

## Written Evidence from the Office for Environmental Protection (OEP) to the Levelling Up and Regeneration Bill Committee

Submitted August 31, 2022

### Executive summary

#### *Environmental Outcomes Reports (EORs)*

- Our evidence focuses on Part 5 of the Bill: Environmental Outcomes Reports. That Part would provide ministers with powers to significantly change environmental law through secondary legislation that amends or replaces 17 existing Environmental Impact Assessment (EIA) regimes and the Strategic Environmental Assessment (SEA) regime.
- We recognise Government's desire to develop a new, outcome-based approach for EIA and SEA. We see there are potential benefits of an outcomes-based approach and scope for improvement in the current regimes. Yet there are also risks. Reform needs to be approached with care, based on proper assessment of its impacts, to avoid undermining existing high levels of environmental protection and ensure clarity for those to whom the law applies.
- We are not aware of how Government has assessed the current EIA and SEA legislation or compared it to the better environmental outcomes expected from proposals under the Bill. We believe it would be helpful for Parliament and others if Government were to set out in sufficient detail the analysis that has informed its judgements in these areas.
- Government was legally required to publish several EIA implementation review reports by May 2022. It has not done so. We are concerned about this, and the risk of a more regular failure to bring forward or report on measures to implement environmental law.
- We are undertaking our own analysis of the implementation of EIA and SEA legislation, as well as of the Habitats Regulations Assessment (HRA) process. We aim to publish a report on these matters in due course, although this may not be before Parliament concludes its deliberations over the Bill.
- Part 5 largely contains enabling provisions, so its potential environmental implications will only become fully apparent through 'EOR regulations'. It would be helpful if Government could provide additional detail about the expected content of the regulations.
- The environmental outcomes eventually set in the EOR regulations will be critical. There may be challenges around, for example, balancing national and local considerations and effectively aligning with the Environmental Improvement Plan (EIP) and legally binding targets set under the Environment Act 2021 and elsewhere (such as 'net zero').

- Securing an effective environmental outcome-based system will be a complex, long-term endeavour. As well as effective policy and legislation, it will depend on adequate delivery mechanisms and governance, taking account of considerations such as resourcing, monitoring, reporting and enforcement.

#### *Maintenance or improvement of environmental standards*

- The statement accompanying the Bill and made under section 20 of the Environment Act 2021 sets out Government's view that the Bill will not reduce the level of protection provided for by existing environmental law. We are not aware of how the effect of the current legislation has been compared against that of the Bill. We believe it would be helpful for Parliament and others if Government were to set out the analysis supporting its conclusions and judgements in these areas.
- While recognising the 'non-regression' safeguard in clause 120, we note that its ambition is relatively limited in requiring an overall level of environmental protection through the EOR regulations that may be no more than that provided by existing environmental law. Elsewhere, Government has committed to an overall improvement in protection, for example in the EIP produced, and environmental targets to be set, under the Environment Act 2021.
- Without detail on how this safeguard will be assessed or scrutinised, its application could be subjective. We suggest that any such statement that a Secretary of State is satisfied that this test is met should be accompanied by their supporting assessment.

#### *Habitats Regulations Assessment*

- We understand it is not Government's intention that the Bill should provide for the replacement of HRA. On our reading, however, it does appear to make provision which could have this effect in practice. We highlight the importance of clarifying the intention in this part of the Bill.

## **1. Introduction and background**

- 1.1. The OEP is an independent, statutory body established under the Environment Act 2021. Our principal objective in exercising our functions is to contribute to environmental protection and the improvement of the natural environment. We do this by holding Government and other public bodies to account against their environmental commitments.
- 1.2. Purely environmental considerations play a relatively small, though important, part in the Bill. The most significant area is Part 5. We focus our evidence on this Part.
- 1.3. Part 5 provides for a new framework, focused on a process for setting and assessing 'environmental outcomes' which would replace existing EIA and SEA legislation and potentially (see section 6 below) HRA under the Habitats Regulations.<sup>1</sup>

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<sup>1</sup> The Habitats Regulations are defined in clause 127(4) as only those parts dealing with HRA, i.e. regulation 5, Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001; regulation 24 and Part 6 Conservation of Habitats and Species Regulations 2017; and regulations 27-37 Conservation of Offshore Marine Habitats and Species Regulations 2017.

- 1.4. The Bill provides significant scope for Government to change existing environmental law through secondary legislation. Clause 130(1) sets out 17 EIA regimes (some contained in primary legislation), plus SEA, which may be amended or replaced by EOR regulations. These regimes constitute many of the mechanisms through which environmental impacts are currently considered in the development of plans, projects and programmes in England and in some cases across the UK.
- 1.5. The new system would centre on EORs required for certain consents and plans, so decision-makers can assess the extent to which giving those consents or adopting those plans would be likely to improve on delivery of the environmental outcomes (clause 117(4)-(5)).
- 1.6. In particular, the Secretary of State may, through EOR regulations, specify environmental outcomes relating to environmental protection in the UK or relevant offshore areas. In doing so, they must have regard to Government's EIP (currently, the 25 Year Environment Plan<sup>2</sup>).

## **2. The evidence base for the proposed new approach**

- 2.1. We understand Government wishes to replace EU-derived law with national legislation reflecting a new approach, focused on delivering environmental outcomes. With the prospect of change there is an opportunity to address deficiencies in the current regimes, for example in the proportionality of EIA.<sup>3</sup> Whether or not Government proceeds with the changes it has proposed, we argue that deficiencies in the current regimes should be addressed in any case.
- 2.2. Any reform should be approached with care so as not to undermine existing high levels of environmental protection. Government will also need to take care to ensure a clear approach to the transition for the many parties who are subject to the current regimes.
- 2.3. We have not seen a substantive evidence base that presents the case for wholesale reform, for example which specific deficiencies within EIA or SEA it is tackling, or how an outcomes-based approach would address these. As set out in our recent progress report on implementation of the 25 Year Environment Plan, we consider that this sort of analysis should be central to designing more effective and efficient systems<sup>4</sup> and to scrutinising what is proposed.
- 2.4. We regret, therefore, that Government has not published several implementation reports required in respect of existing EIA legislation. For example, regulation 71(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 requires the Secretary of State to review

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<sup>2</sup> HM Government, 'A Green Future: Our 25 Year Plan to Improve the Environment', (Defra, January 2018). [www.gov.uk/government/publications/25-year-environment-plan](http://www.gov.uk/government/publications/25-year-environment-plan)

<sup>3</sup> For example, see Institute for Environmental Management and Assessment. 'Levelling up EIA to Build Back Better', (September 2020). <https://www.iema.net/resources/reading-room/2020/10/01/iema-paper-levelling-up-eia-to-build-back-better>

<sup>4</sup> OEP, 'Taking stock: protecting, restoring and improving the environment in England' (12 May 2022a). <https://www.theoep.org.uk/report/taking-stock-protecting-restoring-and-improving-environment-england>

and report on these Regulations from time to time. Other EIA legislation contains similar requirements.

- 2.5. The Government was required to publish the first reports under the regulation 71 process by 16 May 2022 (five days after the Bill was introduced). As of the date of this evidence, this has not occurred. Pertinent material on the implementation of existing regimes is therefore not available to assist Parliament, and others interested in scrutinising Government's policy and legislative proposals.
- 2.6. On the face of it, this is a clear failure to comply with environmental law. It undermines transparency and erodes trust, especially without Government publishing an explanation and a date by when it will be rectified. Such a failure is perplexing, and the timing unfortunate, given that the reports could have been useful to explain the proposed reforms and support the Bill's scrutiny. We are concerned that this may be part of a wider pattern of Government failing to bring forward or report on measures to implement environmental law.
- 2.7. We note that Government first flagged its intention to reform EIA in the August 2020 Planning White Paper.<sup>5</sup> This did not include significant detail on the proposed reform but said that: *"Any new system will need to ensure that we take advantage of opportunities for environmental improvements while also meeting our domestic and international obligations for environmental protection. This will be the subject of a separate and more detailed consultation in the autumn."* However, this consultation did not happen.
- 2.8. We are undertaking our own analysis of the implementation of EIA and SEA legislation, as well as HRA, under our function of monitoring environmental law. We aim to publish a report on these matters in due course, although this may not be before Parliament concludes its deliberations over the Bill. It will, however, be able to inform the development of EOR regulations which we discuss below.

### **3. Substance of EOR regulations**

- 3.1. The impact of the proposed new regime will be determined by the EOR regulations and their implementation. The regulations will specify the environmental outcomes (clause 116). The wider content of the EOR regulations will determine how these environmental outcomes interact with and give effect to other important Government initiatives. These will include not just the EIP, but also environmental targets set under the Environment Act 2021 (with initial targets due to be laid before Parliament by 31 October), 'net zero', the ambition to protect at least 30% of land and seas by 2030, and other commitments such as those from the emerging biodiversity and marine net gain programmes (on which we have also made submissions to Government<sup>6</sup>).

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<sup>5</sup> Ministry of Housing, Communities & Local Government, 'Planning for the Future' (White Paper, August 2020), 58. <https://www.gov.uk/government/consultations/planning-for-the-future>

<sup>6</sup> OEP; 'OEP advice in response to Biodiversity Net Gain consultation' (18 May 2022) <https://www.theoep.org.uk/report/oep-advice-response-biodiversity-net-gain-consultation>; and 'Response to Government on Nature Recovery Green Paper and advice on proposals to reform Habitats Regulations Assessment' (18 May 2022b) <https://www.theoep.org.uk/report/oep-response-government-nature-recovery-green-paper-and-advice-proposals-reform-habitats>. The OEP's response to the marine net gain consultation will be published shortly.

- 3.2. While the detail has not been developed, it may be difficult to set environmental outcomes that will be relevant across local, regional and national scales. We do not yet know if assessment will be limited to the specific environmental outcomes listed in EOR regulations, or entail any broader consideration of how plans or consents will affect the environment holistically, as currently applies under EIA and SEA.
- 3.3. In addition, local considerations may be difficult to relate to nationally-focused outcomes, unless the national outcomes themselves include provision for consideration of locally significant issues (perhaps, for instance, by reference to the environmental policies of local plans and local nature recovery strategies). These will be important issues for Government and Parliament to consider for the EOR approach to be successful.
- 3.4. This raises a question as to how EOR regulations will take account of and interact with Government's broader environmental commitments. Clause 116(5) requires the Secretary of State to have regard to the current EIP in developing EOR regulations. While we welcome that requirement, the EIP is part of a package of mechanisms to secure environmental outcomes within a strong, unifying governance framework. Important further elements include Government's environmental principles policy statement, required by section 17 of the Environment Act 2021, and the long-term and interim targets set under sections 1-7 and 11.
- 3.5. We also note that that the requirement would be only to "have regard" to the EIP. This would leave open the possibility that EOR regulations are made containing outcomes inconsistent with those in the EIP.
- 3.6. We would therefore prefer to see a requirement for closer alignment between the outcomes specified in EOR regulations and those in the EIP. We consider there should also be a more coherent approach whereby EOR regulations are explicitly aligned with the Government's environmental principles policy statement and statutory targets to be set under the Environment Act 2021 by 31 October (and other statutory targets, for example the 'net zero' target in section 1 of the Climate Change Act 2008).
- 3.7. We note additionally that clause 116 may apply across all nations of the UK (subject to consent in clause 121), yet the Secretary of State need have regard only to English environmental policy (the EIP). We query the appropriateness of that EIP serving as a basis for setting outcomes for relevant consents and plans arising in Northern Ireland (where a separate EIP is being developed), Scotland or Wales.

#### **4. Development and implementation of EOR regulations**

- 4.1. The Bill contains broad, enabling powers for EOR regulations which would allow for significant changes to the current, longstanding environmental assessment regimes. Leaving such a considerable amount of content to be developed via secondary legislation means there is not the same opportunity to scrutinise the provisions and supporting evidence as would be so if more detail were set out in primary legislation (especially without accompanying detail in a white paper, consultation document or draft regulations). It would therefore be helpful if Government could provide additional information about the expected content of the regulations.

- 4.2. We note that the Chair of the Levelling Up, Housing and Communities Committee, in a letter to the Secretary of State, has also commented on the lack of detail in the Bill making it difficult to assess the EOR provisions.<sup>7</sup> This reflects comments from other stakeholders during that committee's scrutiny of the Bill.
- 4.3. Part 5 states what EOR regulations may cover, not what they must contain. This is not unusual legislative drafting. However, we consider that there are many elements of the possible contents of the regulations which will necessarily be required to support practical implementation. This would include, for example, requiring an EOR in relation to a proposed relevant consent or plan (clause 117(1)) and specifying what constitutes a relevant consent or plan (clause 117(7)). We also consider that assessing and monitoring the impact of consented or planned activity on outcomes (clause 119) will be important. This is an area where the current regimes are lacking.
- 4.4. There are likely to be other measures which will be important to address in EOR regulations. We suggest that any new system should maintain positive elements of the current regimes that are congruent with reform, for example the requirement for non-technical summaries of environmental assessments to support public engagement. Without the detail, we are limited in the evidence that we can provide at the committee stage but will seek to contribute further as Government develops draft regulations.
- 4.5. More broadly, delivering an effective environmental outcomes-based system will be a complex, long-term endeavour given the breadth of sectors, environmental issues and existing legislation to be covered. There are likely to be multiple risks to successfully developing a coherent strategy which delivers for those involved whilst reversing undesirable environmental trends. Such reform will need to be built with foundations that support good governance to ensure effective delivery and align more broadly with the EIP and statutory environmental targets.<sup>8</sup>
- 4.6. Delivery will also depend, for example, on appropriately skilled and resourced public authorities. We note that, at present, it is widely felt that local planning authorities are under-resourced and lack the ecological expertise they need.<sup>9</sup>
- 4.7. In relation to the scope of consents and plans requiring EOR, we have previously highlighted to Government the importance of assessing the environmental impacts of economic activities not currently subject to assessment, such as fisheries.<sup>10</sup>
- 4.8. Clause 117(7)(h) provides for EOR regulations to address the extent to which EORs are to be taken into account in decision-making. We consider that this offers an important opportunity to improve on the existing EIA and SEA

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<sup>7</sup> Letter from Clive Betts MP to the Rt Hon Greg Clark MP (24 August 2022).  
<https://committees.parliament.uk/publications/28460/documents/171233/default/>

<sup>8</sup> OEP (2022a), 39.

<sup>9</sup> For example, see Morgan Robertson, 'The State of No Net Loss/Net Gain and Biodiversity Offsetting Policy in English Local Planning Authorities: Full Report' (CIEEM, September 2021).  
<https://cieem.net/resource/lpa-survey-morgan-robertson/>

<sup>10</sup> OEP, 'Consultation response to the draft fisheries statement' (11 April 2022).  
<https://www.theoep.org.uk/report/oep-response-joint-fisheries-statement-consultation>

regimes. These currently require little by way of decision-makers ensuring that identified environmental impacts are avoided or mitigated, or improvements secured. A mechanism to require that EORs are 'given effect' by decision-makers, rather than just 'taken into account', could be a positive advance.

## **5. Maintaining or improving standards of environmental protection**

- 5.1. The Bill includes a statement by the Secretary of State under section 20 of the Environment Act 2021. This confirms Government's view that the Bill contains provisions which would be environmental law, and that it will not have the effect of reducing the level of protection provided for by existing environmental law.
- 5.2. Section 20(6) of the Environment Act 2021 requires the Secretary of State, in making such a statement, to assess the levels of environmental protection provided under relevant existing environmental law *and* any further protection that *could* be provided under existing powers (for example, to produce secondary legislation). Further, the Secretary of State 'may' consider the effect of any powers conferred by the Bill, for example powers to make EOR regulations.
- 5.3. We are not aware of how the effect of the current legislation (including any enabling powers) has been assessed and compared against the expected effect of the Bill, and whether the latter includes consideration of any powers conferred. We believe it would be helpful (in this case and for other Bills in the future) for Government to set out the analysis supporting the Secretary of State's conclusions and judgements in these areas.
- 5.4. We also note the intended safeguard in clause 120(1) of the Bill whereby the Secretary of State can only make EOR regulations "if satisfied that making the regulations will not result in environmental law providing an overall level of environmental protection that is less than that provided by environmental law at the time this Act is passed".
- 5.5. This safeguard is relatively limited in requiring an overall level of environmental protection that may be no more than under existing environmental law. This could entail considerable effort for no overall environmental gain. Elsewhere, Government has more ambitiously committed to an overall improvement, such as in the Environment Act 2021 (e.g. the 'Significant Improvement Test' in respect of environmental targets) and the EIP.
- 5.6. We would suggest that such a major legislative reform should seek to deliver a significant overall improvement rather than to just avoid a decline in the overall level of protection. Indeed, the accompanying material<sup>11</sup> produced by Government alongside the Bill states that: "In bringing forward a new approach to environmental assessment, we want it to deliver more, not less, for the environment." However, clause 120 simply requires delivering "not less".
- 5.7. The reference to an 'overall' level of environmental protection not less than that provided by current law potentially allows declines in some areas and improvements in others. We do not know how this will be assessed or scrutinised. It is likely to be subjective, for example when comparing different

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<sup>11</sup> Department for Levelling-up, Housing and Communities, 'Levelling Up and Regeneration: further information' (Policy Paper, 11 May 2022) <http://www.gov.uk/government/publications/levelling-up-and-regeneration-further-information>

types of impacts (e.g. balancing effects on the current generation, future generations or biodiversity).

- 5.8. We also note that a requirement for a minister to indicate that they are 'satisfied' may be easily delivered without readily being subject to scrutiny. We suggest that any such statements should be accompanied by evidence explaining the assessment and judgements.

## 6. Uncertainty of implications for the Habitats Regulations

- 6.1. We understand from discussions with DLUHC that it is not Government's intention that EOR regulations should remove the requirement to also undertake HRA where relevant. This appears to be reflected in Government's policy paper<sup>12</sup> and the Bill's explanatory notes (e.g. paragraph 729), neither of which refer to the EOR process replacing HRA (as opposed to EIA and SEA).
- 6.2. However, on our reading, the Bill *does* provide for HRA to be *replaced* for 'relevant consents' and 'relevant plans' by the EOR process.
- 6.3. HRA is currently the main mechanism controlling the impacts of development and other activities on the most important protected biodiversity sites. Careful consideration ought to be given to any changes to how those sites are protected, with the mechanism for this set out clearly in any legislation brought forward for that purpose. We have provided more specific advice to Government on this in response to the recent Nature Recovery Green Paper.<sup>13</sup>
- 6.4. The main relevant provisions of the Bill in this area are in clause 127. Clause 127(3) states that EOR regulations "may amend, repeal or revoke existing environmental assessment legislation" but *not* that they may amend, repeal or revoke HRA. However, clause 127(2) sets out more broadly various things EOR regulations may do in connection with EIA, SEA *and* "Habitats Regulations". This includes "disapplying or otherwise modifying any provision of ... the Habitats Regulations" (clause 127(2)(d)).
- 6.5. In practical terms, it is not clear how "disapplying or otherwise modifying" HRA would be different to a power to "amend, repeal or revoke" it. We therefore highlight the importance of clarifying the intention in this part of the Bill.

**31 August 2022**

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<sup>12</sup> Department for Levelling-up, Housing and Communities (2022).

<sup>13</sup> OEP (2022b).