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On Best-in-Class Regulators

Researchers involved in the Penn Program on Regulation’s Best-in-Class Regulator Initiative have started our research and are convening dialogues with a variety of experts from the University of Pennsylvania and elsewhere around the world. In addition, project team members have conducted many one-on-one interviews with individuals interested in energy extraction regulation in Alberta, Canada, including landowners, industry managers, environmental group representatives, and others. We assemble here some initial and tentative reflections about what it might mean to be a “best-in-class” regulator – as well as some possible core attributes of regulatory excellence.

We invite comments and suggestions on these preliminary ideas, intended here to promote discussion. Please email us with your feedback at comments@bestinclassregulator.org.

General Reflections

The following are some general ideas about what it may mean for a regulator to be best in class.

- All regulators face a never-ending series of tradeoffs. Tradeoffs exist with respect to the attainment of regulatory objectives; for example, attaining environmental improvements can often increase costs to otherwise vital and productive industries. Tradeoffs also exist across the various activities and operations of regulatory bodies; for example, expanding public outreach (external engagement) may in some circumstances, or at least in the short run, increase management costs (internal management) and may slow down the agency’s outputs. A best-in-class regulator will not be able to escape tradeoffs but instead must strive to understand them and certainly be open to options that may sidestep or minimize them, but ultimately the regulator must achieve an optimal and appropriate balance between competing values. That balance could possibly fall squarely in the middle of the spectrum of responses, but it may fall anywhere else on the spectrum depending on the validity of the competing claims.
- One bit of conventional wisdom appears to hold that because a regulator “can’t please everyone” (that is, can’t meet mutually exclusive and conflicting demands), then if everyone is *unhappy* the regulator must be doing well. This may not necessarily be so;

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such a regulator may be making choices that appear Solomonic but actually make little sense. A best-in-class regulator may instead be the one that seeks to navigate through irreconcilable conflicts in a thoughtful, empathetic, calm, and independent way. The regulator's role, on this view, is not about greasing the squeakiest wheels, nor about automatically doling out wins and losses to opponents evenly. It's about listening well but not being afraid to make the hard choices, and being able and willing to justify and explain those decisions. In other words, even though at times a regulator may make some people unhappy, the key may lie in understanding *why* they are unhappy and in *how* the regulator responds.

- “Best-in-class” is presumably a dynamic, not a static, concept. Regulators face changing conditions and ever-present risks, so the best regulators are attentive to change and able to adapt. Vigilance and the pursuit of *continuous improvement* would seem essential.
- A key way to think about assessing regulatory excellence might be: How good is a regulator at setting the right priorities, setting evidence-based and publicly-responsive goals for addressing the high-priority problems, and ultimately achieving those goals (i.e., picking the right problems to solve, and then solving them)?
- Another way to define best-in-class status might be to compare the regulator with similar regulatory bodies elsewhere that are trying to address similar problems, and then either (a) compare the outcomes, adjusted in an appropriate fashion to correct for differences in underlying scales or circumstances (assuming such adjustments are even feasible), or (b) simply gauge how similar are the practices and activities between the regulator and its comparators.
- Relative assessments with other entities may well be, by themselves, insufficient if others in the “class” are not themselves performing well – or well enough. Terms such as “best in class” or “world class” may – or perhaps should – connote an *absolute* level of achievement and excellence as much as a relative judgment.
- An important part of being an excellent regulator is serving the public. It is not enough for a regulator just to do what other regulators elsewhere do, and do those things better, if doing so still leaves some important matters related to the regulatory environment, or other important public concerns, insufficiently addressed. Perhaps a best-in-class regulator may even at times have to think more creatively about using the scope of its authority to address problems related to its mission that may have “fallen through the cracks.”

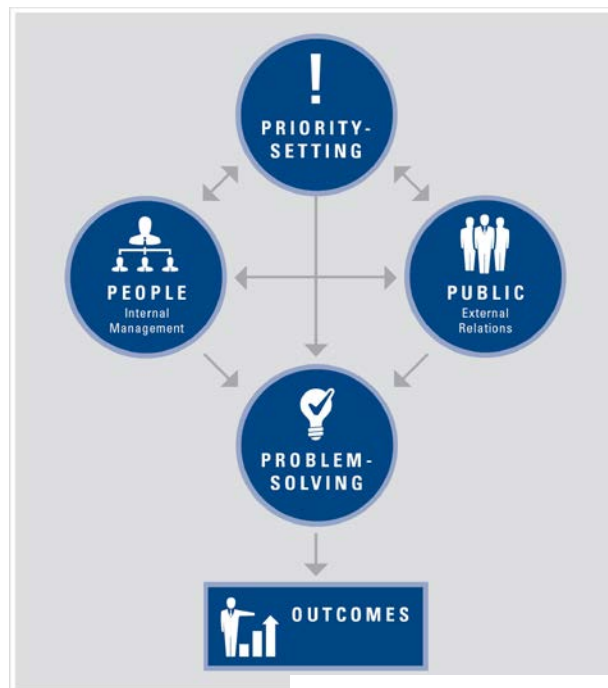
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- Learning would seem to be an essential component of a best-in-class regulator. The processes of evaluation and validation are not only vital for determining whether a regulator is best in class, but they may well be a defining feature of being best in class.

Elements of Excellence: A Framework for Assessing Regulatory Performance?

Regulatory performance would typically be assessed by outcomes rather than actions. The following figure illustrates a proposed framework for analyzing the four vital factors that feed into and ultimately affect the outcomes that regulators achieve: priority-setting, problem-solving, people (internal management), and the public (external engagement). In a best-in-class regulator, each of these four facets will presumably interact with each other to generate socially-desired outcomes – the realized public value.

Figure 1: The Regulatory Core



Source: Coglianesi (2014)

- Priority-Setting, then Problem-Solving

Any regulator must choose from a number of different problems to address – that is, it must engage first in **priority-setting**. Some of these priorities may be set by the legislature, but laws still leave much discretion to the regulator and much responsibility for priority-setting.

After deciding what problems to prioritize, the regulator then proceeds to take actions to try to solve those problems. **Problem-solving** entails tasks or activities: approving applications,

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adopting regulations, conducting inspections, prosecuting enforcement actions, disseminating information, providing grants, and more. These activities are directed at solving the problems that the regulator has been established to address, whether environmental contamination or transport accidents or any number of other problems.

- People and the Public

In both setting priorities and solving problems, the regulator operates through its **people** (i.e., its employees), creating a variety of challenges of internal management, from training to evaluation, from IT systems to whistleblower policies. The regulator also pursues its core mission in interaction with the **public**, that is, all those individuals and entities external to the regulator: the broad public, regulated industry, NGOs, the legislature and other governmental entities (municipal, provincial, or federal), indigenous peoples, academic institutions, and a variety of other stakeholders.

Evaluating and Validating Best-in-Class Regulators

With respect to each of the four facets of a regulator – its four “P’s” – important evaluative questions arise. Best-in-class regulators presumably engage in ongoing evaluation and validation not merely to determine if they have “arrived at” excellence, but to identify how they might do better no matter where they might be in terms of their quest for excellence.

- What to Evaluate?

- Evaluation focuses on specific outcomes – whether they are *substantive* outcomes (e.g., avoiding industrial accidents and environmental spills, etc.) or *procedural or managerial* outcomes (e.g., achieving effective internal management or transparent external communications).
- Although evaluation is motivated by problems, the purpose is to learn how well specific programs and activities are addressing those problems. Even processes of decision making and public consultation can be evaluated, such as by investigating how well might a particular type of stakeholder engagement process reduce conflict or increase information available to the regulator.

- How to Evaluate?

To evaluate policies, programs, processes, or other activities, the regulator will need to:

1. Identify *goals*
2. Select *metrics* for measuring progress toward these goals, and
3. Engage in *assessment* to determine if progress is being made.

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As noted, the goals, along with accompanying metrics and assessments, will be tied to specific programs, policies, tasks, or other activities. For example, with respect to external relations, the regulator will need to define goals, metrics, and determine how it will assess its performance. Is its goal to reduce conflict? Increase public trust? Gain more information? A regulator might well have a combination of one or more of these or other goals. For each goal, the regulator will need to identify metrics and then engage in assessment.

- Methods of Assessment

The nature of any assessment may best be driven by a “value of information” approach. That is, the effort and degree of rigor applied in assessing a regulator’s performance will likely vary depending on factors such as the importance of the goal, uncertainty over how well the regulator is achieving that goal, and the potential for unintended consequences or undesirable side effects.

- External Validation

External or third-party validation could be used when evaluating a regulator. Assessments can also be subjected to external peer review. Other types of more global validation can be deployed to assess the regulator’s overall performance, such as by convening at periodic intervals advisory bodies of international experts or using public perception surveys.

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