

Cary Coglianese
Jennifer Nash
Todd Olmstead

Performance-Based Regulation: Prospects and Limitations In Health, Safety, and Environmental Protection

55 Admin. L. Rev. 705 (2003)

Abstract by Raymond R. Janairo

Agency administrators have a number of regulatory options available to pursue agency goals. One option that administrators may use is performance-based regulation. Performance-based regulation sets performance goals and allows individuals and firms to decide how to meet those goals. In theory, performance-based regulation strives to achieve the same results, such as design or prescriptive standards, while giving the objects of regulation the flexibility to achieve those results in a cost-effective manner. There is, however, a dearth of empirical study assessing the effectiveness of performance-based regulation. In 2002, the Regulatory Policy Program at the John F. Kennedy School of Government convened a workshop of government officials and industry researchers to discuss the merits of, and concerns with, performance-based regulation in addressing health, safety, and environmental problems.

Throughout the article, the authors set out to summarize the discussions at the workshop. The workshop focused on one principal use of performance-based regulation, namely the use of performance standards as the basis for the legal commands found in government regulations. Particularly, according to the authors, a performance standard specifies the outcome required, but leaves the specific measures to achieve that outcome up to the discretion of the regulated entity. Acknowledging that performance-based regulation is not a “magic bullet,” the article introduces a number of factors that agencies should consider in choosing performance-based regulation over other means such as: the relative strengths and weaknesses of performance standards; the costs it imposes on businesses; its ability to address risk, especially the risk of making a mistake; and its relationship to design standards, hybrid regulations and other regulatory instruments. The authors also discuss the role uncertainty, information, and experts play in relation to performance-based regulation. The authors acknowledge the difficulty of implementing such regulations, especially in the face of agency and industry resistance. Other inhibiting factors include Congress’s continued use of design-based legislation, agency enforcement issues, and the ability to develop meaningful measures and indicators. Although the article concludes with a positive outlook on the use of performance-based regulations, it balances its optimism by recognizing the difficulties associated with its use.