Executive Summary

This report is the third and last report in the research project, Towards Water Resources Regulation in South Africa, the first being the Survey of Approaches to Water Resources Regulation, and the second being Water Resources Regulation Arrangements in South Africa: Institutional Criteria, Functions and Arrangements. It deals with the issue of regulatory impact assessment as a tool in understanding and managing the impacts of water resources regulation.

South Africa is currently in transition from a historical focus on the development of water resources infrastructure to a stronger focus on water resources regulation. At the same time, the South African government has been investigating the use of Regulatory Impact Assessment, a process lead by the Presidency and National Treasury. According to Neva Makgetla, DDG: Policy of the Department of Economic Development, the intention is to ensure that a range of alternatives, including the 'do nothing' option, have been considered, that the impact on employment, investment and growth have been considered, and that consultation has been done with key stakeholders (pers comm. 2010).

In the light of these developments, this report sets out to consider the international experience of RIA, its application to water resources regulation, and some lessons for the implementation of propoor RIA in water resources regulation in South Africa.

The report begins with an explanation of the evolution of RIA, the purpose of RIA and some discussion on the methodology of conducting such assessments. This is followed by an assessment of international RIA experience. Section 5 looks at a possible RIA approach for the water resources sector in South Africa. This is followed by the concluding section.

What is Regulatory Impact Assessment?

RIA is a tool for assessing the impacts of regulation, which is used to examine and measure the possible benefits, costs and effects of new or changed regulation (OECD, 2008a: 7; OECD (Undated): 16), in order to provide decision-makers with empirical data and a comprehensive framework in which they can assess their options and the consequences their decisions may have (Rodrigo, 2005: 5).

Ideally RIA is based on determining the underlying regulatory objectives and identifying all the feasible policy options capable of achieving them. The alternative policy options are assessed using the same method so that policy-makers can systematically choose the most efficient and effective options using information on the efficiency and effectiveness of the different options (OECD, 2008c: 3).

In some countries cost-benefit analysis is the main approach used to carry out RIA although there are other methodologies including cost-effectiveness analysis, compliance cost assessment, costbenefit analysis and risk-risk analysis (Renda, 2006: 38).

According to the OECD (2008b: 4), the use of RIA as a formal regulatory quality instrument goes back more than 25 years. It was first introduced in the US in 1974, and since then most developed countries have been applying RIA to some extent to new and existing policies (Analytica, 2010: 1; OECD, 2009: 3). However, the introduction of RIA into countries in transition and developing countries has often been driven by external factors such as donor-driven programmes, or the desire to accede to the EU.

RIA as it was originally conceived, was a tool to identify the costs of regulation to the business sector, to support a process of deregulation to reduce the burden of regulation on the private sector, thus improving competitiveness (Kirkpatrick and Parker, 2006: 1). Since then, however, the definition and purpose of RIA have been widened, and the public objectives have been widened to include consideration of the social, economic and environmental impacts of regulation. This follows a shift of focus from 'less' regulation to 'better' regulation. (Kirkpatrick and Parker, 2006: 1).

Nonetheless, RIA is not without its critics in terms of its effectiveness and its ability to deliver value for money. In many developing countries RIA is still perceived as a costly instrument that might not produce the expected outcomes in the short term (OECD, 2008a: 26). Developing countries have particular challenges in relation to understanding the impacts of proposed or existing regulation, challenges posed by their specific social, environmental and economic challenges and by challenges of access to good quality data. Developing countries also face a challenge in ensuring that RIA procedures are appropriate to their human and financial capacity constraints.

Purpose

According to the OECD, the aim of RIA is to ensure that legislation or regulations are implemented only if they are efficient and effective (OECD, 2009: 3). There are four challenges that RIA can help to address:

- Over-regulation
- Inappropriate regulation
- Lack of regulation and
- Unenforceable regulation.

Part of the process of RIA is to look at other non-regulatory alternatives for achieving the same objectives, such as public information dissemination, providing information to consumers, information provision by suppliers, imposing a tax on certain activities, applying subsidies to certain activities, and promoting self-regulation.

Challenges in using RIA

Radaelli (2004) highlights a number of challenges and concerns regarding the use of RIA. The first concern is that RIA, incorrectly applied, may bias the results towards the interests of one particular constituency, such as the business community. A second issue, and one that pertains particularly strongly in a highly unequal society such as South Africa, is the difficulty of addressing the distributional impacts of regulatory options through RIA. Further concerns include the difficulty in measuring such factors as the value of human life, or wilderness, and that RIA usually ignores threats to other species, to biodiversity, and to other components of human welfare, such as mental health, spiritual well-being, and social stability' (Thiele, 2000: 554). Contrary to the desire purely for 'efficiency and effectiveness' highlighted by the OECD, developing countries may be more or equally concerned about transformational and distributional impacts.

A further challenge raised by Radaelli is that RIA requires 'time, institutional energy and human resources' (2004: 12). It is, therefore, not possible to cover every aspect of regulation, or every possible impact. Some countries use RIA extensively, but other countries have chosen, because of the resource intensiveness of the process, to use the tool far more selectively.

Methodology

There are a range of methods for applying RIA, ranging from the use of full cost-benefit analysis to simpler checklists, and from quantitative to qualitative approaches. The choice of methodology is particularly important in a country like South Africa which has limits to financial and human resources, but also has a strong need to understand the impacts of regulation on, inter alia, growth, poverty eradication and the optimal use of scarce natural resources such as water. The European Commission recognises the value of both quantitative and qualitative elements of RIA and highlights that the real function of RIA is to identify the major trade-offs of regulatory choices.

There are generally three steps in an RIA process:

- an analysis of the problem to be addressed, who is creating the problem, who is affected by the problem, the severity of the problem, and whether the problem requires government intervention;
- an evaluation of costs and benefits, including a consideration of the processes for the implementation of the regulatory action and an evaluation of a number of possible alternative regulatory and non-regulatory approaches which include a "do-nothing" approach.
- stakeholder consultation which is critical not only for purposes of transparency and accountability but also because stakeholders have a keen sense of the likely costs, benefits and impacts of proposed regulation.

International experience in using RIA

An assessment was conducted of RIA implementation in a number of countries, and lessons from these processes are highlighted in the report. The countries examined are: the UK, Ireland, Australia, the USA, Uganda, Tanzania, the Republic of Korea, and Mexico.

Arising from this experience, some general lessons can be drawn out:

It is important to introduce RIA gradually, increasing the complexity of the RIA model over time as administrations become more familiar with it, rather than adopting overly complex procedures in a restricted sample of selected proposals (Renda, 2006: 39).

There are different models for introducing RIA, some backed by legislation, some not. There is little indication that legislative backing improves the implementation of RIA where the political will exists to implement it. However, experience from Kenya and Tanzania shows that RIA as an external, donor-driven programme shows little momentum or sustainability. In Uganda the introduction of RIA enabled donors to engage in business environment reforms resulting in RIA that favoured business interests. Kirkpatrick, Parker and Zhang (2003: 13) argue, however, that if RIA is to contribute effectively to economic growth and poverty, it should not be manipulated by special interests. They further state that in some developing and transition countries "consultation has tended to be limited to government and the business sector, with consumer interests and other civil society interest groups being under-represented in the consultation process", as in Uganda.

Mandatory public consultation enables increased participation by the general public in the early stages of the regulatory process but equally exposes regulators to risks of lobbying and capture (Renda, 2006: 22).

Despite decades of RIA implementation in the US, a review of implementation shows significant weaknesses, as follows:

- in 27% of the cases agencies had not considered alternative options
- only in 31% of the cases had agencies quantified both expected costs and benefits of proposed regulations
- only in 63% of the cases had the proponent agency calculated all identified costs
- only in 28% of proposals had the agency calculated the net present value of the regulatory intervention.

According to Lee (2007: 31), one of the key lessons from Korea is the value of creating "an independent body at highest level of the government, and let[ting] it control regulatory quality and check the "pro-regulation" tendency of line ministries". However, without sufficient capacity, the creation of such an approach can result in significant delays in the implementation of necessary regulation.

The success of the Mexican RIA implementation, according to the OECD (1999: 50), is attributed to the requirement for an RIA to be signed by a deputy minister (or director general for lower-level actions), that they focus only on costly regulations, and the inclusion of a number of possible impacts and quality aspects to be assessed.