Written evidence submitted by Friends of the Earth, (England, Wales and Northern Ireland) & the Royal Society for the Protection of Birds to the Levelling Up and Regeneration Bill Committee on Environmental Outcomes Reports (LRB54)

Summary

1. In May 2021, the Government announced plans for "quicker, simpler frameworks for…assessing environmental impacts", and in May 2022 it introduced the Levelling Up and Regeneration Bill ("LURB"). Part 5 of the Bill includes provisions to introduce "environmental outcome reports" ("EORs"), designed to replace the current system of environmental protection. This, says the Government, would ensure projects and plans "are assessed against tangible environmental outcomes set by Government, rather than in Brussels". However, as this briefing sets out:

    - The "tangible environmental outcomes" are not defined in LURB or elsewhere.
    - There is an unacceptable lack of detail within the Bill on how detailed or ambitious the new assessment regime will be (see paragraph 12).
    - The Government is instead seeking powers to decide these key matters through secondary legislation, with minimal parliamentary scrutiny. This is contrary to constitutional principle and at odds with the system currently in place (which uses primary legislation to set the overarching framework).

2. The UK Government is therefore proposing wide ranging powers, which would open the door for the watering down of long-established and well-understood environmental protections in the UK – something the 'safeguards' in LURB would do little to prevent. Instead:

    - If it is to be acceptable, Part 5 of LURB must be substantially amended with clauses that fully sets out the EOR framework. That framework, as a minimum, should build on the current system's strengths to enable early, rigorous assessment, based on up-to-date data and evidence and on public participation (see our recommendations under paragraph 12).
    - Secondary legislation should only be used to fill in the detail.

3. Only with details of the EOR framework (scope and requirements) can MPs, the public and civil society form a view on whether the new regime would be an improvement on existing protections, maintain the current level of protection, or whether it would enable deregulation and a reduction of environmental protection by the back door. If the latter, this is particularly concerning given the climate emergency and the Government's poor approach to high-polluting projects under the current system.

The current system of environmental assessment

4. "EIA", or "environmental impact assessment" is the current process for assessing *individual projects*. It applies to certain types of large project likely to have "significant effects" on the environment. It requires information about those likely effects to be collected, published and considered. "SEA", or "strategic environmental assessment", is a similar process, but for *plans and programmes* which are prepared by public bodies and which are likely to have significant effects on the environment.
5. The aim of both is to ensure that environmental considerations, for example relating to climate and biodiversity impacts, are not overlooked. A related aim is to enable the public to participate in decisions likely to have a significant effect on the environment. Key aspects of the EIA and SEA processes are discussed below.
6. The EIA and SEA processes are originally from the US, with international requirements starting in the 1980s. The UK was also required to implement EU requirements since 1985 [1]. They were brought into UK system through secondary legislation by the UK Government[2]. There are different pieces of secondary legislation for different areas. For example, one set of EIA regulations covers town and country planning, while other sets cover major infrastructure, harbours, highways etc.[3].

Key strengths of the current system

7. Under EIA, consent for a project likely to have significant effects on the environment should be granted only after an assessment of such effects has been carried out and considered. That assessment must be informed by detailed information supplied by the developer. This would include, for example, a description of the project's likely significant effects on land, soil, air, water, biodiversity, and climate. It would also include a description of the how adverse environmental effects are to be avoided, prevented, reduced, and, if possible, offset (in line with the 'mitigation hierarchy').
8. The current system includes important provisions for public involvement throughout the process and for the considerations of alternatives.
9. It includes the assessment of direct and indirect effects on the environment. The decision maker must analyse and examine the substance of the information provided by the developer and received through consultations, as well as considering any supplementary information. This is so it can reach "a complete assessment of the direct and indirect effects of a project on the environment"[4] before deciding whether to allow the project to proceed. This is aimed at ensuring a "high level of protection for the environment"[5]. The SEA regime is similar to the EIA regime, albeit it applies to certain plans and programmes issued by public bodies.
10. The EIA and SEA systems are not perfect, but they have been refined and fleshed-out over decades and are well understood. Whilst EIA / SEA have been criticised for being costly, cumbersome in some cases, and for being poorly integrated with other nature-protection regimes, if used correctly, they provide a vital tool for the systematic assessment of environmental impacts. They also enable measures for the mitigation of any effects to be attached to any consent given. This is particularly important given the accelerating global climate and biodiversity crises[6].

The new system of EOR

11. The Government does not intend to introduce EORs immediately, or as one cross-Government package. There are currently 16 environmental assessment regimes. The Government wants power to replace these one-by-one, so that it can "manage the transition" to the new system[7].

    There are no assurances that the breadth of scope and considerations required within EIA / SEA will be replicated under EOR.

12. Instead, the government is to be given delegated powers, and therefore significant discretion, as to:

    a. What is considered adequate public engagement
    b. The scope of what is considered an environmental outcome and how 'impacts' from development will be considered
    c. The consideration of environmental factors such as human health, population, and climate
    d. When an assessment will be required
    e. What the assessment should include and what should be described when assessing likely significant effects of development[8]
    f. The scope of projects / development that will require an EOR, and when, at the decision-makers discretion, an assessment is not required
    g. The strength of the duty on the decision-maker to take into account an EOR and how much influence the assessment will have in decision-making

A focus on "outcomes" not process

13. The EIA/SEA system aims for a "complete assessment" of all "direct and indirect effects" on the environment. By contrast, the EOR system aims to assess against "environmental outcomes". LURB's explanatory notes state:

    > "56. The Bill introduces an outcomes-based approach that will allow the Government to set clear and tangible environmental outcomes which a plan or project is assessed against. This will allow decision-makers and local communities to clearly see where a plan or project is meeting these outcomes and what steps are being taken to avoid and mitigate any harm to the environment. These outcomes will…for the first time, allow the Government to reflect its environmental priorities directly in the decision-making process.
    >
    > 57. By moving to an outcomes-based approach…the Bill provides the opportunity to go further for the environment and to turn passive assessment into a more active tool to support environmental regeneration."

14. The "passive assessment" is a reference to the well-developed, well-understood and systematic EIA/SEA process described above. Also, this is not the first time the Government would be able to "reflect its environmental priorities directly in the decision-making process". It already does this, for example through national planning policy[9]. It is unclear, therefore, how much of a practical difference an outcomes-based approach would make. This may become clearer once the outcomes are published. Indeed, if, once published, those outcomes are sufficiently detailed and ambitious, it is possible they could be an improvement on the current system. That is why the

outcomes should be published now, before Government is given powers to scrap the current system.

Government's "abuse of democracy"[10]

15. The EOR provisions in LURB are 'skeleton provisions', as they set out the principles for EOR policy but do not include substantial detail on how that policy will be given practical effect. Instead, the Bill would give broad powers to ministers to fill in this detail at a later stage. This is to be done by secondary legislation, brought forward after LURB has been passed by Parliament and become law.
16. Parliament has heavily criticised the Government's increased use of skeleton legislation, describing this as "constitutionally unacceptable", even in the Brexit context[11]. This abuse of the system means Parliament is being asked to "pass legislation without knowing how the powers conferred may be exercised by ministers, nor details of the reasons why such changes need to be made and without knowing what impact the legislation may have on members of the public affected by it"[12]. Parliament, whose law-making role is being bypassed, has described this an "abuse of democracy"[13].

The proposed delegated powers in LURB

17. The Government has stated it took the above concerns on board when preparing LURB[14]. Whether it did so, it has not acted on them. In its own words, it intends to use delegated powers, not to fill in the detail, but to set the "framework"[15]. That means key policy decisions, which should be in primary legislation, are to be left for secondary legislation. The delegated powers set out within LURB are vast and include who will be responsible for preparing EORs (clause 129(1)), the provisions of enforcement, the interaction with existing environmental assessment regulations (including the Habitat Regulations) (clause 127) and who determines an EOR is required and in what circumstances. The following powers are discussed in more detail below, including consideration of the Government's attempted justification.

    Power to use secondary legislation to specify:
    - *what the environmental outcomes are*
    - *when an EOR will be required and which plans and projects it will apply to*
    - *what an EOR should include, and*
    - *how influential EORs should be in decision-making*
      (clauses 116, 117, 118 & 122(2)).

18. These are important features of the EOR framework. It is obvious they should be in primary legislation. To illustrate the lack of detail, there is no reference in part 5 of LURB to climate. We (and Parliament) are left to hope that Government will, at some later stage, include the protection of the climate as an environmental outcome, and do so in a way that reflects the scale and urgency of the action needed. Even were that to happen, it could easily be undone by some future Government through further EOR regulations. Similarly, we are not told which plans and projects will require assessment. Were a future Government minded to deregulate, for example, it could do that easily by keeping this list short.
19. One justification by Government for the powers is the need for new regulation-making powers post-Brexit[16]. However, whilst Brexit was an exceptional event, it

does not justify the Government's increasing abuse of secondary legislation[17]. Whilst there may be a need for new regulation-making powers, this should be only to fill in the details, not to set the framework itself. It is constitutionally objectionable to seek delegated powers simply because substantive policy decisions have not yet been taken. Similarly, the need for Government "convenience", "flexibility" or "futureproofing" does not justify delegated powers nor has the need for these been evidenced. [18]

20. Another justification is that the current system was put in place by UK ministers using secondary legislation, so this is nothing new[19]. Whilst technically correct, this is misleading since the use of secondary legislation was just the way this type of EU law was brought into the UK system[20]. The EU law itself, so far as it set the EIA and SEA frameworks, used primary legislation following clear policy justifications and debate . To illustrate this, Annex A sets out the main provisions of the EIA Directive (along with their associated domestic regulations), to show what should be included within primary legislation.
21. The Government argues delegated powers are needed to react to changing science and best practice, and that this is the "key driver" for the need for delegated powers[21]. Again, however, convenience and flexibility are inappropriate justifications for the use of delegated powers. Also, the Bill itself would not limit ministers to making changes only to react to changing science and best practice. Instead, broad and vague powers would be conferred on Government, with weak safeguards.
22. The Government argues delegated powers are needed as different departments will be making different sets of EOR regulations[22]. Again, however, broad or vague powers, or those sought for the convenience of flexibility for the Government, are inappropriate. The existing EIA/SEA frameworks were set in primary legislation.
23. The Government argues there would be appropriate restrictions on its use of delegated powers[23]. In reality, though, these would not be very restrictive:

    a. Whether or not the affirmative resolution procedure is used, there would be no genuine risk of defeat, and no amendment possible. Parliament would merely be rubber-stamping any EOR regulations tabled by Government.
    b. There would be a duty to have regard to the environment improvement plan[24] before making EOR regulations. However, that plan is long on aspiration and short on details[25]. Even if the plan contained hard-edge commitments, all Government must do when using delegated powers under LURB is "have regard" to it. Having regard to something is equivalent to thinking about it, so the Government could consider the plan but decide not to follow it. This is therefore a weak obligation.
    c. The so-called 'non-regression' safeguard in clause 120(1) of LURB is also weak. Under this clause:

        > "The Secretary of State may make EOR regulations only 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."

        The fundamental problem is that the Government will be marking its own homework on whether, "overall", existing environmental protections would be weakened by any proposed EOR regulations. If challenged in the courts, judges are unlikely to question such a subjective judgement by an elected representative. Nor, as above, would there be proper parliamentary scrutiny. The

word “overall” also weakens this “safeguard”, as it suggests increased harm in some areas may be acceptable if (in the Government’s view) that is somehow offset in others.

d. Although EOR regulations may not contain provisions that are inconsistent with the implementation of the UK’s international obligations relating to environmental assessment, these obligations are neither detailed nor prescriptive[26]. In the Government’s own words, they give “considerable latitude to individual states as to how to implement [them]”[27].
e. The provisions for public consultation are also weak. They require consultation to be good enough to enable “adequate public engagement” but again leave it for Government to define that term. This would potentially water down the requirements for public consultation which have been developed in UK case law. The reference to “seek to ensure”, rather than “ensure” gives further latitude.

24. In addition there should be clarity and certainty for all including developers, decision makers and the public. With a climate and nature crises, there is not time for multiple wheel reinventions especially the time required for “users” to understand new requirements. In line with the Bill’s Section 20, the Environment Act 2021, Statement, a true non regression commitment should be on the face of the Bill along with the details required discussed above.

Conclusion

25. The EIA and SEA regimes are not perfect. However, it is impossible to say whether the proposed EOR regime would improve our environment or make matters worse, because key features of the regime are set to be left to secondary legislation. This is concerning given the Government’s poor record, particularly in assessing climate impacts. For the reasons set out above, Part 5 of LURB should be withdrawn and replaced with primary legislation which fully sets out the EOR framework (as a minimum this should include the details set out in paragraph 13 of this evidence). Secondary legislation should only be used to fill in the detail.

Annex A: Main features of the current system that were included in primary legislation (rather than delegated to secondary legislation

Description of provision	Relevant provision in primary EU legislation
A statement of the **principles** underlying the policy in the EIA Directive and their implementing regulations. This Policy is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Further, effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.	EIA Directive, recital 2.
A detailed list of the projects that must be subject to EIA.	EIA Directive, articles 2(1)) and 4(1) and Annex I. EIA Regulations[1] regs 2, 3 and Schedule 1
A detailed list of the **projects that may be subject to EIA**, subject to assessment of whether the projects are likely to have significant effects on the environment. When making that assessment the decision maker must take into account **detailed criteria** set out in the Regulations.	EIA Directive, article 4(2) and Annex II. EIA Directive, article 4(3) and Annex III (see also article 4(4) and Annex IIA). EIA Regulations, regs 2, 3, 5 and Schedules 2 and 3
A description of the main features of the EIA process, together with definitions of key concepts:	
- The EIA Directive applies to the assessment of the environmental effects of projects likely to have significant effects on the environment.	EIA Directive, article 1(1) Regulations regs 2 and 4 and Schedule 4
- Such projects must be subject to "**environmental impact assessment**". This is a process the key elements of which are set out in the Directive. Those elements include a requirement on developers to	EIA Directive, article 1(2)(g), see also article 4(5)

[1] For this briefing we have referenced the English Town and County Planning (EIA) Regulations 2017 No. 571 but please not all EIA regulations have similar requirements.

prepare EIA reports, and requirements for public consultation. - The **contents of an EIA report** are prescribed in detail. This includes that EIA reports must identify, describe and assess a project's direct and indirect significant effects on certain (specified) environmental **factors** (for example, on the climate). The report must also describe likely significant effects on the environment resulting from certain listed matters. These include, for example, "the impact of the project on **climate** (for example the nature and magnitude of greenhouse gas emissions) and the vulnerability of the project to climate change". Reports must also describe the '**baseline scenario**'. This is the current state of the environment and how it might evolve over time if the proposed project is not implemented.	EIA Regulations, reg 17, Part 5 – regs 18 to 27 EIA Directive, article 5 and Annex IV EIA Regulations reg 4 and Schedule 4, Part 5 – regs 18 to 27 EIA Directive, articles 3 and 5 and Annex IV, paragraph 4. EIA Directive, article 5 and Annex IV, paragraph 5(f). EIA Directive, article 5(1) and Annex IV, paragraph 3.
A requirement that **competent experts** be involved to ensure the completeness and quality of EIA reports**.**	EIA Directive, article 5(3). EIA Regulations reg 18
Detailed provision for **consultation** and for **public participation**, including participation by environmental NGOs, and for assessing significant effects in a **transboundary** context (i.e. something happening in one country, affecting another).	EIA Directive, recitals 17 and 18 and article 6. EIA Regulations Part 5 – regs 18 to 27 EIA Directive, article 7. EIA Regulations Part 10 and Schedule 4

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August 2022

[1] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment was the first but has been amended several times. Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment (as amended by Directive 2014/52/EU) ("**The EIA Directive**"); and Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("**the SEA Directive**").

[2] Under the power in the European Communities Act 1972, section 2(2). Now repealed.
[3] For a list of the legislative provisions, see LURB, clause 130.
[4] The EIA Directive recital 23.
[5] EIA Directive, recital 22. The stated aims of the EIA Directive are to: take account of concerns to protect human health; contribute by means of a better environment to the quality of life; ensure maintenance of the diversity of species; and maintain the reproductive capacity of the ecosystem as a basic resource for life (EIA Directive, recital 14).
[6] See the reports of the InterGovernmental Panel on Climate Change and the InterGovernmental Science-Policy Platform on Biodiversity and Ecosystem Services respectively.
[7] UK Government, 'Levelling Up and Regeneration Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee', 31 May 2022 (**Delegated Powers Memorandum**), paragraph 1081.
[8] Which under the current system are already set out in primary legislation - see 'Schedule 4, clause 4 & 5 of the EIA Regulations'
[9] The National Planning Policy Framework, for example, sets out Government's planning policies for England and how these are expected to be applied. Similar policies cover other consenting-regimes.
[10] This section draws from 'Skeleton Bills and delegated powers', published by the House of Lords Library, 21 December 2021.
[11] For an overview see 'Skeleton Bills and delegated powers'.
[12] Joint letter from the chairs of the House of Lords Secondary Legislation Scrutiny Committee, the House of Lords Constitution Committee and the House of Lords Delegated Powers and Regulatory Reform Committee to the Government about skeleton Bills and skeleton provision, September 2020.
[13] See 'Two Lords reports published on the balance of power between Parliament and the Executive', 24 November 2021, and the two reports themselves.
[14] UK Government, 'Levelling Up and Regeneration Bill: Memorandum concerning the Delegated Powers in the Bill for the Delegated Powers and Regulatory Reform Committee', 31 May 2022. See 'Introduction'.
[15] *Ibid*. paragraph 1034.
[16] Delegated Powers memorandum, paragraph 1038: "To date, most of the domestic environmental assessment framework has been brought forward by regulations implementing the EIA and SEA Directives…As the ability to introduce regulations…has expired, new regulation-making powers … are necessary in order to ensure that Government is not left without the ability to regulate in this important area."
[17] Letter from House of Lords to Government on 'Skeleton Bills and skeleton provision', 25 September 2020.
[18] These reflect the findings in the report by the House of Lords Constitution Committee, 'The Legislative Process: The Delegation of Powers', November 2018. See pages 32 to 34.
[19] Delegated Powers memorandum, paragraph 1039.
[20] European Communities Act 1972, section 2(2). Now repealed.
[21] Delegated Powers Memorandum, paragraph 1040.
[22] Delegated Powers Memorandum, paragraph 1041.
[23] Delegated Powers Memorandum, paragraph 1042. Emphasis added.
[24] This is currently the 25 Year Environment Plan.
[25] For example see Friends of the Earth's article, '25-year environment plan falls short', published 25 January 2018.
[26] In this context, international obligations do not include the EIA and SEA Directives discussed above
[27] Delegated Powers Memorandum, paragraph 1036.