessed and ranked. The risk assessments of approved controlled actions, required since late 2011 were not prepared for 40 per cent of actions examined by the ANAO and, where prepared, the assessments often contained errors and have not been updated over time. In addition, risk considerations are not sufficiently documented during the planning of monitoring inspections and compliance audits to demonstrate that inspections and audits are directed at those controlled actions that pose the greatest risk.

22. In the absence of an effective risk assessment process, Environment has taken steps to address the heightened risks to MNES posed by one category of approved controlled actions—coal seam gas projects—which comprised 2.2 per cent of all approved controlled actions as at September 2013. To manage these risks, the department has allocated additional staff and has developed tailored monitoring arrangements (including close departmental and external scrutiny) for these actions.¹⁶

23. In February 2014, Environment’s executive endorsed a compliance monitoring strategy for the period 2013–16 that outlines key deliverables¹⁷ over this period that are designed to assist the targeting of compliance activities and allocation of departmental resources to areas of greatest risk. The department is also working in collaboration with the Commonwealth Scientific and Industrial Research Organisation to develop a National Environmental Significance Threat and Risk Assessment (NESTRA) model that is designed to enable its managers to strategically target their regulatory effort from 2014–15 within existing and future resource constraints.

Managing compliance (Chapter 3)

24. Environment’s ability to manage proponents’ compliance with their controlled actions’ conditions of approval is dependent, to an extent, on the clarity of the approval conditions. Generic conditions included more commonly in controlled actions approved from 2010 onwards establish common requirements and provide a sound basis for the department to monitor proponents’ ongoing compliance.¹⁸ However, the limited use of generic conditions in many controlled actions (and in particular those approved prior to 2010) increases the onus on the department to actively monitor these actions. Ambiguities or the lack of precision in the expression of bespoke conditions can have, and at times have had, an adverse impact on the department’s ability to undertake enforcement action. There is scope for the department to more frequently exercise its powers under the EPBC Act to vary conditions of

16 The Expert Panel for Major Coal Seam Gas Projects, comprising three external members appointed by the Minister, is also responsible for providing expert hydrological and hydrogeological advice to the Minister and the department relating to major coal seam gas projects.

17 The strategy’s key deliverables include a risk assessment tool, updates to standard operating procedures and guidance for proponents on preparing documentation for submission to the department.

18 Examples of generic conditions include requirements for the proponent to: self-report on compliance with conditions at periodic intervals; revise an approved plan on request; and publish approved plans and compliance returns.

approval (by consent or in response to proponents' non-compliance) to improve their enforceability.

25. In general, responsibility for the management of controlled actions is transferred from the area of the department responsible for the actions' approval (the assessment branches) to the compliance monitoring area soon after the approval of controlled actions. While there are specific circumstances where approved controlled actions can be retained by the assessment branches to undertake initial compliance monitoring activities, around 20 per cent of all approved controlled actions—some approved as early as 2001—have been retained by the assessment branches for undocumented reasons. The approved controlled actions retained by the assessment branches examined by the ANAO were more likely to have plans overdue for submission and other missed deadlines, and less likely to have been actively monitored by the department.

26. Environment's regulation of proponents' compliance with those conditions requiring the submission, approval and/or publication of plans and compliance returns has generally been inadequate. The ANAO's examination of 64 approved controlled actions (10 per cent of the population as at September 2013)¹⁹ found:

- numerous overdue plans and returns—22 plans relating to 10 controlled actions (15.6 per cent) and 18 compliance returns relating to nine controlled actions (14.1 per cent) were overdue for submission by proponents (many of which had been overdue for more than 18 months, including eight plans that the department was not aware were overdue);
- retention of evidence demonstrating the appropriate assessment of submitted plans and returns was generally poor—the department retained only partial or limited evidence of its assessment of 41 of the 67 approved plans (61.2 per cent).²⁰ In addition, the department retained only limited evidence of its assessment of 36 of the 84 plans, reports and compliance returns (42.9 per cent) not requiring approval; and

19 The ANAO's review of a sample of approved controlled actions focused on monitoring activity undertaken by Environment during the period from July 2010 to December 2013.

20 Environment evidenced the assessment of 10 of the 11 plans/reports submitted in the period from July 2013 to January 2014—a significant improvement when compared to earlier years.

- a significant proportion of unpublished plans and returns—13 of the 51 plans, reports and compliance returns (25.5 per cent) requiring publication could not be located on proponents' websites as at December 2013.²¹

27. Monitoring inspections and compliance audits are an important part of Environment's compliance activities that can provide assurance regarding proponents' ongoing compliance, as well as being used to detect non-compliance. There is scope for the department to improve the planning, conduct and management of monitoring inspections to ensure that they achieve planned objectives. In relation to compliance audits, inconsistencies in planning, reporting and follow-up (such as some audit justification forms and evidence of the following-up of identified non-compliance not being retained) are inhibiting their effectiveness as a compliance tool. For both monitoring inspections and compliance audits, there would be merit in enhancing the sharing of lessons learned and intelligence gathered from these activities.

28. For most approved controlled actions, the department has not actively monitored proponents' compliance with their approval conditions²², to effectively supplement the monitoring undertaken through the department's assessment/approval of management plans and compliance returns. The ANAO found that the department had retained limited evidence of active monitoring for 44 controlled actions (68.8 per cent of the actions examined)—whose conditions are designed to protect 93 MNES under the EPBC Act.²³ The department indicated that it is currently updating guidance for staff that will outline the processes and procedures necessary to actively monitor approved controlled actions.

21 However, as some plans/reports examined by the ANAO were required to be published as long ago as July 2010, plans may have been published on the website at the time, but have since been removed or website links degraded over time.

22 Active monitoring, appropriate to the circumstances of each action, could take the form of: contacting proponents to inform them of an upcoming reporting requirement or milestone; seeking a status update from proponents for actions (such as commencement dates); or undertaking a monitoring inspection or compliance audit.

23 The 93 protected matters are: world heritage (five controlled actions); national heritage (two); wetlands of international significance (10); listed threatened protected species or endangered communities (37); listed migratory species (23); Commonwealth marine environment (five); Commonwealth land (six); action by Commonwealth agency (two); and unspecified (three). Actions can relate to multiple protected matters.

Responding to non-compliance (Chapter 4)

29. Environment's compliance framework includes key department-wide guidance material to support the delivery of a number of regulatory regimes. In general, this guidance material is not current and, as identified by a departmental internal audit, does not address numerous better practice regulatory considerations. Environment is, however, implementing strategies that are designed to address shortcomings in its compliance framework, as well as assessing regulatory resourcing needs, with an estimated completion date of August 2014.

30. While proponents of approved controlled actions are expected to report any potential non-compliance to Environment, they are only compelled to self-report non-compliance under Part 9 of the EPBC Act to the extent required by their actions' conditions of approval.²⁴ Compliance monitoring staff are well-positioned to identify non-compliance with approval conditions. However, many instances of proponent non-compliance evident from departmental records were either not identified by staff, or were identified but not referred for assessment and possible enforcement action. Although many unreported instances of non-compliance were of a technical nature—for example, a missed deadline to submit a management plan—they can nonetheless have an impact on the effectiveness of environmental safeguards. Of the 151 instances of non-compliance detected by the ANAO from an examination of approved controlled actions, information had not been retained to evidence that compliance monitoring staff had referred 88 instances (59.5 per cent) relating to 20 approved controlled actions (31.3 per cent of actions examined) to the section responsible for investigating non-compliance (Compliance Section) or that they had been centrally recorded.²⁵

31. Reported non-compliance by proponents of approved controlled actions can result in the department undertaking an investigation. However, Environment has prepared limited procedures on the conduct of investigations

24 Only two-thirds of the actions examined by the ANAO required proponents to submit annual compliance returns and/or report non-compliance incidents as they occur.

25 These 20 controlled actions related to the following 46 protected matters: world heritage (three controlled actions); national heritage (two); wetlands of international significance (four); listed threatened protected species or endangered communities (20); listed migratory species (nine); Commonwealth marine environment (two); Commonwealth land (three); action by Commonwealth agency (one); and unspecified (two). Actions can relate to multiple protected matters.

where a criminal offence is not suspected²⁶—resulting in the investigations examined by the ANAO being conducted using inconsistent practices. In contrast, there is sound guidance for staff and established practices to determine appropriate enforcement responses for identified serious and low-level non-compliance, which had generally been followed for the investigations examined by the ANAO.

32. Where investigations determined that non-compliance had occurred, documentation retained by Environment outlined its enforcement decisions and, to the extent to which reasons were documented, the stated reasons were relevant to the circumstances of the investigated matters and in accordance with established guidance. There is further scope for staff undertaking investigations to improve the transparency of enforcement decision-making by strengthening the link between the stated reasons and established guidance, and incorporating comparisons to recent decisions for relevant past cases.

Governance arrangements (Chapter 5)

33. The number of approved controlled actions managed by the Approvals Monitoring sections has increased significantly since July 2008, but compliance monitoring resources have increased at a lower rate and work-related efficiency gains (in areas such as improved risk management, work practices and information management) have been limited. On the other hand, investigations into non-compliance incidents (across all parts of the EPBC Act) have generally been addressed in shorter time periods with fewer resources due to the Compliance Section's efficiency improvements, including improved standardised work practices and the introduction of the Compliance and Enforcement Management System (CEMS).²⁷

34. The expanded use of IT systems to assist regulatory staff to undertake their day-to-day work, however, have had mixed results. The introduction of CEMS has improved the management of non-compliance investigations and associated documentation. In contrast, the functionality limitations of the 'Chapter 4 database'²⁸ make it difficult for compliance monitoring staff to

26 The department's *Investigation Procedures Manual* is directed primarily to investigations of a criminal nature, which does not apply to most non-compliance incidents related to approved controlled actions.

27 CEMS is a repository of reported non-compliance allegations and incidents, and a workflow management system for investigations and enforcement action.

28 The 'Chapter 4 database' records monitoring requirements and events to assist departmental staff to monitor proponents' compliance with their actions' conditions of approval.

effectively and efficiently monitor compliance. An examination of IT controls within CEMS and the 'Chapter 4 database' also identified significant deficiencies (including in relation to system access) that increase the risks to the integrity and security of regulatory data. Further, Environment's management of hard-copy records generally, does not effectively support its monitoring function.²⁹

35. The performance information captured that is relevant to the compliance monitoring function has been limited, which has 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 has included in its annual reports in relation to its EPBC Act Part 9 compliance activities does not provide stakeholders with sufficient information on which to determine the extent to which these activities are appropriate or sufficient to protect MNES. While recent internal quarterly performance reviews have improved the coverage of the performance of the compliance monitoring function, there is potential to further improve the reporting of compliance monitoring activities and outputs to enhance accountability to Environment's senior management and provide greater assurance regarding proponent compliance with approval conditions.

Summary of agency response

36. Environment's summary response to the proposed report is provided below, while the full response is provided at Appendix 1.

The Department acknowledges that there have been shortcomings in past compliance monitoring of environmental conditions. The Department accepts the recommendations in the report and is well placed to implement them.

Since 2012, the Department has been implementing a comprehensive business improvement programme. Implementation is expected to be completed in July 2014. It has been informed by an internal audit of compliance and enforcement activities in 2013 and includes:

- in 2012, implementing the Compliance and Enforcement Management System to track and coordinate investigations and intelligence gathering

29 Environment informed the ANAO that an electronic document records management system will be introduced within the Compliance and Enforcement Branch by 30 June 2014. The department considers that this system will address many of the current records management shortcomings.

- in 2013, implementing a risk-based case-prioritisation model, based on the Australian Crime Commission practice, to focus investigations on highest-risk cases
- in 2014, developing a risk-based prioritisation model, with the assistance of the Commonwealth Scientific and Industrial Research Organisation and based on the practice of the Australian Tax Office, to focus the Department's monitoring activities on those approved projects posing the highest risk
- in 2014, enhancing the Department's assessments and approvals database to enable more accurate monitoring and reporting of approval decisions, and
- in 2014, updating 63 standard operating procedures to ensure a systematic approach to the Department's compliance and enforcement activities.

In addition to the business improvement programme, the Department has significantly increased its proactive management of regulation over the last two years, in contrast to the report's finding that the Department takes a generally passive approach to regulation. Since 2012, the Department has undertaken 177 variations to conditions to assist proponents with voluntary compliance, has issued 19 infringement notices for breach of conditions, has directed 15 proponents to undertake independent audits of their actions, and has commenced varying conditions of approvals in response to breaches. In contrast, from 2008 to 2012, there were only 2 infringement notices and no directed audits.

ANAO comment

37. While the ANAO identified some areas of improved regulatory performance over the period examined by the audit, such as the level of documentation supporting the assessment of submitted plans and reports (refer to paragraphs 15 and 3.29), a significant increase in the 'proactive management of regulation', particularly in relation to monitoring proponent compliance, was not evident.

Recommendations

Recommendation No.1

Paragraph 2.31

To better assess and manage the risks to matters of national environmental significance posed by approved controlled actions, the ANAO recommends that the Department of the Environment develop and implement an annual program of compliance activities having regard to:

- (a) a structured approach to collect, retain and regularly analyse, compliance intelligence; and
- (b) the identification and regular review of relevant risk factors for approved controlled actions.

Environment's response: *Agreed*

Recommendation No.2

Paragraph 3.25

To strengthen compliance monitoring of approved controlled actions, the ANAO recommends that the Department of the Environment:

- (a) transfer approved controlled actions to the compliance monitoring area at the time of their approval, unless a specific need has been identified for the assessment branches' retention of the actions; and
- (b) establish, and monitor adherence to, appropriate protocols and procedures to help ensure that approved controlled actions retained by the assessment branches are transferred to the compliance monitoring area once the specific need has been addressed.

Environment's response: *Agreed*

**Recommendation
No.3**

Paragraph 3.65

To improve the management of risks to compliance and matters of national environmental significance, the ANAO recommends that the Department of the Environment:

- (a) review standard operating procedures and reinforce the need for staff to document the assessment and/or approval of material submitted by proponents of approved controlled actions;
- (b) better target monitoring activities towards those approved controlled actions that pose the greatest risks to matters of national environmental significance; and
- (c) develop and resource a coordinated program of compliance monitoring activities, monitoring inspections and compliance audits.

Environment's response: *Agreed*

**Recommendation
No.4**

Paragraph 4.39

To improve processes for responding to instances of non-compliance, the ANAO recommends that the Department of the Environment:

- (a) reinforce to staff the need for all instances of non-compliance by proponents of approved controlled actions to be recorded centrally; and
- (b) improve the documentation of reasons for enforcement decisions, including the key factors considered when an appropriate response was determined.

Environment's response: *Agreed*

**Recommendation
No.5**

Paragraph 5.64

To improve the governance and oversight of the compliance monitoring function, the ANAO recommends that the Department of the Environment:

- (a) implement improvements to IT systems and records management practices, to address identified gaps and enhance functionality;
- (b) improve the frequency and coverage of management reports in relation to compliance monitoring activities, outputs and outcomes; and
- (c) develop and report against appropriate performance measures that relate to the activities undertaken to monitor compliance with the EPBC Act.

Environment's response: *Agreed*

Audit Findings

1. Background and Context

This chapter provides information on the Environment Protection and Biodiversity Conservation Act 1999 and the Department of the Environment's approach to managing compliance with the requirements of Part 9 of this Act. It also sets out the audit objective and approach.

Introduction

1.1 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) is the Australian Government's primary legislation to protect Australia's environment and conserve its biodiversity. The objectives of the EPBC Act are broad and include the protection of matters of national environmental significance (MNES), the promotion of ecologically sustainable development, the conservation of biodiversity, and cooperative approaches to the protection and management of the environment. The Department of the Environment (Environment) is responsible for administering the EPBC Act.³⁰

1.2 The EPBC Act (Part 3) prohibits the undertaking of an action³¹ without approval from the Minister for the Environment (the Minister) or delegate, unless exempt, that is likely to have a significant impact on any of the following MNES:

- world heritage areas;
- national heritage areas;
- wetlands of international significance;
- listed threatened species and communities;
- listed migratory species;
- the Commonwealth marine environment;

30 In September 2013, the Department of Sustainability, Environment, Water, Population and Communities (DSEWPac) became the Department of the Environment as part of changed administrative arrangements.

31 An action includes a project, development, undertaking or activity (or series of activities) (s523(1) of the EPBC Act).

- Great Barrier Reef Marine Park;
- nuclear actions;
- water resources from coal seam gas developments and large mining developments³²;
- Commonwealth heritage sites;
- actions by a Commonwealth agency; or
- Commonwealth land.³³

1.3 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 actions is required under the EPBC Act. The Minister (or delegate) is then to determine whether the actions are:

- *controlled actions*—requiring assessment and approval under the EPBC Act;
- *not controlled actions ‘particular manner’* (NCA-PM decisions)—where approval is not required if the actions are taken in accordance with the manner specified; or
- *not controlled actions*—where approval is not required.

1.4 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, using one of a number of prescribed methods.³⁴ 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.³⁵ Examples of the types of conditions that may be attached to approvals include:

32 This matter of significance was inserted into the EPBC Act by the *Environment Protection and Biodiversity Conservation Amendment Act 2013* on 21 June 2013.

33 Federal environmental regulation of proposed actions is in addition to any environmental regulation that applies at the state/territory or local government level.

34 The most common assessment methods are by preliminary documentation, state/territory process and environmental impact assessment or public environment report.

35 The EPBC Act provides mechanisms for states/territories to assess some controlled actions for decision by the Commonwealth Minister. The Australian Government intends to enter into agreements with the states/territories to assess and approve controlled actions under the EPBC Act, which is discussed later in this chapter.

- 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.

1.5 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.³⁶ Compliance with approval conditions underpins the effective operation of Part 9 of the EPBC Act and the public's confidence that approved actions will not detrimentally affect MNES.³⁷

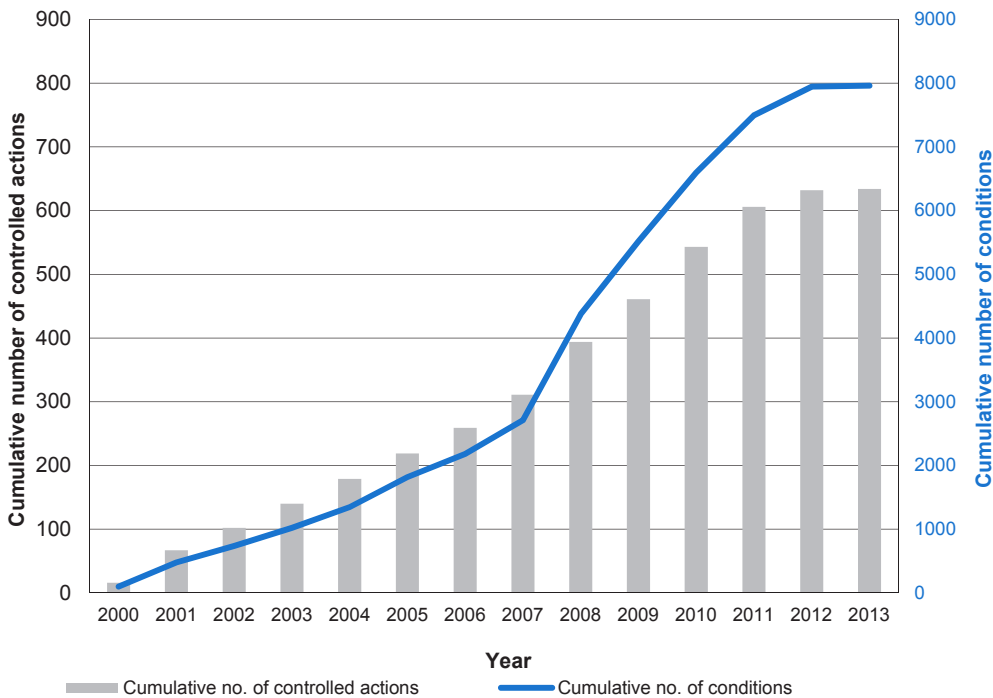
Approved controlled actions

1.6 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—equating to an average of around 13 conditions for each controlled action. The timeframes for 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 (as illustrated in Figure 1.1), only 32 actions had been 'closed' and were no longer subject to compliance monitoring by Environment.

³⁶ s142(1) of the EPBC Act.

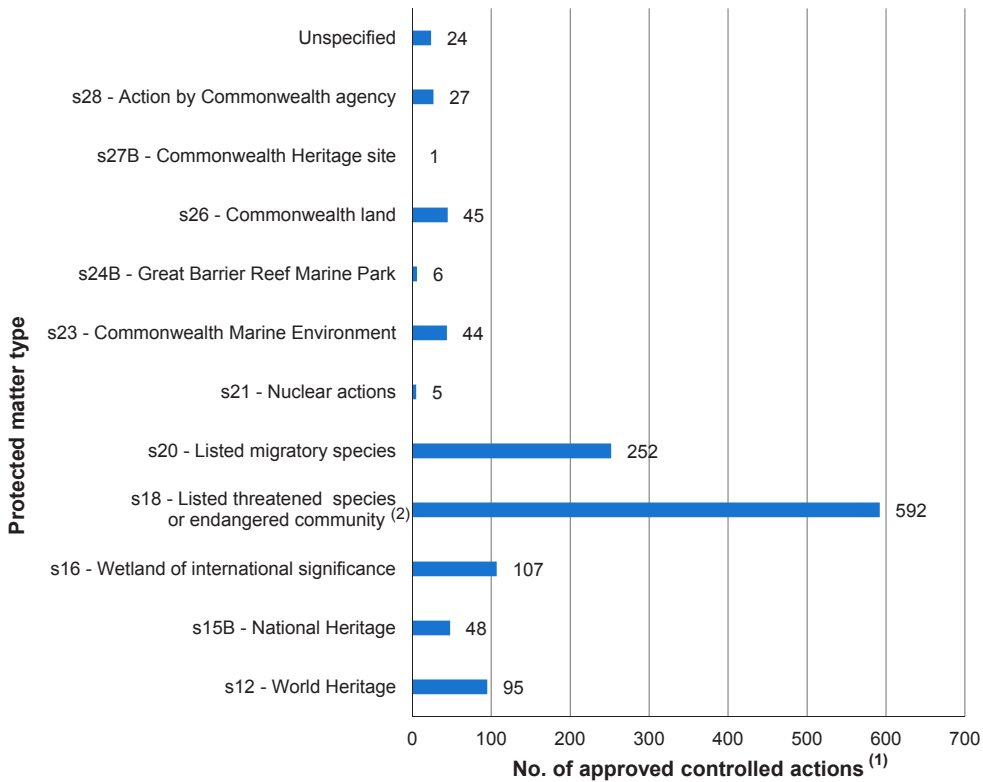
³⁷ State/territory and local governments may impose their own approval conditions for an action in addition to those imposed by the Australian Government. In deciding whether to attach a condition to an approval, the Minister is obliged to consider any relevant conditions that have been, or are likely to be, imposed by a state/territory on taking the action (s134(4)(a)).

Figure 1.1 Approved controlled actions under the EPBC Act (as at September 2013)



Source: ANAO analysis of Environment data.

1.7 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. As previously noted, the conditions imposed on approved controlled actions are primarily designed to protect one or more MNES, such as internationally significant wetlands or listed threatened species. The 635 approved controlled actions are designed to protect 1282 matters of national environmental significance, as illustrated in Figure 1.2.

Figure 1.2 Protected matters covered by approved controlled actions

Source: ANAO analysis of Environment data.

Note (1): 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.

Note (2): Some controlled actions have multiple protected matter sub-types within s18 of the EPBC Act.

Administrative arrangements

1.8 Compliance monitoring and investigation/enforcement activities associated with approved controlled actions are managed by the Compliance and Enforcement Branch (CEB) within the Environment Assessment and Compliance Division (EACD) of the department, with oversight provided by a number of internal forums.³⁸ As at March 2014, CEB had three sections comprising approximately 24 staff with responsibility for monitoring

38 The internal forums are the EACD Panel, the Regulatory Enforcement Committee, and the Compliance Management Panel.

compliance with the conditions attached to approved controlled actions (and NCA-PM decisions). There are also two sections (approximately 21 staff) with responsibility for investigating allegations or incidents of non-compliance and initiating enforcement action for breaches of the EPBC Act (involving approved controlled actions, as well as other matters).

1.9 Compliance monitoring by departmental officers involves:

- desk-based monitoring of actions as they progress (commonly by phone and email), and includes assessing/approving management plans/reports/compliance returns that proponents submit as required by their controlled actions' conditions of approval³⁹;
- monitoring inspections, where staff visit proponents' sites; and
- compliance audits, where officers are required to assess information provided by proponents to demonstrate their compliance with all relevant conditions of approval (which can be desk-based or involve site visits).

1.10 Any allegations of, or incidents relating to, non-compliance may be subject to investigation by Environment. Where non-compliance is established, the department may take enforcement action against non-compliant proponents, which can include variations to conditions and the issuing of infringement notices requiring the payment of a fine.

Previous reviews and audit coverage

1.11 Over recent years, there have been a number of reviews and audits of aspects of the operation of the EPBC Act by the ANAO, independent reviewers, Environment's internal auditors and Committees of the Parliament.

ANAO performance audit coverage

1.12 In 2003, the ANAO completed an audit into *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* (Audit Report No.38 2002–03) that examined, among other things, the then Environment Australia's compliance and enforcement activities. The 2003 audit found that, while departmental planning for the monitoring of actions was well underway, implementation was at an early stage.

³⁹ Documents reviewed by officers can range from simple reports numbering a few pages to lengthy and complex plans and reports containing hundreds of pages.

1.13 A subsequent audit, ANAO Audit Report No.31 2006–07 *The Conservation and Protection of National Threatened Species and Ecological Communities*, found that, at that time, Environment had a well-designed compliance and enforcement strategy, but did not have sufficient information to determine whether conditions on the approved controlled actions were generally met and there was little effective management of the information that had been submitted by proponents. Consequently, the department was not well-positioned to determine whether the conditions that were being placed on actions were efficient or effective. The department agreed with the ANAO's recommendation to audit a representative sample of proponents' compliance with Part 9 approval conditions each year.

1.14 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 the previously mentioned 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'.

Review of the EPBC Act

1.15 In October 2009, the *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* was delivered to the then Minister for the Environment, Heritage and the Arts. The independent review undertaken by Dr Allan Hawke AC examined, among other things, the extent to which the objects of the EPBC Act had been achieved and the operation of the EPBC Act generally. The report identified the strong compliance and enforcement focus as one of the positive features of the EPBC Act, but considered there was scope to improve arrangements for performance auditing and compliance. The review also noted broad concerns from stakeholders about the capacity of the department to deliver the activities necessary to ensure the efficient and effective operation of the EPBC Act.

1.16 The recommendations of the independent review that were related to compliance and enforcement of Part 9 approvals included amendments to the EPBC Act to:

- allow for the full suite of administrative, civil and criminal remedies to be applied (Recommendation 55); and

- provide the departmental Secretary power to issue Environment Protection Orders (Recommendation 58) to temporarily cease an action (until the matter is properly investigated) where satisfied that there is credible risk of a contravention of the EPBC Act occurring.

1.17 The Australian Government, in its response to the Independent Review in August 2011, agreed to implement Recommendations 55 and 58.⁴⁰ Legislative changes to the EPBC Act to implement these recommendations have yet to be presented to the Parliament.

Departmental internal audit coverage

1.18 In September 2013, Environment's internal auditors finalised their review of Compliance and Enforcement Program Management in four divisions of the department that administer seven Acts of Parliament with a regulatory focus (including the EPBC Act in EACD). The internal audit reviewed, among other things: governance and risk management arrangements; resourcing; compliance monitoring; and enforcement actions.

1.19 Overall, the internal audit found that the department's regulatory compliance framework includes key policy and guidance material that supports the delivery of regulatory compliance regimes. However:

- key pieces of legislation identified as containing regulatory compliance provisions had not been risk-rated and prioritised, resulting in regulatory compliance activities being undertaken that may not be commensurate with the level of risk attributed to the relevant legislation;
- each division/section is currently using different approaches and varying degrees of the key principles as set out in their Regulatory Compliance Manual to manage compliance and enforcement activities; and
- regulatory compliance regimes are generally implemented reactively across the department as a result of conflicting priorities and staff shortages.

1.20 As at April 2014, the department advised that management actions designed to address the internal audit recommendations are underway and all are expected to be completed by August 2014.

⁴⁰ *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, dated August 2011.

Productivity Commission research report

1.21 In December 2013, the Productivity Commission published its research report on *Major Project Development Assessment Processes*, which had been commissioned by the Council of Australian Governments (COAG) in December 2012. The report benchmarked Australia’s development assessment and approval processes for major projects against international and domestic best practice. It examined specific regulatory practices including: the role of lead agencies and one-stop-shops; the use of strategic planning and assessment; statutory timeframes; and risk-based and outcome-based approaches to regulatory design.

1.22 Overall, the research report concluded that there is substantial scope to improve the efficiency of regulations, without reducing their stringency, so that regulatory goals are achieved at a lower cost to proponents and communities. The study also highlighted, among other things:

- the tension between stakeholders’ concerns of inadequate enforcement of conditions and rigid approaches to enforcement that impose unnecessary compliance costs; and
- that regulators could better articulate how compliance with conditions will be assessed and produce annual reports that detail how proponents have complied with conditions.

Independent review into the Port of Gladstone

1.23 In April 2014, a three-member independent panel appointed by the Minister for the Environment reported on its review of the design, construction and functioning of the outer bund wall⁴¹ of the Port of Gladstone Western Basin Dredging Project—a controlled action approved under the EPBC Act (EPBC 2009/4904).⁴² The independent panel found a number of significant deficiencies in the overall performance of environmental regulators (both state and federal) and the proponent responsible for construction of the bund wall. In relation to the performance of Environment, the independent panel found:

41 The bund wall for the Port of Gladstone Western Basin Dredging Project is a temporary physical barrier that encloses dredging locations in the port and is designed to reduce water turbidity in surrounding areas.

42 Gladstone Bund Wall Independent Review Panel, *Independent Review of the Bund Wall at the Port of Gladstone: Report on Findings – April 2014*.

- that conditions of approval established for the controlled action lacked specificity to enable their effective assessment and/or enforcement by the department;
- inconsistencies in decision-making processes;
- inadequate resources applied to compliance monitoring, including poor record-keeping and inadequate follow-up when breach allegations persisted; and
- a lack of coordination between jurisdictions, particularly on compliance monitoring.

1.24 The Minister expects to formally respond to the independent panel's 19 recommendations by 1 July 2014, but has indicated an 'intention of adopting as many of the recommendations as possible'.⁴³

Senate inquiry into biodiversity offsets

1.25 In March 2014, the Senate referred an inquiry into the 'history, appropriateness and effectiveness of the use of environmental offsets in federal environmental approvals in Australia' to the Senate Environment and Communications References Committee.

1.26 The terms of reference for the inquiry include: an examination of the principles that underpin the use of offsets; the processes used to develop and assess proposed offsets; and the adequacy of monitoring and evaluation of approved offsets arrangements to determine whether promised environmental outcomes are achieved over the short and long-term. The inquiry is due to report by 16 June 2014.

One-stop-shop arrangements

1.27 In the lead-up to the 2013 Federal Election, the incoming Government announced its commitment to establishing a one-stop-shop (OSS) for environmental approvals covering both Commonwealth and state/territory legislation. Under proposed OSS arrangements, proponents would no longer be required to participate in a state/territory assessment process and then re-submit their project for approval to the Australian Government—the assessment and approval of most projects against Commonwealth and state/territory

⁴³ Hunt, G., *Findings of the Independent Review into the Port of Gladstone*, Media Release by the Minister for the Environment, 9 May 2014.

environmental requirements would be undertaken using existing state/territory processes once accredited. The new arrangements are intended to reduce regulatory burden on proponents and increase jobs and investment, while maintaining environmental standards.⁴⁴

1.28 The Government has signed memoranda of understanding with all Australian states and territories and intends to enter into bilateral approval agreements with states and territories from September 2014 to implement the OSS arrangements. Under the new arrangements:

- the states and territories would be responsible for:
 - determining whether to approve, and the conditions to attach to, EPBC Act controlled actions; and
 - monitoring and enforcing proponents' compliance with the conditions of approval attached to actions they approve; and
- the Australian Government would retain responsibility for:
 - approving the controlled actions that involve the Commonwealth marine environment, Commonwealth land or Commonwealth agencies; and
 - monitoring and enforcing proponents' compliance with the conditions of approval attached to actions approved by the Australian Government before the implementation of the OSS arrangements.

1.29 Subject to the successful negotiation of agreements within planned timeframes (September to December 2014), the department anticipates that the number of approved controlled actions under its management responsibility would peak during 2014–15 and gradually reduce over subsequent years as actions are completed.

Audit objective, criteria and methodology

1.30 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*.

⁴⁴ Within the context of the OSS policy, the Government announced that the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) had become solely responsible for assessing offshore petroleum and greenhouse gas activities in Commonwealth waters under the EPBC Act, effective from 28 February 2014.

1.31 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 has been developed;
- a risk-based compliance program to effectively communicate regulatory requirements and to monitor compliance with regulatory objectives has been implemented;
- arrangements to manage non-compliance are effective; and
- appropriate governance arrangements are in place to effectively support EPBC Act Part 9 regulation.

Audit methodology

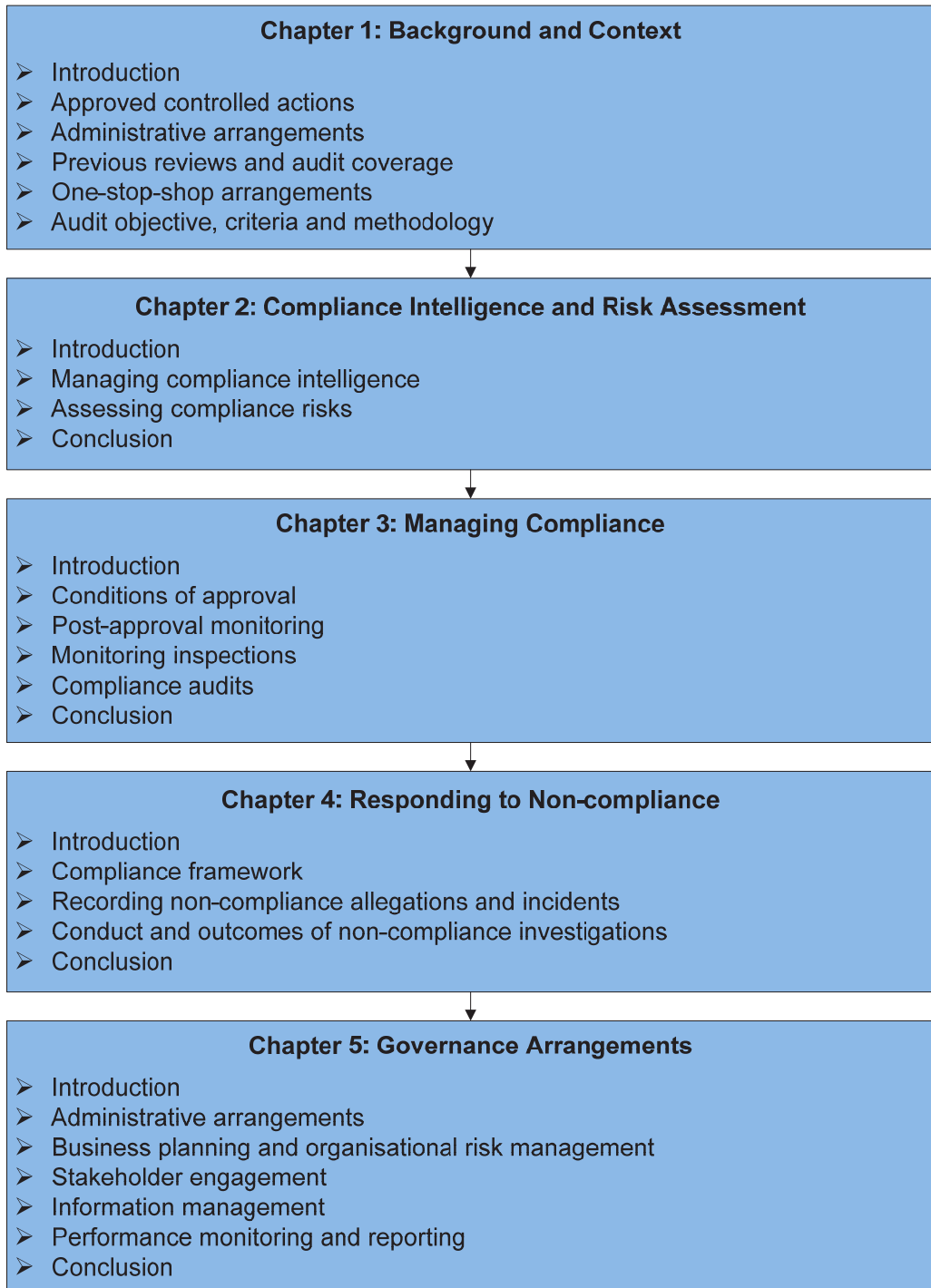
1.32 In undertaking the audit, the ANAO reviewed Environment's files and documentation, including those associated with a sample of approved controlled actions, monitoring inspections, compliance audits and non-compliance investigations. The ANAO accompanied departmental staff on monitoring inspections 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 groups⁴⁵, were sought on the department's regulation of approved controlled actions.

1.33 The audit was conducted in accordance with the ANAO Auditing Standards at a cost to the ANAO of \$713 000.

Report structure

1.34 The structure of the report is illustrated in Figure 1.3. Chapters 2, 3 and 4 discuss compliance intelligence and risk assessment, compliance management and responding to non-compliance, respectively, while Chapter 5 examines the governance arrangements in place to support the regulation of approved controlled actions.

⁴⁵ 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.

Figure 1.3 Report structure

2. Compliance Intelligence and Risk Assessment

This chapter examines the compliance intelligence capability and risk assessment processes employed by the Department of the Environment to assess proponents' compliance with the conditions of approval attached to controlled actions.

Introduction

2.1 Compliance intelligence and robust risk assessment processes underpin an effective regulatory regime. Compliance intelligence received and analysed on a timely basis can inform the periodic assessment of the risks posed by approved controlled actions to MNES. These risk assessments can then be used to develop compliance strategies that target the greatest compliance and environmental risks. The ANAO examined whether Environment had effective arrangements in place to collect and manage compliance intelligence and to assess the risks of non-compliance with EPBC Act Part 9 conditions of approval by proponents.

Managing compliance intelligence

2.2 Compliance intelligence information may, in isolation, be inconclusive and it is the regulator's ability to combine elements of intelligence information and analyse linkages that determines the effectiveness of its compliance intelligence capability. Compliance intelligence should feed into every aspect of compliance management, including planning, risk assessment, monitoring and enforcement activities. In the context of Part 9 of the EPBC Act, compliance intelligence should play an important role in informing Environment about the risks posed by approved controlled actions to MNES and better place the department to either mitigate or manage these risks.

2.3 The department has a number of internal and external intelligence sources to inform its regulation of approved controlled actions, as illustrated in Table 2.1.

Table 2.1 Sources of compliance intelligence

Source		Intelligence Information
Internal	Post-approval monitoring	Information received from proponents as part of the department's ongoing monitoring of approved controlled actions, including the assessment/approval of management plans/reports/compliance returns.
	Monitoring inspections	On-site observations can improve the department's understanding of the actions and the risks posed to matters of national environmental significance, as well as detect non-compliance.
	Compliance audits	Reports on proponents' compliance with their conditions of approval and detected non-compliance through: <ul style="list-style-type: none"> • departmental audits—reviews of documentation demonstrating proponents' compliance with conditions (desktop audits), supplemented by on-site inspections, where undertaken (full audits); or • independent audits—as required by some actions' conditions of approval, or conducted at the request of the department.
External	Other regulators	Compliance activities undertaken by other Australian and state government agencies ⁽¹⁾ (which are similar to those undertaken by the department) to determine proponents' ongoing compliance with their respective regulatory requirements.
	Members of the public	Allegations of non-compliance received by the department.

Source: ANAO analysis of Environment information.

Note 1: Other Australian Government agencies include the Great Barrier Reef Marine Park Authority and the National Offshore Petroleum Safety and Environmental Management Authority.

2.4 In February 2014, the department endorsed a compliance monitoring strategy for the period 2013–14 to 2015–16, but this includes limited reference to compliance intelligence.⁴⁶ It is also yet to develop a policy or procedure to guide its compliance intelligence capability to support the regulation of approved controlled actions.

2.5 In the absence of a documented strategy to guide its management of compliance intelligence, the ANAO examined Environment's current approach to the collection, storage and use of compliance intelligence information (that includes, but is not limited to, allegations/incidents of non-compliance) to guide its compliance monitoring activities.

⁴⁶ The only mention of compliance intelligence was in the context of a proposed departmental assessment of non-compliance data during 2015–16 to inform the development of the next compliance monitoring strategy.

Collecting compliance intelligence

2.6 Environment collects, to varying extents, relevant intelligence information from the sources listed in Table 2.1 when undertaking its regulatory activities for approved controlled actions. For example, the department has detected proponents' use of unapproved versions of management plans on their controlled actions through conversations with proponents. Notwithstanding the information currently collected, there is scope for the department to better exploit existing sources of compliance information, particularly from post-approval monitoring activities and other regulators.⁴⁷

Storage and use of compliance intelligence

2.7 In general, compliance intelligence information, with the exception of reported non-compliance, is stored exclusively on hard-copy files established for each approved controlled action (see Table 2.2 on the following page). This approach helps to ensure that all information related to a controlled action is retained together. It does not, however, facilitate analysis and the sharing of information to inform the preparation of risk assessments and the targeting of future regulatory activities across all regulated entities and actions.⁴⁸

2.8 The absence of a centralised repository for compliance intelligence also means that the department places a heavy reliance on the knowledge and understanding of departmental staff assigned to manage each controlled action. However, the relatively high turnover of CEB staff (discussed in Chapter 5) has reduced the level of knowledge that staff have acquired in relation to the approved controlled actions that they manage. In these circumstances, sound records management practices and appropriate information management systems are essential to effectively capture and manage compliance intelligence information.

47 In a number of cases, approved controlled actions are also subject to permits or approvals issued by other Australian and state/territory government agencies.

48 This finding accords with results of analysis undertaken in mid-2012 by the department that found, among other things: that active intelligence gathering by the department was at a low level; and the absence of high-level strategic intelligence analysis by the department to inform whole-of-department strategic regulatory compliance priorities.

Table 2.2 Storage and use of intelligence gathered

Intelligence Source	Storage	Use
Non-compliance incidents/allegations reported to Compliance Section		
All sources	<ul style="list-style-type: none"> • Compliance and Enforcement Management System (CEMS) • Hard-copy files established for compliance investigations 	<ul style="list-style-type: none"> • Proponents' non-compliance history considered in relation to current non-compliance cases • Not analysed for impacts on risks to matters of national environmental significance (MNES) on individual actions or collectively
Intelligence other than non-compliance incidents/allegations reported to Compliance Section		
Post-approval monitoring	<ul style="list-style-type: none"> • Hard-copy files established for each approved controlled action 	<ul style="list-style-type: none"> • Not analysed for impacts on risks to MNES on individual actions or collectively
Monitoring inspections		
Other regulators		
Compliance audits— independent		
Compliance audits— departmental	<ul style="list-style-type: none"> • Hard-copy files established for each audit 	<ul style="list-style-type: none"> • Audit reports are considered by Compliance Management Panel⁽¹⁾ • 'Lessons learned' summaries generally posted on the department's intranet • Not analysed for impacts on risks to MNES on individual actions or collectively

Source: ANAO analysis of Environment information.

Note 1: The Compliance Management Panel is the primary decision-making body within Environment that determines the prioritisation and resourcing of matters for investigation and determines the enforcement action to be pursued.

2.9 The general poor quality of departmental hard copy records and the limited functionality of the IT support system adversely impacts on the effectiveness of the department's regulatory activities. At present, Environment does not regularly (or periodically) analyse in any systematic manner the intelligence information that it gathers to inform an assessment of the risks to MNES by approved controlled actions. The current practice of retaining compliance intelligence information on action-specific files and the absence of centralised reporting makes it difficult for the department to effectively address key risks. There is scope for the department to significantly strengthen its collection, retention and analysis of compliance intelligence to direct its regulatory activities, which may require further investment in IT support systems.

Assessing compliance risks

2.10 A structured approach to risk management enables a regulator to identify, analyse and monitor regulatory risks, and to prioritise and plan compliance activities to mitigate these risks. As noted earlier, Environment has recently endorsed (in February 2014) a compliance monitoring strategy for the period 2013–14 to 2015–16 that is designed to assist the targeting of compliance activities and allocation of departmental resources to areas of greatest risk. One of the four priorities in the compliance monitoring strategy was to ‘deliver a risk-based, cost-effective approach to compliance monitoring and audit’ by, among other things, developing and implementing:

- a risk assessment tool to inform the allocation of departmental resources to reactive and proactive compliance monitoring (during 2013–14);
- a strategic plan for prioritising resources to proactive compliance monitoring (during 2014–15); and
- compliance audit programs for 2013–14, 2014–15 and 2015–16 (during each respective year).

2.11 The ANAO examined the extent to which Environment has determined factors that influence the level of risk to MNES posed by approved controlled actions, as well as the department’s current application of risk to its compliance monitoring activities.

Risk factors related to MNES

2.12 The development of a risk-based approach to inform compliance monitoring activities initially requires the identification of risk factors. The factors influencing the risks posed by approved controlled actions are initially determined through the completion of a Project Prioritisation Matrix by compliance monitoring staff. The matrix was established in 2011, and is required to be completed when new approved controlled actions are transferred to CEB from the assessment branches. Factors considered in determining a rating score for each newly transferred action include: the status of the action (commenced, completed or unknown); and content of conditions (including whether management plans, offsets, bonds, compliance returns are required and/or overdue).

2.13 While the template contains a sub-set of relevant risk factors, there are potentially other factors that influence the level of risk posed by actions that could also be considered when preparing risk assessments, including the:

- characteristics of controlled actions—such as the category of action (for example, mining or residential development) and the number and type of MNES protected;
- frequency and coverage of monitoring by other government regulators—the monitoring undertaken by other Australian or state/territory government regulators in relation to their permits/approvals may also address risks to MNES; and
- compliance history of proponents and their major contractors—which could cover multiple approved controlled actions, and other environmental approvals from Environment, and other Australian and state/territory government regulators.

2.14 Given the changing environment in which the department’s regulatory functions are delivered, it is important to ensure that risk factors are routinely reviewed and that assessments are used to inform broader examinations of risk. The appropriateness of the matrix to inform compliance management activities has not, however, been subject to periodic review and the set of risk factors included in the matrix have not been updated over time.

2.15 Notwithstanding Environment’s recent work to develop a compliance management strategy—some 14 years since the EPBC Act came into force—the department is yet to develop a set of key risk factors against which controlled actions can be assessed and ranked. As such, the department is not well placed to target its limited resources to those approved controlled actions that present the greatest risks. The department has since informed the ANAO—in June 2014—that risk indicators to inform future risk assessments have been identified.

Application of risk in the department’s compliance monitoring activities

2.16 A risk-based approach to compliance monitoring helps to ensure that limited regulatory resources are targeted toward the controlled actions that pose the greatest risk and to limit the regulatory burden on compliant proponents. The ANAO examined Environment’s consideration of risk as it undertakes the following compliance monitoring activities for approved controlled actions: post-approval monitoring; monitoring inspections; and compliance audits.

Post-approval monitoring

2.17 The department has adopted two broad approaches to address risk through its post-approval monitoring function. The first approach involves the dedication of specific resources to manage a small number of highly complex and environmentally sensitive actions—coal seam gas projects. The second approach involves risk-rating actions through the completion of the Project Prioritisation Matrix (discussed in paragraph 2.12) when actions are transferred to CEB from the assessment branches.

Coal seam gas approved controlled actions

2.18 In October 2011, the department established a Coal Seam Gas Taskforce (which would later become the Approvals Monitoring Coal Seam Gas Section) to manage coal seam gas approved controlled actions. The additional monitoring staff allocated to the Coal Seam Gas Section allows the department to monitor coal seam gas actions more intensively than other approved controlled actions.⁴⁹ The department considered that the significant environmental risks posed by coal seam gas actions (including in relation to ground water aquifers) can be addressed through a large number of conditions—many of which require departmental involvement and approval—and close departmental and external scrutiny.⁵⁰ Furthermore, in contrast to actions managed in the other two CEB sections, coal-seam gas proponents' management plans and reports are routinely assessed by contractors engaged by the department for this purpose.

Project Prioritisation Matrix

2.19 As noted earlier, compliance monitoring staff are required to complete a Project Prioritisation Matrix when each approved controlled action is transferred from the assessment branches. A rating score is determined on completion of the matrix (with the higher the score, the higher the action's priority for receiving case management attention). This is the only occasion where Environment's standard operating procedures for post-approval monitoring explicitly require the consideration of risk.

49 As at November 2013, 493 approved controlled actions had been assigned to the Approvals Monitoring North and South sections (comprising 18 staff), while 15 approved controlled actions had been assigned to the Approvals Monitoring Coal Seam Gas Section (comprising six staff). Coal seam gas approved controlled actions comprised 2.2 per cent of all approved controlled actions as at September 2013.

50 The Expert Panel for Major Coal Seam Gas Projects, comprising three external members appointed by the Minister, is also responsible for providing expert hydrological and hydrogeological advice to the Minister and the department relating to major coal seam gas projects. The Approvals Monitoring Coal Seam Gas Section provides secretariat support to the Expert Panel.

2.20 The ANAO's examination of a sample of 64 approved controlled actions⁵¹ found that the standard operating procedures required the completion of the matrix for 34 actions (53.1 per cent).⁵² Completed matrices were retained on the actions' hard-copy files for 21 out of the 34 actions (61.7 per cent)—with 10 of these matrices only partially completed or containing inaccuracies that influenced the rating score (such as being scored as not controlled actions 'particular manner' (NCA-PM) decisions rather than approved controlled actions). As the department has yet to develop guidance material for staff to inform the consistent completion of the matrix for all actions, there is an increased risk of inconsistent assessments across actions. Further, the assessments are not consolidated or analysed to enable the department to determine the risk profile across all approved actions. The department has informed the ANAO that the resulting assessments have not been used to inform monitoring activities.

National Environmental Significance Threat and Risk Assessment model

2.21 During 2013–14, Environment worked in collaboration with the Commonwealth Scientific and Industrial Research Organisation to develop the National Environmental Significance Threat and Risk Assessment (NESTRA) model. The department considers that the NESTRA model, which is expected to be implemented from 1 July 2014, will enable its managers to strategically target their regulatory effort from 2014–15 within existing and future resource constraints.

Monitoring inspections

2.22 Monitoring inspections enable staff to: verify compliance with approval conditions; build relationships with proponents; educate proponents; and develop an understanding of approved controlled actions. The monitoring inspection program should, therefore, form part of a compliance management strategy designed to manage the risks posed by approved controlled actions. However, the department has not established a risk-based program of monitoring inspections and, as noted earlier, a compliance management strategy has only recently been finalised.

51 The ANAO examined 10 per cent of the 635 controlled actions that had been approved as at September 2013. Further information on the sampling approach can be found in Chapter 3.

52 Matrices were not required to be completed for the remaining 30 actions that were transferred before late 2011 or had yet to be transferred.

2.23 Compliance monitoring staff informed the ANAO that actions were generally selected for inspection on the basis of: (undocumented) conversations with action case officers/managers in CEB; logistical considerations (including the proximity of actions within a geographic area and the ability of the department to obtain the permission of proponents)⁵³; and the time available to undertake the inspections.

2.24 Environment has, however, developed standard operating procedures that require compliance monitoring staff to complete a monitoring inspection justification form in advance of each inspection (which can comprise multiple sites and actions). While these forms document the consideration of some risk factors for the selected action (including status of the actions and contentious/compliance issues), the basis for selecting the actions subject to inspection and the risk profile of the selected actions compared to all other approved controlled actions is not documented.

Compliance audits

2.25 Compliance audits allow Environment to determine whether the conditions placed on controlled actions are being implemented as intended. They also allow the department to determine the extent to which proponents understand the approval conditions and the effectiveness of approval conditions in practice.

2.26 In recent years, the department has developed annual compliance audit programs that outline the number of audits of approved controlled actions (and NCA-PM decisions) that are proposed to be undertaken. The current program, for 2013–14, proposed a total of between 10 and 14 audits comprising:

- strategic audits (up to nine)—selected on general ‘themes’, such as: mining/exploration projects; projects with indirect offset components⁵⁴; and directed audits selected using the agreed criteria⁵⁵;

53 Environment requires the proponents’ permission to undertake monitoring inspections of approved controlled actions. However, the EPBC Act also contains provisions that allow a magistrate to issue a monitoring warrant to the department to access premises of approved controlled actions to determine whether conditions have been or are being complied with.

54 Indirect offsets involve activities that do not directly offset the impacts on MNES, but are anticipated to lead to benefits for MNES. Indirect offsets include programs for research, public education, employment and funded conservation.

55 The six agreed criteria are: environmentally sensitive area/risk(s) to MNES; media coverage/public profile; ministerial or politically sensitive profile; economic value or significance/materiality; proponent’s compliance history; and frequency of approvals/referrals.

- ad hoc audits (one)—usually requested from within the department, based on concerns raised by the public, media scrutiny or internally generated intelligence; and
- random audits (up to four)—selected using a spreadsheet-based random sampling tool.

2.27 The audit program did not, however, outline the basis on which the proposed number of each type of audit, and the strategic audit ‘themes’, were determined. Further, weaknesses in the department’s collection and management of compliance intelligence relating to approved controlled actions make it difficult to assess actions against the directed audits’ six agreed criteria, such as proponent’s compliance history.

2.28 In relation to the planning for individual audits, CEB auditing staff are required by standard operating procedures to complete forms justifying the selection of audited actions once they have been identified. Similar to the findings for monitoring inspections, the audit justification forms document the consideration of some risk factors (including status of the action, information from relevant co-regulators and contentious/compliance issues). The forms do not, however, document how the selected actions were identified for audit attention or the risk profile of the selected actions compared to all approved controlled actions. CEB auditing staff informed the ANAO that actions were usually selected on the basis of (undocumented) conversations with action case officers/managers.

Conclusion

2.29 Environment is yet to establish an effective compliance intelligence capability for approved controlled actions some 14 years after the EPBC Act came into force. While the department collects relevant intelligence data, primarily through its compliance monitoring activities, there is considerable scope to improve the collection of relevant intelligence, including from other environmental regulators and post-approval monitoring activities. The department’s current approach to storing compliance intelligence (most of which is stored exclusively on controlled actions’ hard-copy files) makes analysis and information sharing difficult. As the department does not regularly or periodically analyse the intelligence it gathers, it is not well placed to assess the risks that controlled actions pose to MNES.

2.30 While the department has identified a small number of risk factors against which all approved actions are to be assessed, it is yet to identify an appropriate set of relevant risk factors against which approved controlled actions can be assessed and ranked. Further, the required assessments were not completed for around 40 per cent of actions examined and the risk factors have not been subject to regular review. In addition, risk considerations are not sufficiently documented during the planning of monitoring inspections and compliance audits to demonstrate that inspections and audits are directed at those controlled actions that pose the greatest risk. This is a significant shortcoming in the department's regulation of approved controlled actions.

Recommendation No.1

2.31 To better assess and manage the risks to matters of national environmental significance posed by approved controlled actions, the ANAO recommends that the Department of the Environment develop and implement an annual program of compliance activities having regard to:

- (a) a structured approach to collect, retain and regularly analyse, compliance intelligence; and
- (b) the identification and regular review of relevant risk factors for approved controlled actions.

Environment's response:

2.32 *The Department agrees with ANAO Recommendation 1. In 2012, the Department began a comprehensive business improvement programme. In 2013, the need for such a programme was underscored by the findings of an internal audit of compliance and enforcement activities. The highest priority business improvement actions are documented in the Compliance Monitoring Strategy 2013–16 for the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) (Part 3, 7, 9 and 10) and Environment Protection (Sea Dumping) Act 1981. Several business improvement actions in the Strategy aim to better assess and manage the risks to matters of national environmental significance.*

2.33 *One of the key deliverables of the Strategy is the National Environmental Significance Threat and Risk Assessment model, which is being developed by the Department's Intelligence function in cooperation with the Commonwealth Scientific and Industrial Research Organisation. The National Environmental Significance Threat and Risk Assessment model is in the final stages of development, and implementation of the strategy will commence on 1 July 2014. The model includes a*

three stage process to determine the most important projects from a large number that require attention. The model:

- *provides the Department with the immediate capability to develop quantitative risk tools including prioritisation matrices;*
- *enables the identification and regular review of relevant risk factors for approved controlled actions; and*
- *enables recording of all compliance information relating to regulated entities, projects and sectors within Departmental databases to improve compliance intelligence data holdings and risk assessment and treatment capability over time.*

3. Managing Compliance

This chapter examines the Department of the Environment's management of proponents' compliance with the conditions of approval relating to their controlled actions.

Introduction

3.1 The conditions imposed by the Minister (or delegate) when approving controlled actions are considered to be necessary to help safeguard MNES while allowing environmental development. As a consequence, proponents' continuing compliance with their approval conditions is a key means by which the risks to MNES are minimised.

3.2 The conditions attached to each controlled action as part of the approval process are determined by the department's Environment Assessment and Compliance Division (EACD). With some exceptions, approved actions are transferred to the Compliance and Enforcement Branch (CEB) of EACD for ongoing management.⁵⁶

3.3 The ANAO examined the nature of the conditions attached to approved controlled actions and Environment's compliance monitoring activities, including post-approval monitoring, monitoring inspections and compliance audits.

Sampling of approved controlled actions

3.4 The ANAO examined a sample of approved controlled actions subject to regulation by the department. The sample of 64 approved controlled actions (from a population of 635 as at September 2013)—10 per cent of the population—was selected broadly in proportion with 11 key parameters of the population, including the approved actions': category, location and age; the nature of MNES protected; and number of approval conditions.⁵⁷ The ANAO examined monitoring activity undertaken by Environment during the period from July 2010 to December 2013.

56 Approved controlled actions can be retained by the assessment branches where there is an expectation that post-approval monitoring activity will occur shortly after the actions' approval. The transfer of approved controlled actions from the assessment branches to CEB is discussed later in this chapter.

57 Other parameters considered include the proportion of approved controlled actions that have been subject to monitoring inspections, compliance audits and investigation/enforcement action.

Conditions of approval

3.5 Apart from applying a number of common or generic conditions (discussed below), the conditions attached to each approved controlled action are tailored specifically to the circumstances of each action. Although conditions are determined by the EACD assessment branches, the department advised that, since January 2008, compliance monitoring staff have routinely had an opportunity to comment on draft conditions of approval before their finalisation. Figure 3.1 summarises the type of conditions that can be imposed on approved controlled actions.

Figure 3.1 Type of conditions imposed on approved controlled actions

- *Performance Conditions*—specify the environmental outcomes required without specifying how they are to be achieved.
- *Prescriptive or Process-based Conditions*—specify the action(s) or processes a proponent must undertake to comply with the approval.
- *Cooperative Conditions*—require the proponent to seek to cooperate and reach agreement with the department and, where appropriate, the community.
- *Civil Regulation Conditions*—establish mechanisms to increase accountability, primarily through: public availability of information; community involvement in monitoring programs; community liaison/advisory bodies; reporting to the community and community involvement in decision-making.

Source: Environment's Conditions Policy Statement.

Generic conditions⁵⁸

3.6 Over more recent years, Environment has increasingly applied a number of generic conditions to approved controlled actions to improve the accountability and transparency of proponents' ongoing compliance with their approval conditions. Eight generic conditions have been developed by the department, including those that require proponents to self-report to the department when: key action milestone events occur (such as action commencement date); non-compliance is detected; or at periodic intervals (by submitting annual compliance returns).⁵⁹

⁵⁸ The term 'generic' conditions' has been used to describe administrative conditions that, when applied, establish common requirements for approved controlled actions.

⁵⁹ Other generic conditions require proponents to: implement all approved plans, and revise an approved plan on request; undertake independent audits on request; maintain accurate compliance records; and publish approved plans and compliance returns.

3.7 Although some generic conditions were introduced as early as 2003, their use has only become more commonplace for actions approved from 2010. The generic conditions establish common requirements and provide a sound basis for the department to monitor proponents' ongoing compliance. The self-reporting by proponents, as required under generic conditions, also enhances the department's ability to monitor the progress of actions and assess ongoing compliance. Interested stakeholders can also monitor the progress of actions and ongoing compliance where proponents are required to publish management plans and compliance returns. On the other hand, for many controlled actions approved before 2010, most of which are still active, the lack of conditions requiring proponent self-reporting and publication increases the onus on the department to actively monitor these actions.

3.8 Of the 64 approved controlled actions examined:

- 12 (18.7 per cent) have zero to two generic conditions;
- 32 (52.4 per cent) have three to five generic conditions; and
- 20 (31.3 per cent) have six to eight generic conditions.⁶⁰

Bespoke conditions

3.9 While there is scope for the department to increase the use of generic conditions, ultimately a number of conditions are required to be tailored to the specific circumstances of each action. Environment's ability to manage proponents' compliance with conditions of approval is dependent, to an extent, on the clarity of 'bespoke' conditions. Unclear or ambiguous conditions generally make it more difficult for the department to manage compliance. In this regard, the ANAO identified a number of shortcomings with the expression of non-generic conditions of approval that could, and at times, has adversely affected the department's ability to enforce compliance. These include:

⁶⁰ The prevalence of particular generic conditions in the approved controlled actions examined varied significantly. For example, 14 actions examined require proponents to 'publish all approved plans and returns', while 50 actions examined require proponents to 'revise plans on request'.

- 37 instances in 17 controlled actions—that contained ambiguous conditions, such as: undefined terms where the department and proponent did not share a common understanding; use of the word ‘should’ rather than ‘must’; plans/reports required to be submitted and/or published at unspecified dates; and typographical errors⁶¹; and
- seven instances in four controlled actions—one approved in 2003, two approved in 2010 and one approved in 2011—where drafts of plans have been submitted that do not require approval by a specified date (which means that the proponents are not required to seek final approval of their plans and the actions can continue to progress in the absence of an approved and implemented plan).

3.10 The lack of explicit timelines in conditions of approval means that the proponent need only comply with these conditions at some point in time while the approval remains valid—which, in many cases, could be 10 years or more. Consequently, the department would have difficulty establishing a contravention of the conditions until at or near the expiry of the approval period. Case Study 1 on the following page provides an example of poorly expressed conditions of approval and the resulting impact on the department’s ability to effectively monitor and enforce compliance.

61 Typographical errors in conditions of approval, such as references to incorrect paragraphs, figures and appendices, can create sufficient ambiguity to adversely impact on the department’s ability to enforce affected conditions.

Case Study 1: Example of poorly expressed conditions of approval

In 2007, the Minister's delegate within the then Department of Environment and Water Resources approved a controlled action to develop residential lots, and associated infrastructure at a site in Queensland. The protected matter that was the subject of the controlled action was listed threatened species and communities.

The action's conditions of approval, which have effect until 2027, require the proponent to, among other things:

- create and protect in perpetuity a dedicated area on the rural allotment as detailed in an annexure;
- revegetate the dedicated protected area with a particular listed threatened species; and
- translocate the particular listed threatened species found on the site to the protected area.

As a result of a query from a prospective purchaser of a residential property within the site, the department's approvals monitoring area referred the controlled action to the Compliance Section in September 2013 to consider the potential for non-compliance with the controlled action's conditions of approval. The Compliance section found that:

- as there was no timeline in the condition of approval to (i) protect in perpetuity the dedicated area; or (ii) revegetate the dedicated protected area, it would not be possible to establish a contravention of these conditions (until at or near the expiry of the approval in 2027); and
- provisions for the proponent to annually monitor, and report to the department on, translocation success are preceded by 'should' rather than 'must', which also makes it difficult for the department to establish a contravention of approval conditions.

Variations to conditions of approval

3.11 Under Part 9 of the EPBC Act, conditions of approval attached to controlled actions can be varied, under certain circumstances, as the actions progress.

Variations initiated by Environment

3.12 Environment's ability to unilaterally vary or add to the conditions that are attached to approved controlled actions to incorporate generic conditions and/or clarify requirements is limited under the EPBC Act. While conditions can be varied with the proponent's consent (discussed below), conditions can only be varied without consent if:

- an approval condition has been contravened (s143(1)(a)); or
- the action has had (or the Minister believes the action will have) a significant impact that was not identified in assessing the action or significantly greater than when the action was assessed (s143(1)(b)).⁶²

3.13 The ANAO found that, in respect of the sample of 64 controlled actions examined, the department has rarely exercised its powers to seek variations to conditions of approval by consent or vary conditions in the face of the proponents' contravention of approved conditions.⁶³

3.14 Given the benefits from the adoption of generic conditions and the risks that can arise from ambiguous conditions, it would be prudent for Environment to: apply generic conditions more frequently in future approved controlled actions subject to approval; and address ambiguities in, and the precision of requirements of, conditions of approval.

Variations initiated by proponents

3.15 Under the EPBC Act, the Minister (or delegate) can vary an approval with the agreement of the proponent, as long as the decision-maker is satisfied that the variation is necessary or convenient for protecting, repairing or mitigating damage to a MNES.⁶⁴ In accordance with this provision, proponents have requested variations to their approved actions' conditions of approval from time-to-time. The deferral of deadlines in approval conditions are often the subject of variation requests, although variation requests have been made in response to changes in circumstances that were not anticipated at the time of the actions' approval. Proponent requests for variations to the conditions are often assessed and enacted by compliance monitoring staff, although staff from the assessment branches can provide assistance.

3.16 In general, variations to approval conditions are supported by a decision brief to the decision-maker that explicitly considered the impact of the proposed variation on the protected MNES and/or the integrity of the entire approved action. The ANAO's analysis found that, of the 38 variations approved since July 2010 relating to 20 actions (31.3 per cent of the controlled

62 Any variation without consent must be commensurate with the contravention or the increased risk posed to MNES than at the time of the action's assessment.

63 The ANAO noted that a variation of conditions was used on at least one occasion in 2012 to address non-compliance with existing conditions. Environment's management of non-compliance is discussed in Chapter 4.

64 s143(1)(c) of the EPBC Act.

actions examined), decision briefs had not been retained for two variations and one approved decision brief did not explicitly consider the impact on protected matters and/or the integrity of the entire approved action.

3.17 Notwithstanding the requirement for variations to be approved by the decision-maker, the ANAO noted a further four instances relating to three controlled actions where condition requirements were varied by staff without a formal variation. Case Study 2 provides an example of an unapproved variation to an action's approval conditions and potential consequences for subsequent enforcement.

Case Study 2: Example of unauthorised variation to conditions of approval

In 2010, the Minister's delegate within the then Department of Sustainability, Water, Population and Communities approved a controlled action to construct and operate an irrigation pipeline. The protected matter that was the subject of the controlled action was listed threatened species and communities.

The action's conditions of approval required the proponent to, among other things:

- seek departmental approval of, and implement, a monitoring strategy for one of the six protected species; and
- undertake water quality monitoring annually.

In September 2011, the delegate received a decision brief recommending the acceptance of the action's monitoring strategy despite the brief explicitly acknowledging that the strategy did not meet all the required conditions. The recommendation for approval was made on the basis that the department had received assurances from the proponent that the particular monitoring sites would be identified in accordance with the approval conditions and included within the strategy. In early October 2011, the delegate approved the monitoring strategy without comment.

Environment's assessment of the first monitoring results under the monitoring strategy submitted in March 2012 found that the proponent was in breach of several requirements of the monitoring strategy—including a failure to include monitoring sites identified in accordance with the approval conditions. However, officers within the Approvals Monitoring Section considered that the non-compliances were rendered unenforceable by the wording of the condition⁽¹⁾ and the department's approval of the monitoring strategy in 2011. As a consequence, the department accepted the monitoring strategy as satisfying condition requirements.

Documentation has not been retained by Environment to evidence the referral of the potential breach of approval conditions to the Compliance Section for an assessment and possible investigation.

Note 1: The perceived ambiguities or deficiencies with the wording of relevant condition were not documented and retained by the department.

Post-approval monitoring

3.18 Compliance monitoring staff are responsible for monitoring proponents' compliance with their controlled actions' conditions of approval, which primarily involves:

- assessing/approving management plans/reports/compliance returns (which is a desk-based exercise) that proponents submit as required by their controlled actions' conditions of approval⁶⁵; and
- maintaining a 'watching brief' on the status of actions, issues encountered by proponents, and the timing of documentation that should be submitted to the department for assessment/approval.⁶⁶

3.19 The ANAO examined the department's monitoring of approved controlled actions, including in relation to:

- the transfer of approved controlled actions from assessment branches to compliance monitoring staff;
- the assessment of plans/reports submitted by proponents;
- compliance with actions' reporting and publication requirements; and
- active monitoring by the department.

Transfer of approved controlled actions for compliance monitoring

3.20 In general, responsibility for the management of controlled actions is transferred from the EACD assessment branches to the Compliance and Enforcement Branch (CEB) soon after their approval. The assessment branches can retain responsibility for managing approved actions where it is expected that the department will shortly become involved in post-approval condition activity (such as the assessment and approval of a management plan to be submitted by the proponent)—with the rationale being that those involved in the assessment of a controlled action are best placed to review the suitability of the contents of any management plans submitted shortly afterwards.

65 Internal departmental guidance indicates that conditions requiring the preparation of management plans may be imposed where an action is likely to have a particular impact, but the assessment process has not identified specific measures or processes to protect, repair, offset or mitigate damage to the protected matter. Ministerial/departmental approval of management plans is generally required only for high risk actions.

66 Post-approval monitoring activities are also supplemented by monitoring inspections and compliance audits, which are discussed later in this chapter.

However, once these activities are finalised, the management of approved controlled actions is to be transferred to CEB.

3.21 Since 2009, Environment has developed and refined a process for handing over approved controlled actions that involves the completion of a Project Transfer Form (that documents, among other things the action's current status and any issues, risks or concerns that should be noted). Of the 49 actions transferred to CEB since 1 July 2010 that were included in the ANAO's sample, 41 forms (83.7 per cent) were completed and retained.⁶⁷

3.22 Notwithstanding the establishment of the transfer protocol, a large number of actions have been retained by the assessment branches for extended periods of time—the justification for which is unclear. Departmental records indicated that, as at September 2013, around 20 per cent of all approved controlled actions—some approved as early as 2001—had not been transferred to CEB from the assessment branches. Of the approved controlled actions examined by the ANAO:

- the median time between approval and transfer was 8.5 months (ranging from a matter of days to over 10 years) for the 49 actions transferred during the period July 2010 to December 2013⁶⁸;
- documentation was not retained by the department to explain the reasons for the assessment branches' retention of 20 of the 21 actions that had been retained for more than a year after their approval; and
- the nine approved controlled actions retained by the assessment branches and not transferred to CEB⁶⁹, were more likely to have plans overdue for submission and other missed deadlines, and less likely to have been actively monitored by the department.

67 Four of the eight Project Transfers Forms that were not completed and/or retained relate to actions that were transferred to CEB in October 2013.

68 The remaining controlled actions were either transferred earlier or had been retained by the assessment branches as at December 2013.

69 Seven of the nine approved controlled actions that had been retained by the assessment branches were immediately transferred to CEB on their inclusion in the ANAO's sample. This indicates that there may not have been a strong rationale for their retention by the assessment branches.

3.23 The basis on which the assessment branches retain approved controlled actions requires frequent re-assessment by CEB as:

- the intended submission of management plans by the proponent may be delayed or not eventuate (as the proponent may later decide to delay action commencement);
- compliance monitoring is not the primary function of the assessment branches, which increases the risk that approved actions may not receive sufficient monitoring attention; and
- approved actions retained by assessment branches are not subject to the same level of compliance monitoring activity as those actions transferred to CEB (for example, only transferred controlled actions are considered for potential monitoring inspections and compliance audits).

3.24 As approved controlled actions that are not transferred to CEB are less likely to receive sufficient monitoring activity, it would be prudent for the department to strengthen protocols to help ensure that approved controlled actions only remain with assessment branches for defined purposes and specified timeframes.

Recommendation No.2

3.25 To strengthen compliance monitoring of approved controlled actions, the ANAO recommends that the Department of the Environment:

- (a) transfer approved controlled actions to the compliance monitoring area at the time of their approval, unless a specific need has been identified for the assessment branches' retention of the actions; and
- (b) establish, and monitor adherence to, appropriate protocols and procedures to help ensure that approved controlled actions retained by the assessment branches are transferred to the compliance monitoring area once the specific need has been addressed.

Environment's response:

3.26 *The Department agrees with ANAO Recommendation 2. To strengthen compliance monitoring of approved projects, the Department is currently developing a control framework to monitor the transfer of new projects, including changes to senior management oversight and governance arrangements. The purpose of this framework is to improve the timeliness of project handovers and ensure implementation of the Standard Operating Procedure for the handover of approved projects from the*

assessment branches to the Compliance and Enforcement Branch. The Procedure will require the assessment branches to transfer each project within a specified timeframe.

3.27 *Handover of legacy projects that have, to date, remained in the assessment branches has commenced, and will be finalised by the end of June 2014.*

Assessment and/or approval of plans/reports submitted by proponents

3.28 The progress of many controlled actions is dependent on Environment's assessment and approval of various management plans that proponents are required to submit by their actions' conditions of approval. Assessments and approvals of these plans must be sufficiently documented to enable the department to demonstrate that required approval conditions are adequately satisfied. To assist departmental assessors, Environment has developed standard operating procedures to guide the assessment and/or approval of proponents' management plans.

3.29 In practice, numerous management plans or reports that proponents were required to submit in the ANAO's sample were overdue and, where submitted, evidence of the department's assessment was not evident in a number of cases. Overall, the ANAO found that:

- 22 plans relating to 10 controlled actions (15.6 per cent) were overdue for submission by proponents—many of which had been overdue for more than 18 months (14 plans) and/or the department had not followed-up (12 plans), including eight plans that the department was not aware were overdue⁷⁰;
- a further 18 plans (relating to eight controlled actions) had been submitted by proponents, but had yet to be approved by the department, including four plans that were overdue for approval;
- of the 67 plans relating to 29 controlled actions approved by the department, the department fully evidenced its assessment of around

⁷⁰ The ANAO also observed a further 31 instances relating to 16 controlled actions where deadlines were exceeded (mainly in relation to: the submission of documents, such as research agreements and progress reports; and other events, such as the implementation of offset arrangements).

40 per cent of the plans (26), but there was only limited or partial evidence of the department's assessment of the remaining plans⁷¹; and

- of the 29 plans/reports relating to 13 controlled actions that did not require departmental approval, there was limited evidence of a departmental assessment in over half of the cases (55 per cent).

3.30 Case Study 3 on the following page provides an example of overdue management plans and reports in relation to an approved controlled action identified by the ANAO.

3.31 Decision briefs to the delegate recommending the approval of management plans were prepared, as required by the standard operating procedures, in most cases (for 62 of the 67 management plans approved). The briefs outlined the assessment process, results and the manner in which contentious issues had been addressed.⁷² However, the format and quality of departmental assessments supporting the decision briefs (and file notes for plans/reports submitted, but not requiring departmental approval) was inconsistent.

3.32 At times, assessment templates were used to document the initial assessments, but were not generally updated to reflect assessments of subsequent versions of revised plans. Email correspondence between proponents and the department (printed and retained on hard-copy files) formed the basis for many assessments undertaken. However, documentation of some assessments was limited to hand-written notations on drafts of plans, and on a few occasions, the only evidence of an assessment and the delegate's approval was correspondence to the proponents advising of the plans' approval. In nine instances relating to eight controlled actions the ANAO found that the department took extended periods of time (two months or more) to provide substantive comments to proponents in relation to their submitted documentation—with the most common reasons being workload pressures or extended staff absences.

71 Environment evidenced the assessment of 10 of the 11 plans/reports submitted in the period from July 2013 to January 2014—a significant improvement when compared to earlier years.

72 The ANAO noted only one occasion where the delegate formally disagreed with the proponent's proposed response to a condition of approval. In this case, the delegate rejected the proponent's nominated independent auditor on the basis that the proponent used the same auditor to audit the controlled action three years earlier. The department subsequently assessed and approved another independent auditor nominated by the proponent.

Case Study 3: Example of overdue management plans and reports from a proponent

In 2007, the Minister's delegate within the then Department of Environment and Water Resources approved a controlled action to conduct Phases 1–5 of river dredging, including remediation of contaminated sediments on land and associated activities. The three protected matters that were the subject of the controlled action were: wetlands of international significance; listed threatened species and communities; and listed migratory species.

The action's conditions of approval required the proponent to, among other things:

- submit for the department's approval a Compensatory Habitat Plan at least 12 months before the commencement of any works associated with Phase 5;
- not commence any works associated with Phase 5 until the Compensatory Habitat Plan has been approved; and
- submit annual reports on compliance with the conditions.

Although the approval covers Phases 1 to 5 of the dredging project, the department was unaware that the annexure that forms part of the conditions of approval indicated that Phase 1 had been completed in February 2006. This would indicate that dredging works were undertaken in advance of the proponent obtaining approval (constituting a prima facie breach of Part 3 of the EPBC Act).

Information on departmental files⁽¹⁾ indicated that Phase 5 of the dredging works began during 2010, but as at November 2013 (and contrary to the conditions of approval) a Compensatory Habitat Plan had yet to be submitted to the department for its approval. In August 2010, departmental officers were aware that a Compensatory Habitat Plan had not been submitted, but did not take action as they expected the size of the compensatory habitat required by the condition would increase because of the expected Commonwealth approval of subsequent phases of the dredging project. As at November 2013, no subsequent phases of the dredging project had been approved by the Commonwealth.

In addition, the 2009–10 compliance report submitted to the department by the proponent does not address the Compensatory Habitat Plan requirement and the 2010–11 compliance report incorrectly indicates that Phase 5 'is not applicable to the [project]'. The 2011–12 and 2012–13 compliance reports were overdue for submission by the proponent, but departmental records did not indicate that the department was aware of the delayed submission or that it had followed up the overdue reports.

None of the prima-facie cases of non-compliance identified above had been referred to the Compliance Section.

Note (1): Information provided to Environment by the proponent, including in annual compliance returns, did not clearly indicate when each phase commenced or was completed. Therefore, the ANAO has referred to the timelines lines attached to annexures of the original and varied conditions of approval.

Compliance with actions' reporting and publication requirements

Compliance returns

3.33 Conditions of approval attached to controlled actions can require proponents to submit annual compliance returns to the department outlining the extent to which they have complied with their actions' conditions of approval. The ANAO's analysis indicated that, of the 64 actions examined, 41 (64.1 per cent) were required to submit annual compliance returns and 18 (28.1 per cent) were required to report non-compliance incidents as they occur.⁷³ However, proponents of 21 approved controlled actions sampled (32.8 per cent) are not required to self-report to the department regarding their compliance (or non-compliance) with their 221 conditions of approval protecting 40 MNES.

3.34 Where proponents are required to self-report compliance to the department, numerous compliance returns have not been submitted and there is little evidence of the assessment of a significant proportion of submitted returns. Overall, the ANAO found:

- that 18 of the 73 annual returns required (relating to 24 controlled actions) had not been submitted (including multiple returns for four actions);
- limited evidence of the assessment of 20 returns (36.6 per cent of submitted returns) relating to 10 controlled actions; and
- a lack of evidence to indicate that the department identified that:
 - eight returns from four controlled actions did not fully meet the reporting requirements for compliance returns; and
 - five returns from three controlled actions contained inaccuracies (such as, reporting compliance with particular conditions when the proponent was non-compliant).

3.35 These shortcomings diminish the effectiveness of proponents' self-reporting as a tool for monitoring their compliance with EPBC Act conditions of approval.

⁷³ Proponents of 16 controlled actions sampled (25 per cent) are required to both submit annual compliance returns and report non-compliance incidents as they occur.

Additional reporting required by management plans

3.36 In some cases, management plans required by the conditions of approval and approved by Environment establish obligations for proponents to regularly report additional information to the department (for example, quarterly reports of interactions with endangered species). The ANAO's analysis identified that 19 approved plans from 14 controlled actions (21.9 per cent of actions examined) required proponents to report additional information to the department. The ANAO found that:

- proponents of 10 controlled actions complied fully with their additional reporting obligations, but for six of these actions (covering 11 separate instances of reporting for eight plans) evidence was not retained of the department's assessment of the additional reporting; and
- proponents of four controlled actions did not meet their additional reporting obligations for five plans—including a proponent that failed to report additional information on 19 separate occasions from 2010–11 to 2013–14.

Publication of plans and reports

3.37 As outlined earlier, the transparency of proponents' ongoing compliance is enhanced by the publication of approved plans and returns, which has been applied as a condition of approval for some controlled actions. The ANAO examined the extent to which proponents met the conditions requiring the publication of approved management plans and compliance returns on their websites.

3.38 Evidence of action taken by Environment to determine proponents' compliance with publication requirements was retained by the department for only a small proportion of actions (less than 10 per cent of the controlled actions examined). In the absence of departmental records, the ANAO reviewed proponents' websites to determine whether plans and returns had been published as required by their conditions of approval. A significant proportion of plans and returns were unable to be located on relevant websites. Of the 51 plans that required publication, 38 (76.5 per cent) were

able to be located on proponents' websites as at December 2013.⁷⁴ However, as some plans/reports examined by the ANAO were required to be published as long ago as July 2010, plans may have been published on the website at the time, but have since been removed or website links degraded over time.

Active departmental monitoring

3.39 Effective management of approved controlled actions requires compliance monitoring staff to maintain an awareness of the status of the actions they monitor and proponents' compliance with relevant conditions (that is, conditions that are currently in effect). Environment's assessment/approval of proponents' management plans and annual compliance returns, in isolation, may not be sufficient to effectively manage approved controlled actions. Proponents may have no need to contact the department for extended periods of time (over many years in some cases) where they are not required to submit annual compliance returns (which applies to 35.9 per cent of the actions examined by the ANAO). Even in cases where proponents are required to submit annual compliance returns, this requirement is generally triggered only after an action commences. Further, more frequent contact with proponents during pivotal stages of their actions (where non-compliance could have more serious impacts or lasting ramifications) may better address the risks to MNES.

3.40 The department indicated that it is currently updating guidance for staff that will outline the processes and procedures necessary to actively monitor approved controlled actions. To inform the department's development of new guidance, active monitoring, appropriate to the circumstances of each action, could take the form of:

- contacting proponents seeking an action status update, particularly in relation to the commencement of actions, or informing proponents of an upcoming reporting requirement or milestone; or

⁷⁴ The non-publication of plans and reports identified from the ANAO's testing of controlled actions related to eight controlled actions (13.1 per cent) containing the following 20 protected EPBC Act matters: world heritage (one controlled action); national heritage (one); listed threatened protected species or endangered communities (eight); listed migratory species (six); Commonwealth marine environment (one); Commonwealth land (one); and unspecified (one). Actions can relate to multiple protected matters.

- undertaking a monitoring inspection or compliance audit (discussed later in this chapter).

3.41 In this context, the ANAO examined the extent to which approved controlled actions had been subject to active monitoring by Environment. The ANAO found that the department had:

- maintained frequent contact with the proponents of nine approved controlled actions (14.1 per cent of the actions examined) through the combination of active monitoring and the department's assessment/approval of their management plans and compliance returns;
- maintained infrequent contact with the proponents of a further 11 approved controlled actions (17.2 per cent of the actions examined); and
- retained limited evidence of active monitoring for 44 controlled actions (68.8 per cent of the actions examined)⁷⁵—which contain 93 protected EPBC Act matters.⁷⁶

3.42 The ANAO's analysis of the sample of approved controlled actions indicated that Environment retained little evidence of proponents being reminded in advance of deadlines for the submission of their management plans and annual compliance returns. In addition, Environment does not, in a number of cases, retain important information on the status of actions, such as commencement dates—a key milestone that often determines the application of many conditions of approval. As a consequence, it is not well placed to monitor compliance with those obligations linked to the commencement of these actions. In eight cases (12.5 per cent of the actions examined), the department had not been advised of, or was not in a position to determine, the actions' commencement dates or whether the actions had commenced.

⁷⁵ The controlled actions with limited evidence of active monitoring included: 15 of the 21 controlled actions (71.4 per cent) whose conditions do not require annual compliance returns or the immediate reporting of non-compliance; and 10 of the 11 controlled actions that had been retained by assessment branches. For three of the actions retained by assessment branches, there was no evidence of the department undertaking any form of monitoring activity for the period from July 2010 to at least October 2013.

⁷⁶ The 93 protected matters are: world heritage (five controlled actions); national heritage (two); wetlands of international significance (10); listed threatened protected species or endangered communities (37); listed migratory species (23); Commonwealth marine environment (five); Commonwealth land (six); action by Commonwealth agency (two); and unspecified (three). Actions can relate to multiple protected matters.

Monitoring inspections

3.43 Environment maintains on its intranet a list of monitoring inspections undertaken (of both approved controlled actions and not controlled action ‘particular manner’ (NCA-PM) decisions) since July 2011, which indicates that 37 monitoring inspections of approved controlled actions had been conducted as at September 2013. However, the ANAO found that these records were incomplete as a further three inspections were conducted (during one trip in May 2013) that had not been recorded on the list of site inspections undertaken.⁷⁷

3.44 Monitoring inspections are undertaken by compliance monitoring staff and, as outlined in Chapter 2, Environment is yet to establish a coordinated program of monitoring inspections, including a dedicated budget, or determine a target number of inspections to undertake each year. In the absence of such a program, the department informed the ANAO that the amount of departmental funding available for inspection activities was one of the factors that determined the number of inspections undertaken and the locations visited.

3.45 To guide the conduct of monitoring inspections, Environment has developed a standard operating procedure, which outlines procedures and considerations (subject-specific, as well as work, health and safety considerations for inspection staff) for planning, conducting and documenting monitoring inspections. The ANAO examined documentation associated with a sample of 12 monitoring inspections and observed the department’s conduct of nine of these inspections by accompanying compliance monitoring staff to inspect sites in Tasmania and Queensland. Figure 3.2 on the following page illustrates observations from monitoring inspections of approved controlled actions in Tasmania.

⁷⁷ Since September 2013, Environment has taken steps to improve its recording of monitoring inspections undertaken, with quarterly reporting of the number of inspections undertaken now provided to departmental senior management.

Figure 3.2 Observations from monitoring inspections in Tasmania



Clockwise from top-left: Protected plant species harvested from controlled action site and stored in pots ready for later replanting at site; Offset area with protected plant species; Endangered giant freshwater crayfish observed by the roadside of a controlled action site; Sewage treatment pumping station near an environmentally sensitive area; and windfarm.

Source: ANAO observations of Environment's monitoring inspections.

3.46 Of the 12 monitoring inspections examined, the ANAO found that:

- although planning documentation required by the standard operating procedures was completed for most inspections, the scope of the inspections lacked sufficient detail. As a consequence, there is an

increased risk of monitoring inspections achieving some inspection purposes (such as action familiarisation) at the expense of others (such as verifying compliance with specific approval conditions);

- completed monitoring inspection reports were retained for 10 of the 12 inspections, with the more recent reports generally of a higher quality and containing additional information on the activities undertaken during the inspections;
- the monitoring inspection reports relating to the inspections attended by the ANAO (although completed some three months after the inspections were conducted) provided appropriate coverage of observations made during the inspections; and
- while completed monitoring inspection reports were placed on post-approval monitoring files, monitoring information was not collated centrally and shared among staff.⁷⁸

3.47 Overall, there is scope for Environment to significantly improve the conduct and management of monitoring inspections. A coordinated, risk-based program of monitoring inspections would better place the department to demonstrate that it is targeting actions that pose the greatest risks to MNES and effectively allocating departmental resources. Strengthening the planning of individual monitoring inspections and informing proponents of departmental requirements in advance would also help to ensure that inspections achieve planned objectives. In addition, enhancing the analysis of inspection report data and collecting and sharing relevant compliance intelligence and lessons learned would further improve the utility of monitoring inspections.

Compliance audits

3.48 Compliance audits of approved controlled actions (and NCA-PM decisions) are designed to ‘measure compliance, detect non-compliance, evaluate the effectiveness of approval conditions in protecting MNES, and improve internal departmental procedures’.⁷⁹ Compliance audits are currently

⁷⁸ Since October 2013, Environment has placed copies of its monitoring inspection reports on the department’s intranet site.

⁷⁹ Department of the Environment, *Compliance Auditing*, available from <<http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/compliance-2>> [accessed 29 January 2014].

undertaken by staff members from CEB⁸⁰, with auditing resources gradually declining over time from 4.8 staff in 2009 to 2.8 staff in 2013.

3.49 As outlined in Chapter 2, Environment's 2013–14 program of compliance audits comprised strategic, ad-hoc and random audits. The 10–14 compliance audits proposed in the 2013–14 program provided coverage of less than 1.5 per cent of all approved controlled actions and NCA-PM decisions.

3.50 Environment has developed a *Procedures Manual for Compliance Auditing*, which was last updated in September 2013, to guide staff when undertaking compliance audits. The manual sets out procedures for planning, conducting and reporting three types of compliance audits—preliminary, desktop and full audits:

- preliminary audits occur when an early documentation review of an action identifies non-compliance with approval conditions and there is sufficient evidence to refer the matter to the Compliance Section without the need to undertake further audit work;
- desktop audits involve the examination of documentation retained by the department, supplemented by additional material requested from proponents (and other relevant sources, such as other regulators); and
- full audits are similar to desktop audits, but also involve site inspections and the preparation of associated documentation (such as letters of intention to auditees, site visit planning, and evidence of opening and closing meetings).

3.51 While the planning, conduct and reporting of audits is the responsibility of the audit team, follow-up of any non-compliance identified by the audits is generally the responsibility of the relevant compliance monitoring staff managing the controlled actions or CEB investigations staff.

ANAO examination of compliance audits

3.52 The ANAO selected for examination 14 compliance audits of approved controlled actions, from a population of 61 compliance audits undertaken between 2006 and 2013 (a sample of 23 per cent). However, on examining

80 Compliance audits may also be required under approved controlled action's conditions of approval. These audits are undertaken by third parties that are required to be approved by the department.

documentation supporting the conduct of the 14 compliance audits, the ANAO found that:

- three audits were not undertaken by the department⁸¹;
- for one audit, the department decided not to prepare the required audit documentation processes because of previous compliance investigation findings and the limited availability of audit team personnel; and
- one audit covered a narrow set of common provisions in multiple approved controlled actions.⁸²

3.53 The ANAO's analysis, therefore, focussed on the nine remaining compliance audits from the sample—five full audits, three desktop audits and one preliminary audit. The ANAO identified inconsistencies in the planning, conduct, and reporting for each audit against the standard operating procedures applying to each audit type:

- audit justification forms prepared during audit planning to document the selection of controlled actions to audit were retained for six of nine audits;
- most documentation required to demonstrate the conduct of audits (including letters to auditees, completed audit checklists, site visit planning documents and minutes of meetings with auditees) was retained by the department;
- although internal findings and recommendations documents were prepared for each desktop or full audit, only half were published on the department's intranet site to assist with the sharing of 'lessons learned' across the department;
- overall, the 'Summaries of Audit Findings' published on the department's website provide reasonable summations of the key audit findings and conclusions; and

81 Departmental records indicate that two independent audits required by the approval conditions for one controlled action were counted as departmental audits because of the significant time and resources invested by the department in working with the proponent to nominate an appropriate independent auditor and to review the independent audit and related files. An audit of another approved controlled action was not pursued beyond the preparation of an audit justification form, but nonetheless was counted as a departmental audit.

82 The audit was undertaken by a departmental graduate in 2010–11 who was temporarily assigned to the Approvals Monitoring Section. Most of the standard documentation required for compliance audits was not retained by the department in relation to this audit.

- the audits examined (excluding the preliminary audit) took on average 13.7 months to complete, ranging between six and 20 months.

3.54 Of the eight completed audits (excluding the preliminary audit), two audits identified full compliance, five identified non-compliances and one identified partial compliance. Of those six audits that identified non-compliance issues, the ANAO found that non-compliance was also followed-up inconsistently by the department, with:

- evidence of departmental follow-up by the responsible compliance monitoring staff not retained for two audits; and
- non-compliance identified during one audit in 2012–13 not recorded in the Compliance and Enforcement Management System (CEMS).⁸³

3.55 In light of shortcomings in the follow-up of non-compliance identified by compliance audits, it would be prudent for the Compliance Management Panel to monitor the department's response to audit findings. Further, the recently established Approvals Monitoring Business Improvement Coordinator position should help to ensure that 'lessons' learned' from compliance audits are incorporated into monitoring procedures and practices.⁸⁴

3.56 Notwithstanding their limited coverage and the absence of a thorough risk-based selection process, the audits are generally fulfilling their objectives of measuring compliance and detecting non-compliance. However, there is limited evidence to indicate that the remaining objectives—that is, improving internal departmental procedures and evaluating the effectiveness of approval conditions in protecting MNES—are being addressed. The requirement for audits to evaluate the effectiveness of approval conditions in protecting MNES may be overly ambitious given their compliance focus. As such, there would be benefit in Environment reviewing the role of compliance audits to focus audits on the identification of unmanaged/poorly managed risks to, or issues facing, MNES.

83 CEMS is the central repository for non-compliance allegations and incidents related to legislation managed by Environment.

84 The Approvals Monitoring Business Improvement Coordinator position was established in mid-late 2013 to ensure that outcomes and learnings from compliance audits, post-approvals monitoring and other compliance activities from within CEB are appropriately assigned, developed and shared among staff. In April 2014, Environment informed the ANAO that the Business Improvement Coordinator position had been filled after the position became vacant in late 2013.

Public reporting of compliance audits

3.57 Environment's *Procedures Manual for Compliance Auditing* stipulates that summaries of completed compliance audits must be published on the department's audit website. The department also publishes lists of compliance audits undertaken in its annual reports.

3.58 While summaries are made available on the department's website, a comparison of the number of published summaries against the number of compliance audits reported as undertaken in the department's annual reports, identified a significant difference. Successive departmental annual reports from 2009–10 to 2012–13 reported the total number of compliance audits undertaken as 54, but 27 of these listed audits do not have a corresponding audit summary document published on the department's website. The department has informed the ANAO that the primary reason that the number of audit summary documents do not match the number of audits reported in annual reports is that summary documents are not produced for audits classified by the department as 'preliminary audits'. The department informed the ANAO that the scope of preliminary audits has been expanded to include work undertaken by the department to commission an independent audit, or review an independent audit report.

3.59 Given the breadth of compliance activities that can be classified by the department as 'compliance audits', there would be merit in the department providing an explanation of its compliance audit activities in its annual reports to better inform stakeholders.

Conclusion

3.60 Environment's ability to manage proponents' compliance with their controlled actions' conditions of approval is dependent, to an extent, on the clarity of the approval conditions. Generic conditions included more commonly in controlled actions approved from 2010 onwards provide a sound basis on which the department can monitor proponents' ongoing compliance. However, the limited use of generic conditions in many controlled actions, in particular those approved prior to 2010, increases the onus on the department to actively monitor these actions. Ambiguities or the lack of precision in the expression of bespoke conditions can, and at times have, an adverse impact on the department's ability to undertake enforcement action. Given the benefits of adopting generic conditions and the risks that can arise from ambiguous conditions, it would be prudent for Environment to: apply generic conditions

more frequently in future approved controlled actions subject to approval; and address the clarity of conditions of approval.

3.61 While the responsibility for managing controlled actions in the department is generally transferred from the assessment branches to CEB once the actions have received approval, as at December 2013, the assessment branches retained responsibility for managing nearly 20 per cent of approved controlled actions. Approved controlled actions managed by the assessment branches generally do not receive as much compliance monitoring attention as actions managed by CEB.

3.62 Controlled actions' conditions of approval often require departmental assessment and/or approval of management plans and compliance returns periodically or at particular milestones in the lifecycle of the actions. Some actions' conditions also require the publication of approved plans and compliance returns on proponents' websites. However, the department's monitoring of proponents' compliance with these aspects of their conditions of approval has generally been inadequate, with: numerous overdue plans and returns; the generally poor retention of evidence demonstrating the appropriate assessment of submitted plans and returns; and a significant proportion of unpublished plans and returns.

3.63 Monitoring inspections and compliance audits are an important part of Environment's compliance activities that can provide assurance of proponents' ongoing compliance and detect non-compliance. In relation to monitoring inspections, however, there is scope to improve the planning and conduct of monitoring inspections to better achieve established objectives. In relation to compliance audits, inconsistencies in planning, reporting and follow-up are inhibiting their effectiveness as a compliance tool. For both monitoring inspections and compliance audits, there would be merit in enhancing the sharing of lessons learned and intelligence gathered from these activities.

3.64 Overall, monitoring undertaken by the department for the controlled actions in the ANAO's sample during the period July 2010 to December 2013 has been insufficient to determine proponents' compliance with their controlled actions' conditions of approval. For most approved controlled actions, the department has not actively monitored proponent's compliance with their approval conditions, to effectively supplement the monitoring undertaken through the department's assessment/approval of management plans and compliance returns. As a consequence, Environment has limited awareness of the progress of many approved controlled actions.

Recommendation No.3

3.65 To improve the management of risks to compliance and matters of national environmental significance, the ANAO recommends that the Department of the Environment:

- (a) review standard operating procedures and reinforce the need for staff to document the assessment and/or approval of material submitted by proponents of approved controlled actions;
- (b) better target monitoring activities towards those approved controlled actions that pose the greatest risks to matters of national environmental significance; and
- (c) develop and resource a coordinated program of compliance monitoring activities, monitoring inspections and compliance audits.

Environment's response:

3.66 *The Department agrees with ANAO Recommendation 3. One of the key deliverables of the Compliance Monitoring Strategy, to be complete by 30 June 2014, is the review and update of 63 Standard Operating Procedures. The development and implementation of a document control and review framework for the Compliance and Enforcement Branch will also be prioritised in the 2014–15 business plan. This will enable ongoing improvement of the 63 Standard Operating Procedures, related templates, policy and guidelines.*

3.67 *The National Environmental Significance Threat and Risk Assessment model will enable better targeting of monitoring activities towards those approved controlled actions that pose the greatest risks to matters of national environmental significance. The model enables the Department to set priorities for resource allocation based upon the assessment of risk and those priorities will be documented in an annual compliance plan. The annual compliance plan will provide a coordinated program of compliance monitoring activities, monitoring inspections and compliance audits, all focused on the highest risk projects. The compliance plan will be reviewed and updated every 6 months until July 2016, when the review will be transitioned to an annual basis.*

4. Responding to Non-compliance

This chapter examines the Department of the Environment's approach to non-compliance with EPBC Part 9 requirements, including the frameworks and systems underpinning the department's approach to enforcement.

Introduction

4.1 The conditions attached to the approval for a particular action to proceed are considered necessary to ensure the continued protection of MNES. Therefore, ongoing compliance with these conditions needs to be monitored and potential or identified non-compliance by proponents investigated. The ANAO examined the department's:

- compliance framework⁸⁵;
- recording of non-compliance allegations and incidents; and
- conduct and outcomes of non-compliance investigations.

Compliance framework

4.2 Environment's compliance framework includes key guidance material to support the compliance regime under EPBC Act Part 9, including the:

- *Compliance and Enforcement Policy* (and the subordinate *EPBC Act Compliance and Enforcement Policy*)—which describes the department's approach to, and the principles that guide, compliance and enforcement activities under the EPBC Act;
- *Strategic Plan for Regulatory Compliance 2011–2015*—a high-level document that outlines the department's regulatory vision, values, and strategic priorities and practices;
- *Regulatory Compliance Manual*—that provides a single point of overarching departmental guidance on how compliance activities are to be undertaken within the department; and

⁸⁵ The policies and procedures that are required to be followed to best ensure that identified non-compliance is addressed appropriately, proportionately and consistently with a view to returning non-compliant regulated entities to compliance, taken together, constitute a compliance framework.

- *Investigation Procedures Manual*—that outlines better practice standards (including the Australian Government Investigation Standards) and basic procedures for investigations conducted by the department.

4.3 While the compliance guidance material assists departmental staff to manage compliance with a broad range of legislative requirements, an internal audit of the department's Compliance and Enforcement Program Management, completed in September 2013, identified among other things, gaps or out-of-date information in established guidance material. Specifically, the 2013 internal audit found that, of the 84 better practice considerations⁸⁶ within the *ANAO Better Practice Guide: Administering Regulation, March 2007*⁸⁷, the regulatory guidance material did not address 53 elements satisfactorily—nine of which were partially addressed and 44 that had not been addressed.⁸⁸

4.4 The 2013 internal audit also found that:

- departmental regulatory activity and resourcing needed to be targeted according to a risk-based assessment of all departmental legislation containing regulatory provisions;
- current resourcing across the department needed to be based on the assessed risk of each piece of legislation;
- the compliance framework documentation was considered by staff to be guidance, and not enforceable, resulting in its inconsistent application;
- there was a need for centralised reporting on the progress of departmental regulatory activities and cross-cutting public reporting on departmental regulatory efforts; and
- standard operating procedures covering aspects of line areas' compliance work (including CEB) were at various stages of development (with some in draft form and others yet to be developed).

86 The better practice considerations have been grouped into categories that include governance, information management, relationship management and monitoring compliance.

87 A revised and updated edition of the ANAO's *Administering Regulation* Better Practice Guide was released in June 2014.

88 The department reclassified the gaps identified by the internal audit into two categories—those where guidance material partially addressed, or did not address, the better practice consideration.

4.5 In its response to the 2013 internal audit report, Environment agreed with the audit recommendations and expects to complete their implementation by August 2014. To this end, in September 2013, the department's Executive Board endorsed the development of a five-year Regulatory Capability Development Program (RCDP), through which most of the department-wide 2013 internal audit recommendations are to be addressed. In May 2014, the RCDP project plan was endorsed by the Regulatory Enforcement Committee⁸⁹, with ongoing oversight to be provided by a project steering committee comprising senior departmental managers.

4.6 Environment is also addressing some audit recommendations outside of the RCDP process, including in relation to:

- the resourcing of regulatory compliance activities—which had not been commenced as at March 2014 (and is subject to the results of the department's Strategic Review, the Government's National Commission of Audit and Budget 2014)⁹⁰, but is scheduled for completion by August 2014; and
- the development and endorsement of standard operating procedures for compliance activities tailored to the needs of each area of the department administering regulation—in this regard, 23 of the 63 standard operating procedures applicable to the regulation of the EPBC Act had been completed as at March 2014.

EPBC Act Compliance and Enforcement Policy

4.7 The *EPBC Act Compliance and Enforcement Policy* outlines, among other things, the range of compliance and enforcement measures available to the department, including:

- education, outreach and advice;
- administrative measures (including suspension or revocation of approvals);

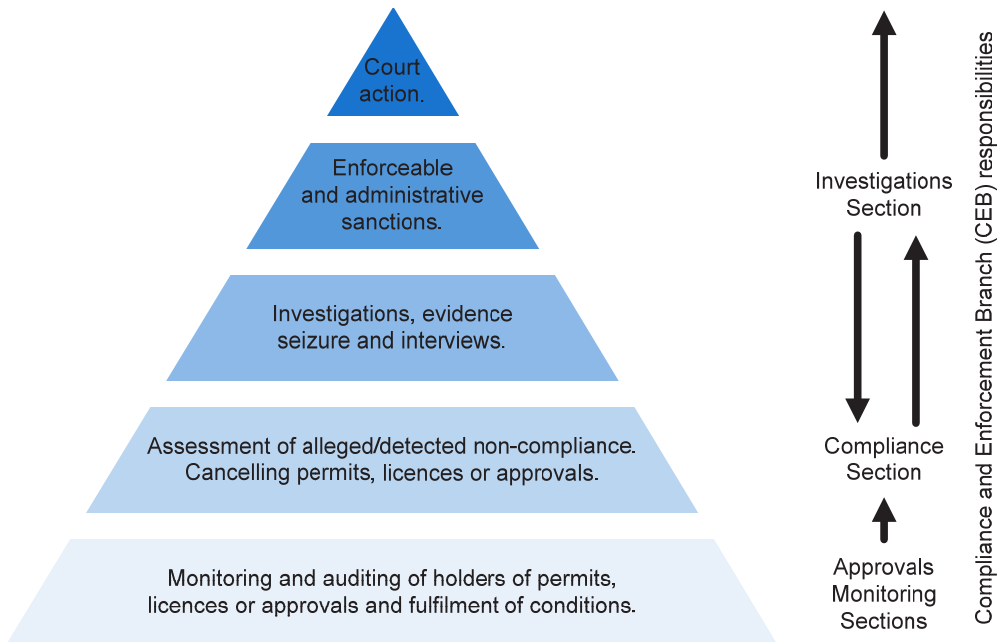
89 The Regulatory Enforcement Committee (REC) provides an oversight and review (but not decision-making) role to enable better practice and consistent action by officers exercising regulatory compliance and enforcement functions. For more information on REC, see Table 5.1 in Chapter 5.

90 Environment's Strategic Review aims to examine the roles and functions of the department and advise on the most effective future structural, governance and other organisational arrangements. The National Commission of Audit was established by the Government as an independent body to review and report on the performance, functions and role of the Australian Government.

- civil remedies (including fines through infringement notices); and
- criminal penalties (a maximum of two years jail and/or a fine of 120 penalty units).⁹¹

4.8 Environment's broad approach to regulatory compliance and the approach adopted by CEB in relation to the regulation of approved controlled actions are illustrated in Figure 4.1.

Figure 4.1 Graduated range of departmental enforcement responses



Source: ANAO diagram based on Environment information.

4.9 Notwithstanding the range of enforcement mechanisms currently available, an Independent Review of the EPBC Act, finalised in October 2009, identified the following 'gaps' in the available regulatory remedies under Part 9:

⁹¹ Commonwealth legislation generally specifies fines for offences as 'penalty units' rather than a dollar amount. This allows the Government to increase fines through amending one piece of legislation (the *Crimes Act 1914*). Since December 2012, one penalty unit has equated to \$170.

- particular civil and offence provisions (such as enforceable undertakings and remediation determinations) that are available under Part 3 of the EPBC Act, are not available by virtue of ‘exemption’; and
- the absence of ‘environment protection orders’ to allow the department (not only a judge of the Federal Court) to temporarily cease an action (until fully investigated) where satisfied that there is a credible risk of a contravention of the EPBC Act occurring.

4.10 The independent review recommended, and the Australian Government’s response of August 2011 agreed to, amending the EPBC Act to address identified gaps in regulatory remedies. Legislation has yet to be presented to the Parliament to address identified gaps.

Regulatory support

4.11 Environment has also established mechanisms for staff to access and share regulatory compliance practices and experiences, including the:

- Compliance and Enforcement Practitioners Network (CEPN)—a practitioner-level forum that meets two to three times a year;
- Communities of Practice (CoP) (spanning compliance, investigations and monitoring and audit)—a practitioner-level forum for focused collaboration, liaison and mentoring between practitioners with a particular specialised compliance/enforcement discipline; and
- compliance and enforcement toolbox—an intranet-based set of guidance and practice documentation for staff.

4.12 CEPN was first convened in November 2010 and meetings in 2011 and 2012 provided a forum for departmental staff to share their compliance and enforcement experiences with other staff, and update others on domestic and international compliance and enforcement developments in relation to policies and practices. CoP meetings provided attendees with practical guidance on departmental policies and practices (for example in relation to work, health and safety in relation to field trips) and the use of compliance and enforcement tools (such as evidence collection and global position system (GPS) equipment). The responses from 16 CEB staff with responsibility for investigating non-compliance (from a survey undertaken during the 2013 internal audit) indicated that most participated regularly or infrequently in the CEPN and CoP forums (68.8 per cent and 81.3 per cent, respectively) and most used the compliance and enforcement tool box (87.5 per cent).

4.13 While CEPN and CoP meetings have provided useful forums to share information relevant to compliance and enforcement, meetings were not convened between August 2012 and January 2014 due to an internal reorganisation of responsibilities. CEPN and CoP meetings reconvened in February 2014, with an expectation that joint meetings will be held three times a year. The department has informed the ANAO that it intends to update the compliance and enforcement toolbox as the RCDP proceeds.

Recording non-compliance allegations and incidents

4.14 Sound processes to identify, refer and record non-compliance allow a regulator to undertake timely investigations, take proportionate enforcement action and facilitates the compilation of accurate and complete compliance histories that can be used for risk assessment purposes.

4.15 The recently endorsed CEB Compliance Monitoring Strategy (discussed in Chapter 2) indicates that proponents are expected to self-report potential non-compliance, which enables the department to address issues as early as possible and may help to prevent issues from escalating or becoming more severe. However, proponents' self-reporting of non-compliance is only mandated to the extent that their actions' conditions of approval require annual compliance returns and/or specific reporting of non-compliance incidents as they occur. The use of conditions requiring the self-reporting of non-compliance by proponents, as noted in Chapter 3, is mixed across approved controlled actions.⁹²

4.16 Where potential non-compliance is reported to, or identified by compliance monitoring staff, the standard operating procedures require any potential non-compliance to be discussed with team leaders and the relevant Director to determine the appropriate response. Where the decision is made to transfer the matter to the Compliance Section, the action monitoring file is provided to the Compliance Section along with a minute signed by the Director outlining the circumstances of the potential non-compliance. The Compliance Section is required to record all referred matters in the Compliance and

92 Twenty-one proponents of the 64 approved controlled actions (32.8 per cent) sampled by the ANAO are not required to self-report to the department their compliance (or non-compliance) with their conditions of approval. In addition, 18 of the 73 compliance returns (24.7 per cent) required at the time of the audit had not been submitted by proponents.

Enforcement Monitoring System (CEMS).⁹³ The standard operating procedures also require any potential non-compliance identified in independent audits of approved actions (undertaken by third-parties under approval conditions) to also be referred to the Compliance Section and entered into CEMS.

4.17 The standard operating procedures do not, however, require potential non-compliance that has not been referred to the Compliance Section to be recorded in the system. Many instances of non-compliance are not routinely reported to the Compliance Section or recorded in CEMS (or the multi-user spreadsheets used previously). While most unreported instances of non-compliance are of a technical nature (such as missed deadlines for the submission of management plans and compliance returns), these non-compliance incidents may elevate risks to MNES by delaying the implementation of management plans and detection of non-compliance.

4.18 The ANAO found that, of the 151 instances of non-compliance detected from an examination of hard-copy records, information was not retained to evidence that compliance monitoring staff had referred 88 instances (59.5 per cent) relating to 20 approved controlled actions (31.3 per cent of the actions examined) to the Compliance Section. They had also not been recorded in CEMS or the multi-user spreadsheets used previously (see Table 4.1 on the following page for further detail). These 20 approved controlled actions related to 46 protected EPBC Act matters.⁹⁴

93 In January 2012, the department introduced CEMS as a repository of reported non-compliance allegations and incidents and as a workflow management system for investigations and enforcement action. Non-compliance allegations and incidents were previously recorded in multi-user spreadsheets.

94 The 46 protected matters are: world heritage (three controlled actions); national heritage (two); wetlands of international significance (four); listed threatened protected species or endangered communities (20); listed migratory species (nine); Commonwealth marine environment (two); Commonwealth land (three); action by Commonwealth agency (one); and unspecified (two). Actions can relate to multiple protected matters.

Table 4.1 Non-compliance detected in the ANAO's sample of 64 controlled actions

Non-Compliance Category	Controlled Actions		Non-Compliance Instances	Year			
	No.	%		2010–11	2011–12	2012–13	2013–14 ⁽¹⁾
Missed deadlines ⁽²⁾	28	43.8	88	18	31	26	13
Compliance returns not meeting condition requirements	4	6.3	8	1	2	3	2
Unpublished plans/reports/returns ⁽³⁾	8	12.5	13	n/a	n/a	n/a	13
Other instances of non-compliance ⁽⁴⁾	12	18.8	42	25	11	3	3
Total	32⁽⁵⁾	50.0	151⁽⁶⁾	44	44	32	31
Total not reported to the Compliance Section	20	31.3	88	15	24	16	33 ⁽⁷⁾

Source: ANAO analysis of Environment documentation.

Note 1: As at December 2013.

Note 2: This category includes, among other things: overdue plans; instances where the proponent did not report against additional reporting requirements established in plans; and absent compliance returns.

Note 3: The ANAO's testing in 2013–14 determined that plans/reports/returns were not published as required. However, the non-compliance may have first occurred in earlier years.

Note 4: This category includes non-compliance detected during compliance audits or unauthorised interactions with listed or threatened species.

Note 5: Many controlled actions were impacted by non-compliance incidents across multiple non-compliance categories.

Note 6: Excludes non-compliance incidents reported directly to the Compliance Section by proponents of the coal seam gas approved controlled actions.

Note 7: This figure includes one controlled action where an independent audit conducted in 2011–12 detected 21 instances of non-compliance that occurred during 2010–11 and 2011–12, but where the audit was formally brought to the attention of the department for the first time during 2013–14.

4.19 The instances of non-compliance outlined in Table 4.1 have either been documented in, or can be determined from, the records retained by the department for each approved controlled action. However, in some cases, compliance monitoring staff were not aware that the non-compliance had occurred, while in other cases, staff were aware of, but did not report or take other action in response to, the instances of non-compliance. The decision not to pursue instances of non-compliance is in contrast to the guidance provided in Environment's *Regulatory Compliance Manual*. The manual indicates that a

‘do nothing’ approach⁹⁵—where incidents of non-compliance are left to ‘drift’ without being subjected to positive decision-making in relation to the associated response—creates its own significant risks, including:

- environmental risks, resulting from a failure to take action, such as where the contravention is allowed to continue, escalate or be repeated;
- legal risks, through which a lack of timely ‘up-front’ action may jeopardise future enforcement action, in the event it becomes necessary; and
- reputation risks, which may cause damage to the regulator’s, department’s or Minister’s credibility, potentially compromising future regulatory efforts.

4.20 Case Study 4 provides an example of unidentified or unreported proponent non-compliance, where documentation retained by Environment does not evidence that appropriate action was taken by departmental staff.

Case Study 4: Example of unidentified or unreported proponent non-compliance

In 2010, the Minister’s delegate within the then Department of the Environment, Water, Heritage and the Arts approved a controlled action to increase a port’s capacity, with activities to include blasting, dredging and the offshore disposal of material, land reclamation and infrastructure construction. The five protected matters that were the subject to the controlled action are: world heritage properties; national heritage places; listed threaten species and communities; listed migratory species; and Commonwealth marine areas.

The action’s conditions of approval required the proponent to, among other things:

- implement an approved Environmental Management Plan (EMP) for dredging operations; and
- obtain an approved Sea Dumping Permit for the disposal of dredge spoil prior to dredging and spoil disposal.

Environment retained responsibility for ensuring compliance with the EMP, while another environmental regulator was responsible for issuing, and managing the proponent’s compliance with, the Sea Dumping Permit.

As required by the Sea Dumping Permit, the proponent commissioned an independent audit of its compliance with the permit within two months of commencing the action. In November 2010, the proponent received a copy of the finalised audit, which covered the period from 24 May 2010 to 8 September 2010. This audit reviewed 36 requirements arising from the Sea Dumping Permit (as required), plus an additional 162 commitments arising from the EMP.⁽¹⁾ The department was kept informed of the

95 A ‘do nothing’ approach in this context is different to a positive ‘no further action’ decision, which is a response in its own right.

audit's progress and its results on completion through minutes of management review group meetings convened by the proponent (as required by the EMP).

The audit identified 21 instances of non-compliance with the EMP. Environment did not retain evidence to indicate that any attempt was made by the department to obtain a copy of the audit report when advised of its completion. The EMP non-compliances were not referred to the Compliance Section of the department and not recorded in the multi-user spreadsheets.

In July 2013, Environment received a full copy of the 2010 audit from the proponent, in preparation for an independent audit required by the EPBC Act conditions of approval. As at January 2014, the instances of non-compliance reported in the 2010 audit had not been reported to the Compliance Section and recorded in CEMS.

Note 1: The 2010 independent audit of compliance against the EMP was not explicitly required by the EPBC Act approval, which mandated a compliance audit of EMP requirements within three years of the action's commencement.

Conduct and outcomes of non-compliance investigations

4.21 The purpose of non-compliance investigations is to examine the veracity of alleged or prima-facie non-compliance and to determine appropriate responses that are proportionate to the nature of any non-compliance. The documentation of the investigation process and resulting decision helps to substantiate any enforcement action taken.

Guidance on the conduct of investigations and the determination of enforcement actions

4.22 Overall, the guidance material prepared by Environment relating to the conduct of compliance investigations in respect to approved controlled actions is fragmented, dated and incomplete. The department's *Investigation Procedures Manual*, last updated in March 2010, is directed primarily to investigations into matters of a criminal nature. The Australian Government Investigation Standards (on which the manual is based) indicates that the standards should be applied to all investigations 'other than audit and compliance work'. The department does not, however, require staff to follow the manual for 'compliance work'⁹⁶—that is, investigations into matters that do not carry a criminal offence or where criminal prosecution is unlikely—which are relevant for most non-compliance incidents related to approved controlled actions.

⁹⁶ However, the manual indicates that staff investigating matters that cannot be readily identified as 'compliance-only' matters, should follow the requirements of formal investigations and adopt the Australian Government Investigation Standards.

4.23 The endorsement of procedures for CEB staff undertaking investigations into potential non-compliance by proponents of approved controlled actions where a criminal offence is not suspected has been limited. The department informed the ANAO that standard operating procedures for compliance investigations are being developed, with their completion expected by June 2014.

4.24 Notwithstanding the limited procedural guidance for conducting non-compliance investigations into approved controlled actions, there is guidance for staff and/or established practices in relation to the determination of appropriate enforcement responses for non-compliance. The department's *Regulatory Compliance Manual* provides generic guidance on initiating responses to non-compliance in accordance with the *Compliance and Enforcement Policy*. The manual outlines:

- factors to be considered when determining an appropriate response (which include the nature and severity of the harm caused, the objectives of the law, the impact the contravention has on integrity of the regulatory system, and any aggravating or mitigating circumstances);
- broad examples of various types of low-level and serious non-compliance; and
- definitions of the various low-level and serious responses along with their potential advantages and disadvantages.

4.25 The manual also indicated that all non-compliance responses and their reasons must be recorded in the interests of transparency and accountability. Well-documented decisions and their reasons can also demonstrate consistency of enforcement decisions, in similar circumstances over time and between different non-compliant proponents.

4.26 The department's Compliance Management Panel (CMP) is the primary decision-making body that determines the prioritisation and resourcing of serious non-compliance matters⁹⁷ for investigation and determines the enforcement action to be pursued.⁹⁸ Cases involving low-level non-compliance (that would, if proven, result in a response such as no further

⁹⁷ Environment's *Regulatory Compliance Manual* defines serious non-compliance as a breach that, if proven, would justify a mid to high-level compliance response (such as infringement notices or revocation of approval) or escalated compliance response (such as court proceedings). Since July 2011, the decision to issue an infringement notice also requires endorsement from a departmental Deputy Secretary.

⁹⁸ CMP comprises the CEB Branch Manager, the four Directors of CEB and the department's principal legal officer.

action or variation of approval conditions) can be determined by the relevant Director, with CMP required to endorse the subsequent closure of these cases, at the recommendation of the Director.

Outcomes of investigations

4.27 Environment's enforcement data holdings (information held in CEMS and on the multi-user spreadsheets used before the introduction of CEMS during 2012) indicates that there have been 163 investigations or enforcement actions during the period from July 2010 to September 2013 relating to approved controlled actions.⁹⁹ The outcomes from the 153 completed investigations¹⁰⁰ are as follows:

- four investigations resulting in the issuing of infringement notices (with one later withdrawn by the department)¹⁰¹;
- two negotiated outcomes determined (involving variations to conditions);
- 42 'no further actions' determined (for reasons that included the matter was insignificant, a significant impact was unlikely or where additional material was provided)¹⁰²;
- 85 cases where there was found to be no breach of compliance obligations; and
- 20 cases where the outcome was unspecified¹⁰³ (17) or 'closed – other' (three)—all of which were finalised prior to introduction of CEMS.

4.28 The majority of the investigations into suspected non-compliance (90 or 55.2 per cent) related to nine coal-seam gas approved controlled actions. Of the 90 investigations, 88 investigations resulted in a finding of 'no breach' or 'no

99 Environment does not categorise non-compliance cases according to whether they relate to approved controlled actions. The department and the ANAO identified cases relevant to approved controlled actions by making informed judgments from the available information. There may be additional investigation cases related to approved controlled actions that have not been identified because of the limited information retained by the department.

100 Ten cases were yet to be completed.

101 The department agreed to a proponent's request to withdraw an infringement notice after an internal review by CEB's investigations staff determined that the infringement notice would not be upheld if challenged in court (due to the department's reliance on a poorly-worded warning notice issued by a state regulator).

102 Where the department determines that a breach has occurred, but intends to take no further action, proponents are advised that the breach will be noted on departmental records and taken into account when determining responses to any future breaches.

103 In these cases, the multi-user spreadsheets did not identify the result of the investigations.

further action', one case resulted in the issuing of infringement notices, with the outcome of the remaining case unspecified.¹⁰⁴

ANAO examination of non-compliance investigations and outcomes

4.29 In relation to investigations into potential non-compliance, the ANAO examined the: conduct and timeliness of the investigations; endorsement of the investigation outcome by the Director or CMP; documentation of enforcement decisions; and follow-up of implementation of enforcement action. The ANAO examined a sample of 19 investigated cases of potential non-compliance (11.6 per cent)¹⁰⁵ from the 163 completed and current investigations (outlined in paragraph 4.27).

Conduct of investigations

4.30 In the absence of standard operating procedures for compliance investigations (as outlined in paragraph 4.23) and the limited use of the *Investigation Procedures Manual* for compliance work, the ANAO examined the extent to which these investigations were conducted using a consistent approach. The ANAO found that inconsistent practices had been adopted, including:

- the investigation priority assessment rating template and the risk rating field in CEMS—used to prioritise work for staff—had not been retained or completed for all relevant cases;
- 'please explain' letters were not sent to proponents during investigations in all cases¹⁰⁶—including one case where the department, having decided on an enforcement action without contacting the proponent, withdrew from its intended course of action after receiving information from the non-compliant proponent describing mitigating circumstances;
- the department did not communicate to the proponents the results of some of its investigations into alleged non-compliance related to coal seam gas actions (all resulting in 'no further action' or 'non-breach' findings); and

104 Most coal seam gas conditions of approval require proponents to report all breaches of state permits and approvals, which constitute many of these reported non-compliance incidents.

105 The ANAO planned to sample 10 per cent of investigations (17), but the sample selection process identified multiple investigations for selected controlled actions, resulting in the examination of two additional investigations.

106 Environment commonly sends 'please explain' letters to proponents to outline the alleged non-compliance that has occurred and provide proponents an opportunity to respond before the department makes a final determination.

- two older investigations (from 2011) where complete documentation could not be located by the department—the department retained electronically some (mostly unsigned) documents related to these cases.

Investigation timeframes

4.31 Investigations should be undertaken in a timely manner to ensure that any non-compliant behaviour is addressed promptly. Further, the application of statutes of limitation to EPBC Act enforcement remedies (such as infringement notices that must be issued within 12 months of the non-compliance occurring) increases the importance of conducting investigations in a timely manner. The Compliance Section has not, however, established timeframes for conducting its investigations. The ANAO noted that the average time taken to conduct all non-compliance investigations (covering all matters) was 59.2 days over the period from July 2011 to February 2014.

4.32 In relation to the EPBC Act Part 9 investigations examined by the ANAO over the same period, the average time taken to complete investigations was 77.4 days¹⁰⁷ (ranging from a matter of days to 156 days, but excluding a very complex case that took over four years to complete). The average duration of investigations examined by the ANAO was 30 per cent greater than the average duration of all Compliance Section investigations. The establishment of target timeframes and the ongoing monitoring of performance against targets would better position the department to manage and improve investigation practices.

Enforcement decision-making

4.33 As noted earlier, CMP determines enforcement decisions related to serious non-compliance matters, while investigations into low-level non-compliance can be determined by the relevant Director. The ANAO's examination of the involvement of the appropriate decision-makers in investigations and enforcement actions for the 19 sampled investigations, found that CMP was appropriately consulted in relation to all serious non-compliance investigations. This involvement included the decisions taken to issue infringement notices to three proponents of approved controlled actions. In relation to the closure of investigations, documentation was not retained evidencing: the Director's clearance of the investigation outcomes for

107 The median time taken to complete investigations examined by the ANAO was approximately 95 days.

five low-level non-compliance matters (four 'no breach' outcomes and one unspecified outcome); and CMP's endorsement of the closure of 10 of the 19 investigations examined.

Documentation of enforcement decisions

4.34 For the 19 investigations examined by the ANAO, Environment had retained documentation that outlined its enforcement decisions, including some information that explained the reasons underpinning the action taken. To the extent to which reasons were documented, the stated reasons were in accordance with the department's *Regulatory Compliance Manual* (see earlier paragraph 4.24 for further information on the manual) and were relevant to the circumstances of the investigated matters. Nevertheless, there is scope for the department to better demonstrate its consistency of decision-making by improving the documentation of reasons for enforcement actions:

- to explicitly address the factors to be considered when determining an appropriate response as outlined in the *Regulatory Compliance Manual*; and
- by including comparisons of how the proposed enforcement action compares to recent decisions for relevant past cases.

Follow-up after the imposition of enforcement actions

4.35 The enforcement actions that are taken against non-compliant proponents of approved controlled actions, by their nature, rarely require tailored departmental follow-up to ensure their effective implementation. Compliance Section staff generally retain responsibility for monitoring the proponents' implementation of any follow-up actions, such as the payment of infringement notices and the submission of directed audit reports. Once any follow-up action has been completed, responsibility for managing these approved controlled actions returns to the Approvals Monitoring Sections.

Conclusion

4.36 While Environment's compliance framework includes key department-wide guidance material to support the delivery of a number of regulatory regimes, the material has not been regularly updated and does not address numerous better practice considerations for administering regulation. Environment is, however, implementing strategies to address shortcomings in its compliance framework, with an estimated completion date of August 2014. As part of a coordinated and strategic approach to regulatory compliance, the

department has also committed to risk-assessing its regulatory priorities so that it can better determine compliance resourcing needs across the department and to improve internal management reporting of departmental regulatory activities.

4.37 Through their monitoring of approved controlled actions, compliance monitoring staff are well-positioned to identify non-compliance with conditions of approval. However, the department's standard operating procedures do not require the centralised recording of all potential non-compliance. As a consequence, many instances of non-compliance evident from departmental records were either not identified by compliance monitoring staff or were identified by staff, but not centrally recorded and referred for assessment or enforcement action. These weaknesses adversely impact on the integrity of the department's regulatory activities.

4.38 Non-compliance investigations into approved controlled actions are conducted using inconsistent practices, with fragmented, dated and incomplete procedures a contributing factor. While the documentation of investigations supported enforcement decisions, there is scope to improve the documentation of the reasons for decisions to better demonstrate to senior management the basis of enforcement actions.

Recommendation No.4

4.39 To improve processes for responding to instances of non-compliance, the ANAO recommends that the Department of the Environment:

- (a) reinforce to staff the need for all instances of non-compliance by proponents of approved controlled actions to be recorded centrally; and
- (b) improve the documentation of reasons for enforcement decisions, including the key factors considered when an appropriate response was determined.

Environment's response:

4.40 *The Department agrees with ANAO Recommendation 4. The Department has already reinforced the need for staff to centrally record all instances of non-compliance and reasons for enforcement decisions. This capacity has been greatly improved since the implementation of the Compliance and Enforcement Management System in 2012. The department will further enhance the documentation of proponents' compliance as well as recording minor or technical instances of non-compliance through the review of 63 Standard Operating Procedures. This will be completed by 1 July 2014.*

4.41 *In addition, to ensure appropriate senior management governance, the development and implementation of a control framework for the Compliance and Enforcement Branch will be prioritised in the 2014–15 business plan. This will include the development of a quality assessment and assurance framework for all agreed business processes.*

5. Governance Arrangements

This chapter examines the governance arrangements in place to support the Department of the Environment's regulation of approved controlled actions.

Introduction

5.1 The regulation of the broad range and diversity of controlled actions approved under the EPBC Act requires appropriate governance arrangements and practices to position Environment to effectively manage its regulatory responsibilities and build stakeholder and public confidence.

5.2 The ANAO examined the appropriateness and effectiveness of the governance arrangements established by Environment for EPBC Act Part 9 regulatory activities, including:

- administrative arrangements;
- business planning and organisational risk management;
- stakeholder engagement;
- information management; and
- performance monitoring and reporting.

Administrative arrangements

5.3 The effectiveness of Environment's regulation of approved controlled actions is largely reliant on a sufficient number of skilled staff to monitor and enforce proponent compliance, with effective departmental oversight arrangements. Within this context, the ANAO examined the staffing and workload of CEB, and the arrangements established by Environment to oversee compliance and enforcement activities.

CEB staffing levels, workload and experience

5.4 As noted earlier, CEB was established in 2007 and assigned 50 departmental officers 'to promote awareness of, and compliance with, the EPBC Act'. As at July 2008, departmental records indicated that CEB staffing levels had increased slightly to 58.2 full-time equivalent staff (FTE), including 13.4 FTE involved in compliance monitoring activities and 27.4 FTE involved in investigations and enforcement activities. By October 2013, overall branch staff numbers had decreased to 45.2 FTE, although compliance monitoring

numbers had increased to 21.8 FTE and investigations/enforcement numbers had decreased to 21.4 FTE.

Compliance monitoring staffing

5.5 The number of compliance monitoring staff required to monitor approved controlled actions is dependent on their assigned workload, which includes the number of approved controlled actions (and not controlled actions 'particular manner (NCA-PM) decisions) and approval conditions, as well as the capability of staff to efficiently and effectively undertake their work. When workloads increase, staffing levels need not proportionally increase if efficiency gains (in areas such as improved risk management, work practices and information management) can be achieved.

5.6 While the workload assigned to compliance monitoring staff has increased significantly over the period July 2008 to October 2013, staff numbers have increased at a lower rate. Figure 5.1 illustrates the number of compliance monitoring staff relative to approved controlled actions (and NCA-PM decisions) for this period. Over the period July 2008 to October 2013:

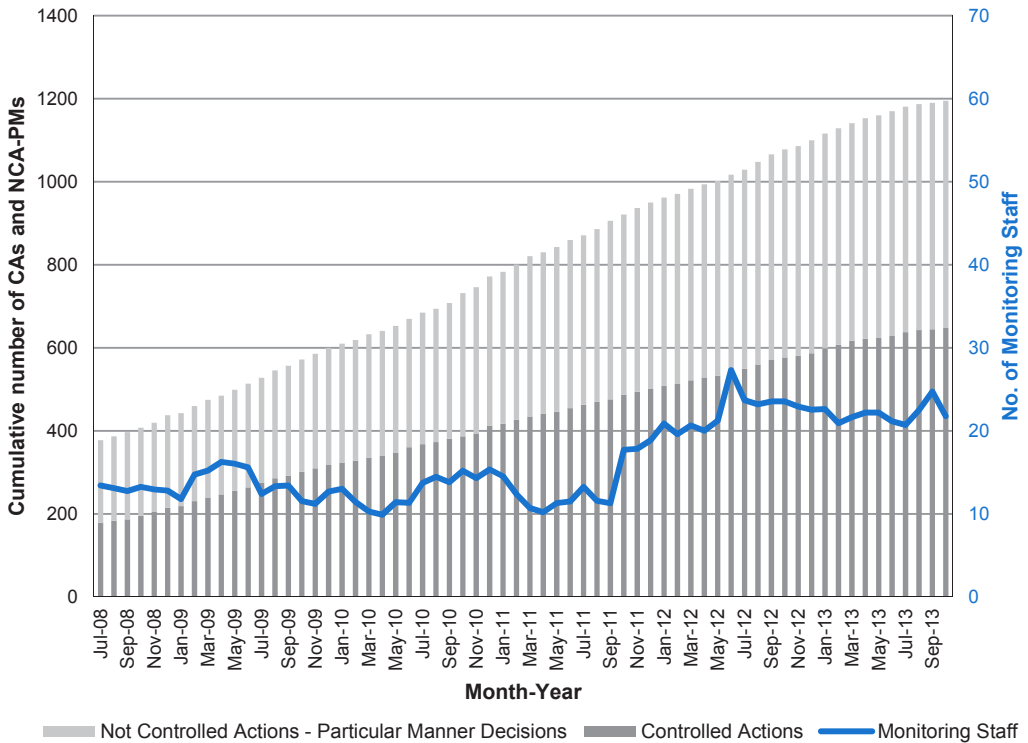
- compliance monitoring staff numbers increased by 38.5 per cent, but approved controlled actions and not approved actions—particular manner decisions under CEB's management increased by 174 per cent and 263 per cent, respectively¹⁰⁸; and
- the number of conditions attached to approved controlled actions managed by CEB increased by 337 per cent (from 1553 conditions to 6789 conditions).

5.7 As at November 2013, 18 compliance monitoring staff were assigned responsibility for managing an average of 28 controlled actions (as well as 19.5 NCA-PM decisions). Five of these staff were responsible for managing in excess of 85 controlled actions and NCA-PM decisions.¹⁰⁹

108 These percentages exclude the large proportion of approved controlled actions and not controlled actions 'particular manner' decisions that were being managed by the assessment branches in the Environment Assessment and Compliance Division (EACD).

109 One staff member (who no longer works in CEB) had been assigned management responsibility for 85 controlled actions and 44 NCA-PM decisions.

Figure 5.1 Relationship of monitoring workload relative to compliance monitoring staff (July 2008 to October 2013)



Source: ANAO analysis from Environment information.

5.8 Overall, efficiency gains generated within the post-approvals monitoring function since July 2008 have, however, been limited. The ANAO found that:

- Environment does not currently have an effective means of determining those approved controlled actions that pose the greatest risks to matters of national environmental significance (MNES) and directing its compliance resources accordingly (this matter is discussed in Chapter 2);
- relatively high-level staff turnover¹¹⁰ has necessitated frequent workload redistributions that require staff to familiarise themselves with newly assigned actions, some of which have long histories and a substantial amount of retained documentation;

¹¹⁰ Compliance monitoring staff have an average length of service of 1.5 years in CEB's approvals monitoring sections and 4.4 years in EACD (as at November 2013).

- work practices of compliance monitoring staff have remained relatively consistent, with staff primarily assessing/approving management plans, reports and compliance returns that proponents are required to submit under their actions' conditions of approval¹¹¹; and
- although CEB introduced the 'Chapter 4 database' in 2012 to assist compliance monitoring staff to manage actions, significant functionality limitations have adversely impacted on the extent to which the database has supported more efficient work practices (which is discussed later in this chapter).

5.9 The 2013 internal audit of Environment's Compliance and Enforcement Program Management considered the allocation of CEB resources and found that, due to the size and complexity of approved controlled actions and resource limitations, ongoing monitoring by post-approvals monitoring staff was generally on a reactive basis.

Investigation and enforcement staffing

5.10 The Compliance and Investigations sections of CEB are responsible for investigating, and taking enforcement action for, non-compliance under all parts of the EPBC Act, including Part 9. Investigation and enforcement activities associated with approved controlled actions are small in number and consume a relatively small proportion of the sections' resources—estimated to be around 15 per cent of the Compliance Section's resources and a very small proportion of the Investigation Section's resources.¹¹²

5.11 Over the period from July 2010 to March 2014, the Compliance Section has addressed an increasing number of non-compliance matters across environmental legislation in shorter time periods with fewer resources. For example:

- cases and incidents have increased from 466 in 2010–11 to 712 in 2012–13 (with the total number of cases and incidents to be managed during 2013–14 likely to exceed the previous year's)¹¹³;

111 Assessment/approval documentation and evidence of other compliance activities continues to be retained on hard-copy files established for each approved controlled action.

112 The department does not retain information in relation to the allocation of compliance and investigation resources among actions taken under different parts of the EPBC Act (or other legislation enforced within CEB).

113 These figures include cases carried forward from the previous year. As at March 2014, 561 cases and incidents had arisen during 2013–14 to date or had been carried over from the previous year.

- average case duration has decreased from 97 days in 2011–12 to 67 days in 2012–13 and to 25 days in 2013–14 (as at March 2014); and
- compliance staff numbers have decreased from 14.3 FTE in 2010–11 to 10 in 2013–14 (as at October 2013).

5.12 Environment informed the ANAO that the factors influencing the Compliance Section's improved efficiency in addressing non-compliance with its environmental legislation primarily related to: improved standardised work practices¹¹⁴; an improved range of administrative enforcement measures (including infringement notices); and the introduction of CEMS in early 2012 as a workflow and document management tool. Notwithstanding these improvements, the 2013 internal audit of the department's Compliance and Enforcement Program Management noted that the Compliance Section of CEB was at 'full capacity managing non-compliance with the EPBC Act (Parts 3, 7, 8, 9 and 13)'.¹¹⁵

Staff qualifications and skills

5.13 Overall, CEB staff possess qualifications and skills relevant to their work. Two surveys of CEB staff's qualifications and skills (one undertaken during the 2013 internal audit in relation to investigations/ enforcement staff and a similar survey undertaken by the ANAO of compliance monitoring staff) indicated that:

- 22 of the 25 compliance monitoring staff possessed Bachelor (or higher) qualifications in science or environmental management fields and/or Certificate IV in Government (Statutory Compliance or Investigations) or Certificate IV in Project Management qualifications; and
- 12 of the 16 investigation/enforcement respondents possessed Certificate IV (or higher) compliance and enforcement qualifications, with a further two having lead auditor qualifications.

5.14 In relation to training provided to staff, the 2013 internal audit noted that the department had not recently, and was not currently offering, specific compliance and enforcement training. In response, the department advised that it supports staff obtaining formal qualifications and attending relevant

¹¹⁴ These improved work practices include the introduction of the case prioritisation matrix, establishing a single Compliance Section to manage cases from June 2012, and enhancing staff skills so that they are less reliant on the availability of staff from the Investigations Section.

¹¹⁵ The 2013 internal audit also noted that most of the investigations/enforcement staff had between one and seven years experience, with an average of approximately three years.

internal forums (such as the Compliance and Enforcement Practitioners Network and Communities of Practice). Environment has since informed the ANAO that compliance and enforcement staff attended field awareness training during 2013–14.

Internal oversight arrangements

5.15 The delivery of compliance activities under EPBC Act Part 9 is subject to existing departmental management arrangements, with additional advice and oversight provided by internal forums covering regulatory activities.

Management oversight

5.16 The performance of CEB and its use of departmental resources is overseen by the Environment Assessment and Compliance Division (EACD) and departmental senior management. In general, information on CEB's performance (in relation to general administrative and operational matters) has been reported to departmental managers through weekly verbal updates (provided at EACD Panel meetings—discussed later in this section) or briefings on specific matters. Regular internal, documented management reports on branch performance have not been prepared, except in the context of quarterly reviews of performance against the EACD Business Plans (internal reporting arrangements are discussed later in this chapter).

5.17 In regard to operational matters, most decisions impacting on approved controlled actions are made by:

- the CEB Branch Manager (under delegation)—including the approval of management plans and variations to conditions; or
- the Compliance Management Panel—in relation to key non-compliance investigations and enforcement decisions.

5.18 There are, however, a number of operational matters relating to approved controlled actions that are referred for information or decision to alternative decision makers, including the Minister in relation to the approval of management plans and variations to conditions associated with high-profile, sensitive actions, such as those related to coal seam gas.¹¹⁶ Over recent years, the Minister has also approved the extension of a compliance audit scope and the preparation of a civil court case against a non-compliant proponent of an approved controlled action.

¹¹⁶ Another example is the requirement for all proposed decisions to issue infringement notices for breaches of conditions to be approved by a departmental Deputy Secretary.

Internal oversight forums

5.19 Environment has established three internal forums that oversee aspects of the department's management of non-compliance and enforcement activity — the Regulatory Executive Committee (REC), the Compliance Management Panel (CMP), and the EACD Panel. Table 5.1 outlines the role and membership of the forums, and the issues that are subject to their consideration.

Table 5.1 Internal oversight forums

Forum	Role and Membership	Issues Covered/Considered
Regulatory Executive Committee (REC)	<ul style="list-style-type: none"> provides an oversight and review (but not decision-making) role to enable better practice and consistent action by officers exercising regulatory compliance and enforcement functions REC generally convenes biannually and comprises senior executives from Environment and its portfolio agencies with regulatory compliance enforcement responsibilities (totalling 12 members) 	<ul style="list-style-type: none"> development/review of the department's regulatory compliance framework (for example, the five-year Regulatory Capability Development Program) and support tools (for example, the Compliance and Enforcement Management System (CEMS)) biannual operational reports from compliance business units within the portfolio (until 2011) staff training and development needs experiences of other regulators (for example, the Australian Taxation Office and the Australian Fisheries Management Authority)
Compliance Management Panel (CMP)	<ul style="list-style-type: none"> primary decision-making body that determines the prioritisation and resourcing of matters for investigation and determines the enforcement action to be pursued CMP convenes fortnightly and comprises the Branch Manager and four Directors of CEB, and the department's principal legal officer 	<ul style="list-style-type: none"> endorsement of/guidance on proposed case direction or enforcement action results of compliance audits progress against the compliance audit program
EACD Panel	<ul style="list-style-type: none"> oversees the work of the five branches within the Environmental Assessment and Compliance Division (EACD), including CEB the EACD Panel convenes weekly and comprises the five branch managers and EACD Division Manager 	<ul style="list-style-type: none"> weekly (oral) business reports from the branches EACD policy/strategy information/knowledge management budget and staffing issues performance against EACD Business Plan (quarterly since 2012–13)

Source: ANAO analysis of Environment information.

5.20 In relation to the operation of CEB, the oversight provided by internal forums is primarily focused on the branch's general administrative and investigation and enforcement activities, which includes CMP's close involvement in enforcement action taken against non-compliant proponents of approved controlled actions. With the exception of compliance audits, oversight of the performance of the CEB's compliance monitoring activity is limited to quarterly reviews against EACD's Business Plans.

Business planning and organisational risk management

Business planning

5.21 Since 2012–13, CEB has produced an annual business plan for each financial year, supported by three sections plans—for the Approvals Monitoring Sections (a combined plan for three sections), the Compliance Section and Investigations Section.

5.22 The 2012–13 CEB Business Plan was in the form of a spreadsheet comprising a long list of activities and success measures (relating to the achievement of the activities) for the coming year. The 2013–14 CEB Business Plan is a significant improvement on the previous year's business plan, with additional information included, such as CEB's: vision and role; risk management plan; and budget (approximately \$7.4 million).

5.23 CEB's activities and outputs from the 2013–14 Business Plan have, for the first time, been linked to the most relevant key deliverables from the 2013–14 Portfolio Budget Statement (PBS).¹¹⁷ Further, internal key performance indicators (KPIs) have also been developed for approvals monitoring and compliance/investigation functions. Nevertheless, the inclusion of qualitative KPIs makes measurement more challenging and there was a lack of alignment between branch and section plans.

Organisational risk management

5.24 A structured approach to risk management allows regulators to identify, assess and develop mitigation strategies for the greatest risks to regulatory objectives. As part of the development of the 2013–14 annual

¹¹⁷ All core CEB business activities and outputs are linked to the 'timely assessment, management oversight and advice on individual and strategic environmental assessments and approvals under the EPBC Act' deliverable in the 2013–14 PBS.

business plans during August/September 2013, risk assessments were prepared by the Approvals Monitoring, Compliance and Investigations sections (in relation to core business activities) and CEB (in relation to support activities, such as stakeholder and information management).

5.25 While the CEB risk assessment was developed in the context of preparing the 2013–14 CEB Business Plan, there is a lack of alignment between the proposed risk treatments outlined in the risk assessment and the ‘risk mitigation activity’ included in the plan. Many risk mitigation activities outlined in the business plan do not appear in the CEB and section risk assessments, which raises questions regarding the effectiveness of the risk assessment and proposed treatments as a means of managing CEB’s risks.

5.26 Overall, the current risk assessments (for both CEB and the sections within the branch) give insufficient weight to the significant risks facing the department—particularly its compliance monitoring function—including the workload relative to resources and information management practices. There would be benefit in Environment reviewing the risk management approaches adopted for its regulation of EPBC Act Part 9 compliance to provide assurance that risks are being appropriately identified and managed.

Stakeholder engagement

5.27 The relationships that a regulator establishes with regulated entities and other stakeholders can make an important contribution to the effective administration of regulation. Effective stakeholder engagement has many benefits, such as allowing a regulator to: effectively elicit compliance; identify and address compliance issues as they emerge; and design appropriate responses to non-compliance. The ANAO examined Environment’s approach to stakeholder engagement in relation to approved controlled actions, including:

- departmental policies and strategies for stakeholder engagement;
- the department’s communication with proponents and other regulators; and
- stakeholders’ views of the department’s regulation of approved controlled actions.

Departmental stakeholder engagement policies and strategies

5.28 The *EPBC Act Compliance and Enforcement Policy* describes, in general terms, the approach to be taken by Environment to interact with the regulated

entities and other environmental regulators. The policy indicates that timely targeted communication and educational activities will, in most cases, ensure that regulated entities meet their obligations under the EPBC Act. To this end, Environment is currently developing a CEB communication strategy to guide the branch's communication with stakeholders in relation to intelligence gathering, investigations, and compliance monitoring. The department expects the strategy's development to be completed by June 2014.

Communication with proponents

5.29 Interaction between compliance monitoring staff and proponents of approved controlled actions commences at the time that actions are transferred to CEB, with a standard introductory letter that: informs proponents of departmental contact details; outlines the department's monitoring role; and reinforces the need for proponents to maintain adequate records. As approved controlled actions progress, the department communicates with each proponent on a case-by-case basis.

5.30 To effectively engage with regulated entities, it is important for regulators to maintain accurate records of each entity including current contact details. The department does not, however, maintain an up-to-date record of proponent contact details, and any attempt to communicate with multiple proponents would require staff to examine hard-copy files to obtain the most recent contact details. The absence of a central record of proponent contact details significantly hampers the department's ability to engage with proponents collectively or in a timely manner. There would be merit in the department enhancing the functionality of IT systems to better manage proponent information.

Communication with other regulators

5.31 To proceed, many approved controlled actions also require permits or approval under other Commonwealth or state/territory legislation, often with their own set of conditions. As such, the activities of other regulators are an important source of compliance intelligence for the department. However, there was little evidence to indicate that Environment communicates with other regulators administering relevant environmental legislation on a regular basis in relation to many approved controlled actions.¹¹⁸ There is scope for the

¹¹⁸ In many instances, departmental records did not evidence any assessment of the extent to which approved controlled actions were subject to regulation by other Australian and/or state and territory government agencies.

department to establish formal relationships with the states and territories to improve communications and arrangements to share intelligence between jurisdictions in relation to approved controlled actions.¹¹⁹ The current negotiations between the Australian and state governments for assessing and approving controlled actions under the proposed one-stop-shop arrangements (further information is provided in Chapter 1) should provide an opportunity to enhance engagement with environmental regulators.

Stakeholder views of Environment's regulation of approved controlled actions

5.32 The ANAO sought comments from both proponents and general stakeholders (including industry/environmental peak bodies and state/territory governments) on Environment's regulation of proponents' compliance with Part 9 of the EPBC Act. In particular, comments were sought in regard to the department's: implementation of the *EPBC Act Compliance and Enforcement Policy*; effectiveness of monitoring and enforcement activities; and management of potential duplication with the compliance activities of other regulators.

5.33 Overall, feedback from stakeholders was generally positive or neutral, but also included a range of suggested areas for improvement—many of which have also been identified by the ANAO. Table 5.2 (on the following page) summarises comments received from proponents (10 responses from 62 requests) and general stakeholders (11 responses from 49 requests, and one unsolicited response).

¹¹⁹ In this regard, the ANAO notes that Environment entered into a memorandum of understanding with the Queensland Department of Environment and Heritage Protection in November 2011 to facilitate the timely exchange of information relevant to coal seam gas projects in that state.

Table 5.2 Stakeholder comments on Environment’s regulation of approved controlled actions

Proponents	General Stakeholders
<ul style="list-style-type: none"> • The department clearly outlined its expectations in relation to the compliance responsibilities arising from the project’s condition of approval • Departmental officers were professional, responsive, helpful and had a good understanding of projects • Mixed views on the level of duplication of project monitoring between state and federal regulators—while some proponents stated there was substantial overlap, others indicated that there was not 	<ul style="list-style-type: none"> • Establishing clear approval conditions in supporting effective monitoring and enforcement was important • The department could incorporate risk to a greater extent in the compliance audit program, with a focus on the industry sectors that pose the greatest risks • Sufficient numbers of skilled staff to effectively undertake the monitoring and enforcement function were needed • The department needed to improve its communication with proponents regarding their compliance responsibilities under the EPBC Act and other regulators regarding monitoring and reporting on controlled actions • Key performance indicators related to the monitoring and enforcement function were needed • More publicly-available information on proponents’ ongoing compliance was desired.

Source: ANAO analysis of stakeholder comments.

Information management

5.34 Sound information management is central to effective and accountable regulatory performance. Well-documented decisions, including the reasons for decisions, coupled with fit-for-purpose IT systems, help a regulator to improve consistency, increase transparency and enhance accountability. The ANAO examined Environment’s management of regulatory information, including:

- two departmental IT management systems:
 - the ‘Chapter 4 database’ supporting the department’s monitoring of approved controlled actions; and
 - the Compliance and Enforcement Management System (CEMS) supporting the recording and investigation of potential non-compliance and enforcement action; and
- the department’s management of its hard-copy records.

Compliance monitoring management information system (Chapter 4 database)

5.35 Over the period from late 2011 and 2012, an information management system—‘the Chapter 4 database’—was implemented by CEB to assist its staff to monitor proponents’ compliance with their actions’ conditions of approval.¹²⁰ The ‘Chapter 4 database’, which is linked to the EASy database used by assessment staff, allows compliance monitoring staff to view relevant action information from the EASy database¹²¹ and attach new information, such as: monitoring requirements related to submission deadlines for documentation; and monitoring events related to the actual date proponents’ documentation was submitted and accepted/approved.

5.36 The ANAO examined the functionality of the ‘Chapter 4 database’, including the extent of staff access and use, and found that:

- the database has significant functionality limitations, including an inability to record: current action status; key action milestone dates or events against which the timing of many conditions of approval relate; and ‘relative’ dates for monitoring requirements, which are a common feature of approval conditions¹²²;
- many monitoring requirements and events are not entered into the database, or have not been entered correctly. The ANAO found that less than half of the 126 monitoring requirements and less than 25 per cent of the 72 monitoring events related to the approved controlled actions examined by the ANAO had been entered correctly into the ‘Chapter 4 database’; and
- the entering of past monitoring requirements and events information into the database has been limited and, as a result, staff are required to examine the superseded monitoring spreadsheet or review hard-copy files to confirm that all past monitoring requirements have been met.

120 Prior to July 2011, post-approvals monitoring staff used a series of spreadsheets, accessible by multiple users, to monitor approved controlled actions. Environment’s transition to the Chapter 4 database was completed in late 2012/early 2013.

121 Relevant information from the EASy database includes: referral and approval dates; the type of assessment process; the action category; matters of national environmental significance protected by the decision; and conditions attached to the approval.

122 Relative dates are future dates that will become ‘fixed’ once a future action milestone or event occurs. An example of a monitoring requirement with a relative date is: ‘the proponent is required to provide an annual compliance return to the department within two months of the anniversary of the action’s commencement’.

5.37 The functionality limitations, in particular the inability to record milestones and monitoring requirements with 'relative' dates make it difficult for staff to effectively and efficiently monitor compliance.¹²³ To address these limitations, some compliance monitoring staff have developed workarounds, such as maintaining notations of key milestone events on hard-copy files and entering 'administrative check' dates into the database as a reminder to review the status of their actions at points in the future.

5.38 Information technology systems should not only assist regulatory staff to undertake their day-to-day work, but also provide a source of important management information. CEB does not, however, generate regular reports from the 'Chapter 4 database' to enable senior managers to monitor the performance of the compliance monitoring function. This is not unexpected, given the limited functionality and use of the system. These functionality, access and use issues will need to be addressed before the database can be used to generate regular and reliable performance reports.

Compliance and Enforcement Management System (CEMS)

5.39 Since January 2012, Environment has been introducing the Compliance and Enforcement Management System (CEMS) across the department to capture and retain compliance information—specifically matters of non-compliance (low-level through to serious incidents). CEMS is also a workflow management system that provides functionality for recording monitoring activities, incident reporting, case management, investigation work and intelligence. The Compliance Section of CEB was one of the first areas within the department to adopt CEMS, with the system generally being used effectively to manage workflow.

5.40 As well as assisting compliance staff to manage investigations, the information stored in CEMS can also assist the department to manage the risks posed by approved controlled actions. CEMS has query and reporting functionality that facilitates the collation and analysis of recorded compliance intelligence, including the compliance histories of actions and their proponents/major contractors. However, to take full advantage of this

¹²³ The standard operating procedures require monitoring requirements with 'relative' dates to be entered into the 'Chapter 4 database' using estimated or anticipated dates. Nonetheless, staff are required to progressively update the actions' monitoring requirements in the database as information comes to hand that allows them to calculate fixed dates.

functionality, the data entered must be complete and links between related pieces of data established. In this regard, the ANAO found that:

- many non-compliance incidents (generally of a technical nature) have not been reported to the Compliance Section or recorded in CEMS; and
- the links between actions, proponents, related entities and major contractors have not been fully established in CEMS in relation to many recorded non-compliance allegations/incidents.

IT controls supporting the ‘Chapter 4 database’ and CEMS

5.41 Environment is placing increasing reliance on IT systems to support CEB’s regulation of approved controlled actions to: capture and retain compliance intelligence and risk-related information; and manage workflows. The department is also seeking to enhance the reporting functionality of its IT systems to underpin the reporting of regulatory performance internally and externally. An effective control environment, encompassing user and programmer access, change management and data security, is therefore paramount for effective decision-making and accurate management reporting.

5.42 The ANAO’s review of the ‘Chapter 4 database’ and CEMS found that adequate controls were in place to backup data and logs, secure and store backup files and recover from system failures. However, the ANAO identified significant deficiencies in the both the ‘Chapter 4 database’ and CEMS in relation to controls over the management of system changes and system access. These deficiencies increase the risk of unauthorised changes being made to Chapter 4 and CEMS data and programs without detection, which presents an increased risk to the integrity and reliability of Chapter 4 and CEMS data and reports.¹²⁴ Given the importance of the integrity and security of regulatory data, these weaknesses should be addressed as a priority.

Management of hard-copy records

5.43 The current departmental policy for EACD stipulates that hard-copy files form the basis of official documentation. As a consequence, there is an expectation that copies of all relevant documentation generated, received and

¹²⁴ Notwithstanding these identified weaknesses, during the IT controls testing of the ‘Chapter 4 database’ and CEMS, nothing came to the attention of the audit team to indicate that unauthorised changes had been made to Chapter 4 or CEMS data or programs.

sent by the department (including emails and emailed attachments) should be attached to the hard-copy files. In accordance with this policy, information on all compliance activities undertaken under EPBC Act Part 9 is required to be retained on hard-copy records.

Compliance activities

5.44 During the audit, the ANAO expended considerable resources examining hard-copy files that recorded evidence of the department's compliance activities related to the 64 approved controlled action examined. The compliance status for many actions examined could only be determined by a complete examination of all post-approval monitoring files. The volume of material and the manner in which it is retained over a large number of files, pose significant challenges for compliance monitoring staff (many of whom are managing, on average, 28 approved controlled actions).¹²⁵ The responsibility for controlled actions is also frequently redistributed among staff due to staff turnover.

5.45 Functionality limitations of the 'Chapter 4 database' (outlined earlier in this chapter) increases the importance of the department having an effective system of recording hard-copy records that allows for the efficient retrieval of stored documents. Environment's general practice of maintaining a single series of consecutive files for each action that often has multiple, distinct and concurrent conditions does not facilitate the efficient retrieval of stored documentation. The ANAO suggests that the creation of file categories for each approved controlled action, in accordance with requirements established under specific conditions, would better place compliance monitoring staff to effectively manage the controlled actions assigned to them and associated documentation.¹²⁶

5.46 Compliance audits undertaken by the department are documented on hard-copy files established for each audit. However, the ANAO found that not all documentation required to demonstrate compliance with requirements relating to audit planning, delivery, reporting and follow-up had been retained on departmental files (which is examined in Chapter 3). Retention of these documents would better place the department to demonstrate the rationale for, and effectiveness of, its compliance auditing function.

¹²⁵ In the case of the larger, more complex actions, hard-copy documentation retained over time can amount to thousands of pages over dozens of files.

¹²⁶ The ANAO notes that staff managing coal seam gas controlled actions have created files for specific condition requirements for each action and that this approach has delivered a more efficient approach to managing controlled actions.

5.47 Environment informed the ANAO that an electronic document records management system will be introduced within the Compliance and Enforcement Branch by 30 June 2014. The department considers that this system will address many of the current records management shortcomings.

Investigations and enforcement activity

5.48 Documentation related to departmental investigations and enforcement activities related to approved controlled actions are retained either on dedicated files for larger cases or within files containing multiple smaller cases. Overall, the ANAO found the documentation of investigations actions and enforcement decisions, and their reasons, were appropriately documented. However, hard-copy documentation supporting two older investigations examined by the ANAO (dated July and September 2011) could not be located by Environment.

Performance monitoring and reporting

5.49 The assessment and approval of controlled actions under the EPBC Act has been of longstanding interest to industry groups, environmental groups, the media and members of public. In more recent times, proponents' ongoing compliance with the conditions of approval placed on their controlled actions has also been the subject of increased public attention.¹²⁷ Accurate performance reporting informs internal management and external stakeholders of the extent to which regulatory objectives are being achieved.

Internal management reporting

5.50 Since 2012–13, each branch within EACD (including CEB) has been required to report their performance and achievements each quarter. CEB reviews the activities/outputs listed in the EACD Business Plan relevant to CEB on a quarterly basis and provides an update for inclusion in the EACD Quarterly Report using 'traffic light' signals and supplementary comments. Finalised EACD Quarterly Reports are subsequently published on the department's intranet.

¹²⁷ Chapter 1 outlines two recent inquiries (a departmental inquiry into a bund wall leak at an approved controlled action in Queensland and a Senate inquiry into the effectiveness of biodiversity offsets) that are examining, among other things, post-approval monitoring and compliance activities by the responsible regulators.

5.51 The coverage of performance information relevant to both CEB's approvals monitoring and compliance/investigations functions has improved significantly in recent EACD quarterly reviews. The 2013–14 EACD second quarter report covering the period October to December 2013 contains an update on progress towards the achievement of most of the key business activities outlined in the 2013–14 CEB Business Plan, including five internal KPIs, 14 activities and 18 outputs.

5.52 For the first time, EACD quarterly reports have reported on the outputs of the compliance monitoring function beyond the number compliance audits undertaken, including the number of: variations to conditions processed (22); monitoring inspections undertaken (26); and controlled actions managed by the Approvals Monitoring sections (514). The second quarter report further indicates that the number of management plans approved/varied and reports received for departmental assessment will also be available in the third quarter of 2013–14.

5.53 Given the scope for significant enhancements to CEB's management information systems, there is the potential to further improve the reporting of activities and outputs from the compliance monitoring function. Data related to the numbers and type of non-compliance identified by compliance monitoring staff, and the frequency of contact with proponents of high risk actions, would better demonstrate the department's active monitoring of approved controlled actions.

External performance monitoring and reporting

Portfolio Budget Statements

5.54 Portfolio Budget Statements (PBS) specify each department's and agency's outcome(s), programs, expenses, deliverables and KPIs. The department's regulation of approved controlled actions under Part 9 of the EPBC Act is not listed as a discrete program in Environment's PBSs, but is included in Program 5.2 Environmental Regulation under Outcome 5—*Environmental Protection and Heritage Conservation*.¹²⁸

¹²⁸ Environment's Outcome 5 for 2013–14 was 'Increased protection, awareness and appreciation of Australia's environment and heritage through regulating matters of national environmental significance and the identification, conservation and celebration of natural, indigenous and historic places of national and World Heritage significance'.

5.55 An ANAO examination of the 2011–12, 2012–13 and 2013–14 PBSs found that:

- the deliverables established under Program 5.2 (such as improvements to business processes and guidelines) do not directly relate to the core regulatory activities of CEB; and
- the established KPI that is directly relevant to the regulation of approved controlled actions relates only to the assessment and investigation of all reported compliance incidents under the EPBC Act (including Part 9). The compliance monitoring functions are not covered by any PBS KPIs.

5.56 There would be benefit in Environment developing PBS deliverables and KPIs that directly relate to the monitoring of regulatory compliance undertaken by the department under all parts of the EPBC Act and other relevant environmental legislation administered. In this context and in regard to CEB's compliance monitoring activities, such KPIs should cover the frequency of risk-based monitoring of approved controlled actions and the extent to which proponents' management plans and compliance returns have been assessed/approved within the timeframes established by actions' conditions of approval.

Annual reports

5.57 Annual reports are an important accountability mechanism for agencies to report their performance to the Parliament and the public. They are designed to provide factual and informative commentary on performance against the targets and anticipated outcomes specified in PBSs and Business Plans.¹²⁹

5.58 While Environment's 2010–11, 2011–12 and 2012–13 annual reports have included information relevant to EPBC Act Part 9 regulation, it has provided stakeholders with limited information on the extent to which regulatory objectives have been achieved. The reported information includes:

- contextual material relating to the *EPBC Act Compliance and Enforcement Policy* and Environment's compliance monitoring activities;

129 Section 516 of the EPBC Act also requires the Secretary of Environment to prepare and submit a report on the operation of the EPBC Act to the Minister, and for the report to be tabled in Parliament. Environment includes its s516 report within its published annual reports.

- miscellaneous statistics (including the numbers of variations to conditions of approval processed, the number of compliance audits undertaken and a short summary of their collective results¹³⁰, and enforcement actions across all parts of the EPBC Act¹³¹); and
- results against PBS deliverables and KPIs—limited to reporting that ‘the department considered all allegations of non-compliance under the EPBC Act’, as required by the PBS KPI relating to investigations.

5.59 The limited information that Environment has included in its annual reports in relation to its compliance activities under the EPBC Act Part 9 does not provide stakeholders with sufficient information on which to assess the extent to which departmental compliance and enforcement activities undertaken in relation to approved controlled actions are appropriate or sufficient to protect MNES. The Productivity Commission, in its 2013 research report into *Major Project Development Assessment Processes*, made a similar finding when it found that there is limited public information provided by environmental regulators that would enable the Commission to draw conclusions about the appropriateness of their compliance monitoring activities.¹³²

Conclusion

5.60 While Environment’s oversight of CEB’s investigations/enforcement function has generally been effective, the department’s management and internal oversight forums have had limited visibility of the activities, outputs and performance of CEB’s compliance monitoring function. As a consequence, the compliance monitoring function has not received sufficient management attention over an extended period of time to address its significant workload challenges and shortcomings in relation to information management practices and external performance reporting through the PBS and annual reports.

130 In each year, the summarised result from compliance audits reported was: ‘Overall, the audits identified a substantial level of compliance with conditions. Instances of non-compliance were addressed in accordance with the department’s Compliance and Enforcement Policy’. Environment separately reports the results of each audit on its website.

131 Annual reports include the following information on enforcement actions: the number of reported non-compliance incidents (and trends over time), the number of new investigations, a brief summary of each serious enforcement action taken by the department, and a short paragraph on each legal action under the EPBC Act.

132 Productivity Commission, *Major Project Development Assessment Processes*, Research Report, November 2013, p.289.

5.61 CEB's annual business planning, first introduced during 2012–13, has improved significantly during 2013–14, with branch activities and outputs now linked to internal KPIs, informed by an assessment of organisational risks. Nevertheless, current risk assessments give insufficient weight to the significant challenges and shortcomings facing the department. While internal performance reporting of CEB's activities and outputs, particularly in relation to its post-approvals monitoring function, has improved recently, there is scope for further improvements to enhance CEB's accountability to Environment's senior management.

5.62 Overall, stakeholders provided generally positive or neutral comments on the department's regulation of approved controlled actions, but also suggested areas for improvement—one of which was enhanced communication with proponents and other regulators. In this regard, the department is progressing the development of branch communications strategy, but would also benefit from the establishment of formal relationships for communicating and sharing intelligence with other regulators.

5.63 The establishment of, and reporting against, improved PBS deliverables and KPIs would also better position the department to demonstrate to external stakeholders that it is appropriately regulating approved controlled actions.

Recommendation No.5

5.64 To improve the governance and oversight of the compliance monitoring function, the ANAO recommends that the Department of the Environment:

- (a) implement improvements to IT systems and records management practices, to address identified gaps and enhance functionality;
- (b) improve the frequency and coverage of management reports in relation to compliance monitoring activities, outputs and outcomes; and
- (c) develop and report against appropriate performance measures that relate to the activities undertaken to monitor compliance with the EPBC Act.

Environment's response:

5.65 *The Department agrees with ANAO Recommendation 5. Since 2012, as part of its comprehensive business improvement programme, the Department has undertaken a suite of enhancements to the functionality of its compliance monitoring*

databases. These enhancements enable the capture and reporting of information upon which compliance and enforcement decisions are based. To implement ANAO recommendations 5 b) and c), the Department intends to implement the National Environmental Significance Threat and Risk Assessment model on 1 July 2014. The model will inform the development of the annual compliance plan, which will set out a coordinated program of compliance monitoring activities, monitoring inspections and compliance audits, all focused on the highest risk projects.

5.66 *The development and implementation of performance measures that relate to the activities undertaken to monitor compliance with the EPBC Act and Sea Dumping Act will be prioritised in the 2014–15 business plan. Whilst performance measures are currently identified and reported against, these will be reviewed post implementation of the risk-based case-prioritisation model.*

ANAO comment

5.67 The ANAO considers that there would be benefit in Environment developing PBS deliverables and KPIs that directly relate to its monitoring of regulatory compliance with the EPBC Act. Recommendation 5(c) is directed to this end.



Ian McPhee
Auditor-General

Canberra ACT
18 June 2014

Appendices

Appendix 1: Response from the Department of the Environment



Australian Government
Department of the Environment

Dr Gordon de Brouwer PSM
Secretary

Ms Barbara Cass
Group Executive Director
Performance Audit Services Group
Australian National Audit Office
GPO Box 707
CANBERRA ACT 2601

Dear Ms Cass

Thank you for your letter of 5 May 2014, providing the Australian National Audit Office proposed audit report on *Managing Compliance with the Environment Protection and Biodiversity Conservation Act 1999 Conditions of Approval*.

Pursuant to sub-section 19(4) of the *Auditor-General Act 1997*, the Department of the Environment has prepared a response to the report. I note that the Department has also provided editorial comments to the report separately.

I acknowledge that there have been shortcomings in past compliance of environmental conditions. In particular, the Department has not demonstrated that it has effectively targeted its compliance monitoring activities to the areas of greatest risk. I am concerned, however, that the audit report does not fully recognise accomplishments by the Department since 2012. Since then, the Department has been implementing a comprehensive business improvement programme. This programme has been informed by an internal audit of compliance and enforcement activities in 2013 and includes:

- in 2012, implementing the Compliance and Enforcement Management System to track and coordinate investigations and intelligence gathering
- in 2013, implementing a risk-based case-prioritisation model, based on the Australian Crime Commission practice, to focus investigations on highest-risk cases
- in 2014, developing a risk-based prioritisation model, with the assistance of the Commonwealth Scientific and Industrial Research Organisation and based on the practice of the Australian Tax Office, to focus the Department's monitoring activities on those approved projects posing the highest risk
- in 2014, enhancing the Department's assessments and approvals database to enable more accurate monitoring and reporting of approval decisions, and
- in 2014, updating 63 standard operating procedures to ensure a systematic approach to the Department's compliance and enforcement activities.

This business improvement programme is expected to be completed in July 2014.

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In addition to the business improvement programme, the Department has significantly increased its proactive management of regulation, in contrast to the report's finding that the Department takes a passive approach to regulation.

For example, since 2012, the Department has issued 19 infringement notices for breach of conditions, directed 15 proponents to undertake independent audits of their actions and has commenced varying conditions of approvals in response to breaches. In contrast, from 2008 to 2012, there were only 2 infringement notices and no directed audits.

The Department has increased its proactive engagement of approval holders to educate and encourage voluntary compliance – an activity that has not been reflected in the report. For example, since January 2012, the Department has undertaken 177 variations to conditions to assist proponents with voluntary compliance.

I accept the recommendations in the report and am confident that the Department is well placed to implement the recommendations, with the majority to be completed within the current business improvement programme by July 2014.

Please find enclosed with this letter the Department's summarised response to the report and a response to each of the recommendations.

Yours sincerely



Gordon de Brouwer

3 June 2014

Enc (2).

ANAO comment

The ANAO's examination of Environment's regulatory activities focused on the period from July 2010 to December 2013, with the report acknowledging a number of developments over this period, such as the introduction of the Compliance and Enforcement Management System (refer to paragraphs 34, 5.12 and 5.39–5.40). The report also acknowledges key initiatives under development during the course of the audit, such as the risk-based prioritisation model (refer to paragraphs 19, 23 and 2.21) and new standard operating procedures (refer to paragraphs 19, 4.6 and 4.23). However, given that a number of these initiatives are not scheduled to be implemented until mid-2014, the ANAO was not in a position to form an opinion on the extent to which they will address the shortcomings identified by this audit and earlier reviews.

The ANAO has also included comments in the report at paragraphs 37 and 5.67 in relation to Environment's response to the proposed report.

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