

Environmental Damage (Prevention and Remediation) (England) Regulations 2015

Lead department	Department for Environment, Food and Rural Affairs
Summary of measure	The 2015 regulations revoked and replaced the Environmental Damage (Prevention and Remediation) Regulations 2009, in order to continue to implement the EU Environmental Liability Directive.
Submission type	Post-implementation review (PIR)
Implementation date	19 July 2015
Department recommendation	Keep
RPC reference	RPC-DEFRA-5321(1)
Opinion type	Formal
Date of issue	01 May 2024

RPC opinion

Rating¹	RPC opinion
Not fit for purpose	The post-implementation review (PIR) has been rated not fit-for-purpose. This is due to RPC concerns regarding the lack of evidence and analysis supporting the Department's recommendation, including whether the Department has given sufficient consideration as to whether the regulations remain necessary to deliver the objectives and if amendments might be justified.

¹ The RPC opinion rating is based on whether the evidence in the PIR is sufficiently robust, as set out in the better regulation framework, to support the departmental recommendation. RPC ratings are fit for purpose or not fit for purpose.

RPC summary

Category	Quality²	RPC comments
Recommendation	Red	The Department has not included sufficient evidence and analysis of whether the regulations have been successful or remain appropriate in their current form. While evidence has been gathered through engagement with regulators, local authorities and industry, the Department appears not to have appropriately considered all of the information received when making the recommendation.
Monitoring and implementation	Weak	While the Department has sought evidence from those who enforce the regulations, as well as some industry groups, the evidence gathered is limited. The review would have benefited from a broader consideration of the evidence required to support the recommendation and the PIR.
Evaluation	Weak	The review does not include a sufficient evaluation of whether the objectives have been met, remain appropriate, or whether the regulations can deliver their intended objectives. Additionally, the Department has not appropriately considered the unintended effects nor discussed in detail what drove the inaccuracies of original assumptions.

² The RPC quality ratings are used to indicate the quality and robustness of the evidence used to support different analytical areas. The definitions of the RPC quality ratings can be accessed [here](#).

Response to initial review

As originally submitted, the PIR was not fit for purpose as the Department did not provide sufficient evidence, or discussion, to support the recommendation being made. In addition, the PIR failed to discuss the scope of the original assessment, limiting the RPC's ability to determine what would be a proportionate evaluation of the regulations.

In response to the concerns raised in the initial review, the Department has provided additional detail of previous impact assessments (IAs) undertaken for both the original 2009 regulations and the 2015 amendments. In addition, the PIR now discusses evidence that has been gathered, and the Department's consideration of this evidence. However, the PIR still does not sufficiently consider the regulation's delivery of the policy's objectives and whether the regulations, in their current form, remain appropriate.

Summary of proposal

The Environmental Damage (Prevention and Remediation) (England) Regulations 2015 were introduced to revoke and replace the Environmental Damage (Prevention and Remediation) Regulations 2009. This would continue to implement the EU Environmental Liability Directive (ELD) (2004/35/EC) as was introduced via the 2009 regulations. The original 2009 IA estimated that the regulations would have an equivalent annualised net-direct cost to business (EANDCB) of £17 million in 2019 prices.

The regulations are intended to function as a 'backstop', as they are triggered only when there is an imminent threat of 'environmental damage' that meets a certain threshold as set out in the regulations themselves. The objective of the regulations as originally introduced was to incentivise potential polluters to minimise the number and severity of cases of environmental damage, via a mechanism whereby polluters pay the costs associated with the damage created.

Recommendation

The RPC is unable to determine whether the Department's recommendation to keep the regulations, is sufficiently supported, based on the evidence presented in the PIR and the Department's consideration of it. The review has not considered if the regulations remain appropriate to deliver the policy objectives, nor has sufficient consideration been given to potential refinements to improve the operability of the regulations.

Monitoring and implementation

Proportionality

The PIR helpfully refers to both the IA that accompanied the regulations when first introduced in 2009, as well as the IA for the amendments made in 2015, when the regulations were revoked and replaced. This provides the context that the regulations when first introduced were expected to have an EANDCB of £17 million

in 2019 prices, a result of the considerations and restrictions being placed on business.

Range of evidence considered

The Department has presented evidence gathered from the Department's arms-length bodies (ALBs) such as Natural England and the Environment Agency, as well as local authorities (LAs). Both groups were consulted as they facilitate the enforcement of the regulation. To gather views from the LAs the Department used existing survey engagement that the Department for Levelling Up, Housing and Communities undertake. However, responses to the survey of LAs were rather limited. Furthermore, the Department state, on page 18, that is no longer appropriate to compare the measure against those implemented in the EU, which does not appear to be a suitable position to take, primarily given the origin of the regulations in the UK was through an EU Directive.

Justification of evidence gaps

The PIR includes a section noting the limitations of the evidence that has been considered. This discussion focusses on the lack of evidence available to the ALBs and the low response rate to the survey of LAs. While this appropriately caveats the evidence gathered through these processes, it does not address the broader issue of insufficient evidence available for the Department to utilise in the PIR. The information that the Department has relied on to support the recommendation appears narrow and limited. The PIR needs to consider what evidence from a wider range of sources should have been considered.

Evaluation

Policy objectives considered

Whilst the PIR clearly states the single primary objective of the regulations, there is little discussion of how successful the regulations have been, or more importantly whether the regulations remain necessary, or sufficient in their current form, to deliver this objective in light of evidence received. The review discusses how there is limited evidence to draw upon for the assessment as the regulations have rarely been used. However, it is not clear whether this indicates that they have been successful in acting as a credible deterrent to potential offenders, or if the triggering criteria in the regulations are set at such a level that it frustrates the effective use of the regulations. The Department needs to have sought evidence from those who are subject to the regulations, through surveys similar to those distributed amongst those whose role is to enforce the legislation. This would enable a better understanding of how the regulations are taken into consideration when businesses undertake activity that may lead to environmental damage. Gathering evidence from businesses is also necessary to support the Department's position that the amendments to the regulations have had minimal or no impact on businesses, as this is statement is currently unsupported by evidence.

In addition, given the Department cites evidence received from ALBs who have used other regulations to correct for actions that may otherwise have been addressed by the Environmental Damage regulations, the review needs to fully consider the suitability of the latter to tackle environmental damage when it does occur.

Unintended effects

The Department state that there have been no unintended effects of the regulations, however this does not align with the previous discussion in the review of the use of alternative regulations to enforce environmental damage. The review should discuss whether this alternative use, particularly where regulatory overlap has been identified, was expected or whether the Environmental Damage regulations were expected to be the primary tool to correct for such issues.

Original assumptions

There is limited discussion of the original assumptions made by the Department prior to the introduction of the regulations. The review does note that originally it was expected that there would be up to one case of marine environment damage that would fall under the scope of the regulations every two years. However, the review notes that in reality no marine cases have been triggered since the regulations were introduced. This is largely attributed to the Department not being fully aware of the effect of specific thresholds at the time of undertaking the original assessment. The review would benefit from a discussion of the respective thresholds and their practical implications for the effective implementation of the regulations.

SMBs

The Department has not considered small and micro businesses (SMBs) within the PIR. The review would have benefited from discussing whether the regulations have been more of an effective deterrent in respect of SMBs than they have been for larger firms, as well as whether the regulations put SMBs at a competitive disadvantage.

Improvements or alternatives considered

While the Department has discussed the production and distribution of guidance to raise awareness of the regulations, as it is believed that they are not well known across regulators and industry, the review should consider other possible action. For example, given the uncertainty relating to the thresholds prior to the original assessment, with these now known and these thresholds often being the determining factor between making use of other regulatory mechanisms instead of the Environmental Damage regulations, the Department should discuss whether amending the regulatory thresholds has been considered. Furthermore, while the Department notes in the PIR that it may be in firms' interest not to self-report, the PIR does not consider whether the firms, or indeed the regulators, have invested in the technologies that would allow them to know when a breach has occurred that should be reported. The review should have considered whether such investments have been made.

Regulatory Policy Committee

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