

Designation of Features (Notices) (England) Regulation 2012 and Designation of Features (Appeals) (England) Regulations 2012

Lead department	Department for Environment, Food and Rural Affairs
Summary of measure	<p>Section 30 and Schedule 1 of the Flood and Water Management Act 2010 enabled the Environment Agency, or a lead local flood authority or an internal drainage board to designate privately-owned flood and coastal erosion risk management assets in England where certain conditions are met. Once designated, the owner of the feature cannot alter, remove or replace it without consent from the relevant authority.</p> <p>This submission reviewed two specific measures related to the Act regarding notice periods and appeals.</p>
Submission type	Post-implementation review
Implementation date	25 July 2012
Department recommendation	Keep
RPC reference	RPC-DEFRA-5325(1)
Opinion type	Formal
Date of issue	16 May 2024

RPC opinion

Rating¹	RPC opinion
Not fit for purpose	<p>The post-implementation review (PIR) has been rated not fit-for-purpose. This is due to RPC concerns that the evidence currently would indicate that the secondary legislation is not proportionate given its very infrequent use to date. The Department should provide some further (proportionate) evidence to support the need for the regulations and undertake a revised analysis to support the recommendation, perhaps seeking further evidence from the bodies that use the regulations.</p>

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	Quality ²	RPC comments
Recommendation	Red	The PIR does not provide sufficient evidence to underpin the recommendation to keep the regulation as the Department's analysis finds that the features have not been widely used. Furthermore, the legislation has not been used in any instances of erosion concern. The Department should provide some further evidence to support the recommendation, undertaking a revised analysis including evidence from the bodies that use the regulations and any available evidence on the legislation in Wales.
Monitoring and implementation	Weak	The Department has considered a range of evidence in its attempt to assess the success of the regulation, although these sources do not demonstrate the regulation's success or support the Department's recommendation. Therefore, some contact with asset owners or case studies of the six designations would have benefited the PIR, as would an understanding of areas where designation was expected but did not occur. The PIR would also benefit from providing more detail on the data received during the data collection exercise.
Evaluation	Weak	The Department provides high level policy objectives. The cost and benefit assumptions from the original impact assessment are discussed quite generally in the PIR. As it is clear that these have not materialised as predicted, the PIR should discuss these further. Other areas that would be expected in a PIR, such as analysis of unintended consequences of the policy, are not addressed in detail due

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](#).

to the lack of data from such a low take-up and impact.

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 particular, the PIR stated that no specific feedback had been received regarding the specific regulations (the 28-day notice period and appeals) and should have provided more detail on its evaluation methodology along with evidence of whether the background risk of flood damage and erosion has changed and whether the policy had reduced that risk.

In response to the concerns raised in the initial review, the PIR now provides further discussion on the evidence that has been gathered, as well as including case studies and a summary of the methodology in the annex. However, these sources do not demonstrate the regulation's success or support the Department's recommendation, with only six designations having been made (out of an estimated ~10,000) and no recorded appeals.

Summary of proposal

Section 30 and Schedule 1 of the Flood and Water Management Act 2010 enable the Environment Agency (EA), a lead local flood authority (LLFA) or an internal drainage board (IDB) to designate privately-owned flood and coastal erosion risk management (FCERM) assets in England where certain conditions are met. Once designated, the owner of the feature cannot alter, remove or replace it without consent from the relevant authority.

Schedule 1:

- a) Gives the Minister the power to make regulations about (amongst other things) the form, content and method of service of a notice under the Schedule; and
- b) Requires the Minister to provide, by Regulations, a right of appeal against designations, decisions and enforcement notices under the Schedule powers.

Schedule 1 itself did not contain a requirement to conduct a PIR and is out of scope for this submission. The PIR, as submitted, assesses the extent to which two specific Regulations associated with Schedule 1 of the Act have met their objectives:

1. **The Designation of Features (Notices) (England) Regulations 2012** – which requires notices to specify a minimum notice period of 28 days before they have effect, unless the designating authority considers a shorter notice period is necessary in an emergency. This Regulation ensures that asset owners are given sufficient notice, and that the notice period is applied consistently, while prioritising the role of flood risk management in an emergency.

2. **The Designation of Features (Appeals) (England) Regulations 2012** – which provide the right of appeal of a decision, which is a requirement in Schedule 1 to the Act, against designations; decisions on an application for consent to alter, remove or replace an asset; a refusal to cancel a designation; and an enforcement notice.

Recommendation

The Department recommends that the two specific regulations in scope for review be kept in place. However, the PIR does not provide sufficient evidence to underpin this recommendation; the Department's analysis finds that the designation of features was not widely used, with negligible evidence to specifically support the use of the 28-day notice period and possible appeals. Furthermore, the legislation has not been used in any instances of erosion concern and the Environment Agency (EA) found that designating most existing structures with no history of management problems was difficult to justify. Therefore, the RPC is unable to determine whether the Department's recommendation is sufficiently supported based on the evidence presented in the PIR.

The Department should provide some further (proportionate) evidence to support the need for the regulations and undertake a revised analysis (for England, as this is now the relevant jurisdiction) to support the recommendation, perhaps seeking further evidence from the bodies that use the regulations in order to demonstrate their value and providing some evidence on the original rationale for intervention (detailing the risk of flood and coastal erosion risk for the lay reader) to justify against removing the regulations. Furthermore, as the regulations are applied in Wales, the IA could benefit from utilising any available evidence on how successfully the legislation has been implemented (and used) in Wales to support the recommendation to keep it in England, including whether any amendments have been made to make it more effective.

Furthermore, as the features were used so infrequently, the Department should have considered the limitations within the existing regulations (which may contribute to their lack of use), as well as any potential improvements, to give greater consideration to replacing the policy with regulations that are more effective. For instance, the designation route may not be viable if there are no accompanying powers (or if they lie in another piece of legislation) for the designating authority to request asset owners to maintain the structural integrity of the designated or carry out repairs.

Monitoring and implementation

Proportionality

Although the impact of the measure is now estimated to be very low, the PIR is very brief and the original impact assessment had a much larger estimated impact. The RPC assesses that some improvements to the PIR are proportionate.

Evidence to support recommendation

The Department has considered a range of evidence in its attempt to assess the success of the regulation, including surveying all designating authorities and utilising the CIRIA-AECOM Report and the EA's 2018 internal review. Despite the variety of evidence, these sources do not demonstrate the regulation's success or support the Department's recommendation, with only six designations having been made (out of an estimated ~10,000) and no recorded appeals. The PIR also states that there was no feedback on the 28-day notice period. The PIR would be improved by including some justification for this specific evidence gap, as a 28-day notice period was given to one of the assets and there is no explanation for why information was not available for the other five. Overall, since the numbers of designations are so small, some contact with asset owners or case studies of the six designations would have benefited the PIR, as would an understanding of areas where designation was expected but did not occur.

Furthermore, the PIR would have been improved by collecting and presenting evidence to explain the low uptake of the regulation and evidencing any potential improvements that could be made to the regulations. This could include evidence considering whether the regulations made the process of designation difficult in practice and if there were any ambiguities with other pieces of legislation.

The PIR does consider further evaluations that will be conducted in future, stating that the EA will continue to monitor the designation of assets. However, the PIR would have benefitted from including a further discussion on whether designations are likely to increase over the next 5-10 years, and also discussing any potential strategies for improving the level of feedback (particularly on the notice period) in future iterations.

In the absence of supportive evidence, the Department has provided some general justification for keeping the regulations, stating that the legislation offers protection to life, properties and the environment as well as improving provision of flood protection. The PIR would have benefitted from further evidencing these points, demonstrating the overall environmental benefits from the six designations and detailing how they have reduced risk of flood damage and erosion.

The PIR would have also been improved by utilising evidence from Wales. This could have shown how successfully the legislation has been implemented (and the

number of times it has been used) in Wales to support the recommendation to keep it in England, including whether any amendments have been made to make it more effective.

The Department has provided some detail on its methodology for data collection by including the questions that were asked in the survey for all designating authorities in Annex B. The PIR would also benefit from providing more detail on the metrics, and the qualitative and quantitative data received during this exercise.

Evaluation

Policy objectives considered

The review briefly references the original objectives of the regulations, stating that it assesses the extent to which the 28-day notice period and the right of appeal of a decision are met. As they stand, these policy objectives are high level and simply explain the regulations. Therefore, the review would benefit from including some more detailed objectives for these regulations. Furthermore, the objectives could be made more 'SMART' (i.e. specific, measurable, achievable, realistic and timely).

The PIR also references the original overall policy objectives of the Section 30 and Schedule 1 of the Flood and Water Management Act, stating that these were to minimise flood and coastal erosion risk, prevent economic damages from flooding and inform people of the importance of assets for risk management. While there was no statutory requirement to review this whole policy, the RPC considers it may yet be proportionate to do so due to the assumptions in the original impact assessment.

The Department also could have benefitted from referencing (and evaluating against) these overarching environmental objectives throughout the PIR to strengthen the review and possibly demonstrate the successful implementation of the regulations. As it stands, the Department does not consider the impact of the regulations on wider environmental objectives, such as the impact on flood risk and flood damage.

Original assumptions

The cost and benefit assumptions from the original impact assessment are discussed quite generally in the PIR, and it is clear that these have not materialised as predicted (such as 25% of the third-party assets requiring designation to provide sufficient coverage to deliver benefits). Specifically, the impact assessment predicted a net benefit of almost £400 million over 25 years and the PIR should discuss this further in the context of lessons learned for future impact assessments on similar measures.

The original impact assessment assumed that 15,600 features would be designated, from which 624 appeals would be made, whereas over the last 12 years there have only been six designations and no appeals. The reasons underpinning the

assumptions in the original IA should be investigated and the reason for the significant overestimate understood.

Other areas of evaluation

Other areas that would be expected in a PIR, such as analysis of unintended consequences of the policy, are not addressed in detail. The Department states that this is due to the lack of data from such a low take-up and impact but should have attempted to consider any limitations of the existing regulations. This could include considering whether there is a lack of clarity within the legislation or if the regulations are outdated in light of new environmental risks. The Department could have also considered whether the regulations made the process of designation difficult in practise and if there were any ambiguities with other pieces of legislation. This should be considered for future evaluations.

Regulatory Policy Committee

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