Response to the Department of Levelling Up, Housing and Communities consultation: Environmental Outcomes Report: A new approach to environmental assessment

This response to the consultation is provided by the Planning and Environment Team of Irwin Mitchell LLP.

Irwin Mitchell is a full service national law firm, established in Sheffield in 1912. It has 19 offices and employs over 2,500 people.

The Planning and Environment Team advises businesses and individuals on a wide range of contentious and non-contentious planning and environmental law matters – covering everything from farm diversification and renewable energy schemes to large scale urban regeneration projects and strategic land.

This response has been informed by discussions with our clients and contacts within the real estate and environmental sectors.

Preliminary Observations

The consultation states that it seeks views on a proposed new system of environmental assessment, this it suggests, will focus on the outcomes and will seek to prevent duplication of effort from the local planning authorities and developers. This in turn will avoid the need for the current cumbersome reports which presently assess the impacts of a scheme. There is a need for amendment to the current system to make it user friendly – helping both the applicant and those reviewing the information to make best use of resources. There is however little detail in how this will be achieved at present.

At the moment, the EIA regime is burdensome and open to a certain amount of abuse from both developers and third parties who wish to bring a challenge through the courts in the hope of preventing or delaying a development.

It has to be said that the current system is different to that which was first envisaged with environmental statements running into multiple chapters and thousands of pages. This creates an unworkable system and one which is not accessible to those parties which must review the information or those which are keen to be part of the planning process.

Having worked on many schemes in the early years of the EIA regime the reports were focused on those aspects in which there would be harm and how this would be mitigated was critical in the planning process.

It also must be recognised by all parties, however, that as the planning system progressed so did the objections regarding the environmental statements. This has led to a risk averse system in which environmental statements attempt to cover all aspects to avoid potential litigation.

Furthermore, local planning authorities often do not have the expertise in house for specialist areas and additional cost and time burdens are placed on these to ensure the EIA is scrutinised prior to a decision being made, again often to avoid future litigation.

There is however, a value to the process as environmental issues are considered and consulted upon, scrutiny of the results of provides adaptions and amendments to a scheme proving it is a critical part of the design process. This value needs to be recognised and maintained in the new system.

An omission of the consultation is the impact assessment of climate change. This should be the golden thread throughout the outcome reporting – how effects are mitigated and how the development helps communities adapt.

Accordingly, we would prefer to see further information on how this new system will bring this forward as a key component of this framework.

CONSULTATION QUESTIONS

<u>An outcomes-based approach</u>

Q1. Do you support the principles that will guide the development of outcomes? [Yes / No]

1. Although we have assessed the individual proposed principles, below, we do not find it logical to consult on these general guiding principles ahead of the process for setting the outcomes and the outcomes themselves. We therefore look forward to the opportunity to consult on the outcomes.

2. However, we do broadly support the principles provided the safeguards under Clause 142 do in practice ensure the level of environmental protection currently provided is not reduced. Also, we believe some of the principles will be unrealistic unless sufficient funding and training is provided.

3. Our comments on the individual principles are as follows:

    a. **Outcomes should drive the achievement of statutory environmental targets and the Environment Improvement Plan** – We agree.
    b. **Outcomes should be measurable using indicators at the correct scale** – While we agree outcomes should be measurable, using indicators at the "correct" scale will require careful explanation and detailed examples should be provided. This is to make sure national targets can still be meaningfully measured against for each project, as the cumulative impact of projects will need to be properly assessed to avoid unplanned-for adverse impacts.
    c. **Outcomes should be designed using the knowledge and experience of sector groups and environmental experts** – We broadly support this principle but feel it should not lead to the exclusion of others from the outcome setting process, for example community groups.
    d. **Outcomes should have an organisation responsible for monitoring overall progress of specific outcomes i.e. a responsible owner** – Although we agree the outcomes should be monitored by a set organisation, it is not possible to provide further comments on this without details who may the government feels should take on this responsibility. Whoever it is, it is imperative they are properly resourced to be able to undertake this task. If the responsibility is to be taken on by local authorities, their already existing under-resourcing must be taken into consideration.
    e. **Outcomes should be reviewed on a regular basis to ensure they remain relevant** – We support this, although more detail is needed about what is considered "regular".
    f. **Outcomes should not duplicate matters more effectively addressed through policy** – We agree.

Q2. Do you support the principles that indicators will have to meet? [Yes/No]

4. As above, we will welcome further consultation on the indicators themselves which we feel should have been part of this consultation. The sector will then need appropriate time to consider how the indicators may work in practice to ensure they can be effective.

5. Our comments on the proposed principles are as follows:

    a. **Indicators must be clearly and directly relevant to one or more priority outcomes** – We agree.
    b. **Indicators must be non-duplicative** – We agree.
    c. **Indicators must be proportionate** – Please see our response to Q.4, below.

d. **Indicators must be drawn from existing data sets, wherever possible** – More information is needed on how this will work. For example, whose data will be used, what if there is contrasting data, or how long can data be relied upon for. These are just a few very high-level points where more clarity is needed. Much more detail is needed before we can assess whether drawing from existing data sets will be appropriate.
e. **Indicators must be measurable at the correct scale** – Our concerns regarding this principle are the same as those set out in response to Q.1.
f. **Indicators must be evidence based** – We agree.
g. **Indicators must be replicable** – We agree.
h. **Indicators must be owned and managed** – Our concerns regarding this principle are the same as those set out in response to Q.1. The under resourcing of local authorities means they are overstretched, and this is already having an impact on the progress of applications. Without proper resourcing and training, the transition to EORs could lead to further delays.
i. **Indicators must be supported by clear methodology and guidance**– We agree.

Q3. Are there any other criteria we should consider?

6. As above, we would welcome consultation on the indicators and outcomes themselves and would find this a more beneficial exercise than discussing principles that may guide these points.

7. Further, the consultation refers to unnamed 'regime owners', and it is difficult to comment on the appropriateness of this without more information, especially as the running of the proposed working groups will require proper resourcing.

Q4. Would you welcome proportionate reporting against all outcomes as the default position? [Yes/ No]

8. Yes, we agree with this proposal. We consider that operating this way would be beneficial for the environment as it would help prevent the exclusion of certain topics that are important but not usually considered as a direct effect from the developments (i.e. GHG emissions).

9. The only concern is whether this default position, as it would cover multiple outcomes, would lead to a dilution of the analysis for each outcome. However, this could be solved by giving a proper definition of what is the minimum level of information required for each outcome. Otherwise, the proposal could lead to further legal challenges on what is / is not "proportionate".

Q5. Would proportionate reporting be effective in reducing bureaucratic process, or could this simply result in more documentation?

10. We do not understand how the proportionate reporting could help to reduce the bureaucratic process.

11. Reports on the outcomes will still need to be prepared by applicants and reviewed by the authorities, which means that resources will still be used on both sides. If the EOR is to be streamlined and aimed at the general public, this does not mean technical reports will not be needed as this information will still be needed, for example for statutory consultees, and so will only be located elsewhere in the application. This may ultimately lead to applications only appearing less transparent.

12. Further, as above, unless "proportionate" is properly defined, this may lead to legal challenges.

Q6. Given the issues set out above, and our desire to consider issues where they are most effectively addressed, how can government ensure that EORs support our efforts to adapt to the effects of climate change across all regimes?

13. We believe the EOR process should be clearer in how it will help deliver net zero and climate change targets. The current observation that "*Many of the potential indicators used in the assessment framework will relate to climate change*" does not sufficiently address this point.

14. While we acknowledge that carbon audit may be required for all development in the future under the NPPF/NPS, therefore making such an assessment in the EOR unnecessary, this is not currently the case and a failure to properly consider climate change within the EOR process may lead to it not being considered at all, at least for the moment.

15. We believe, in order for the EOR process to have the support of the general public, climate change and net zero targets need to be much more explicitly addressed, otherwise the process could be open to legal challenge.

16. In order for this to be effective, consideration of the relevant metrics will need to take place at a local or sector level. While it is currently the case that many more local plans require decision makers to consider the climate impacts of new development, clear and adequate information needs to be provided to the decision makers so such an assessment can take place and the EOR process seems an appropriate place for this to be included.

<u>What an Environmental Outcomes Report will cover</u>

Q7. Do you consider there is value in clarifying requirements regarding the consideration of reasonable alternatives?

17. Yes. Currently, the definition of what is considered “an alternative” is unclear in the legislation and case law. Explicit guidance on this matter is welcomed as the current situation generates issues for both developers and decision-makers.

18. For the developers, the uncertainty caused by the lack of clear definition becomes a risk for their projects as the failure to consider reasonable alternatives could become a ground for legal challenge.

19. For the decision-makers, the review of alternatives as it is currently established can become problematic as the legislation only requires addressing the alternatives studied by the developer. Given this situation, decision-makers do not have enough environmental information to be able to judge how development of the particular site affects the environment and how those effects might be different at another site.

20. In any case, guidance should be crafted carefully to avoid situations in which there are no realistic alternatives and both developers and decision-makers need to spend resources preparing and reviewing dummy alternatives generated for the only purpose of complying with the regulations. We also suggest the guidance to include a definition of reasonable design changes.

Q8. How can the government ensure that the consideration of alternatives is built into the early design stages of the development and design process?

21. Considering alternatives into the early design can be promoted by the government, but it is unlikely to find a method that will ensure this with complete certainty. This is because at early stages the design of developments is quite flexible. The initial designs of a development are usually quite different from the final design, which is caused by multiple factors like land availability, new technologies, legal issues, economic issues, better or different technical solutions, among many others.

22. The consultation document proposes to request developers a “a high-level summary of the key dates when decisions were taken, and how the mitigation hierarchy was applied throughout the design and development of the plan or project”. This proposal assumes that the design evolves by clearly defined stages which can be tracked, but this is not usually the case as the design tends to transform in a more organic way.

When an Environmental Outcomes Report is required

Q9. Do you support the principle of strengthening the screening process to minimise ambiguity?

23. Yes, we support this principle. Removing ambiguity by making the rules clearer does not only make the process smoother but also reduces the risk of legal challenges. We agree with the government's statement that the screening process has been the source of multiple legal challenges in the past, therefore the need to update it. However, the limited information provided in the consultation document does not allow consultees to see how what the proposed changes are or whether they would make the process clearer.

24. First, while the screening for category 1 would be removed, the screening for category 2 consents would remain. No information is given on how this new screening for category 2 would work apart from providing that new regulations will narrow the scope by being "more prescriptive" on how borderline cases should be considered. We cannot comment on these changes if we do not know what these will be.

25. Second, the consultation document considers whether instead of relying on the current thresholds like the project size, the screening process for category 2 should use, for example, the "potential effects on a particular community or species". While this sounds good in theory, this proposal might not work in practice. At the screening stage, the information available to the developers/government is not sufficient to properly identify what environmental effects would occur and in what magnitude. In order to get the necessary information, a baseline study of the site would be needed, the design of the project should be completed, and the exercise of identifying impacts should take place. This is not much different to preparing an environmental impact assessment. Therefore, this proposal would be tautological as an environmental assessment would need to be carried out in order to determine whether an environmental assessment is required.

26. Third, the wording used in the proposed example is "potential effects on a particular community or species". However, it is unclear whether these effects would be evaluated in terms of impacts to the locality or impacts to national outcomes, and how would the latter work in practice.

Q10. Do you consider that proximity or impact pathway to a sensitive area or a protected species could be a better starting point for determining whether a plan or project might require an environmental assessment under Category 2 than simple size thresholds? [Yes/No].

27. We only agree partially.

28. Size thresholds by themselves are not sufficient because they are blind to site-specific and species-specific circumstances. In that regard, including proximity to protected sites would be an ideal way to

make size thresholds more sensitive to the real context. However, for implementing this idea, the government would first need to map clear buffer zones of reasonable areas around the protected sites. That way, if a project falls within the protected site or its buffer, then that would trigger the need of an environmental assessment. Without clear buffer zones, the issues with the legal challenges to screening procedures would not be solved.

29. We disagree with using impact pathways as a criterion for determining if an environmental assessment is required. We refer to our response to Q.9 above, as the environmental information available at that stage (pre-environmental assessment) does not allow those involved to clearly understand the possible environmental impacts of the development.

Q11. If yes, how could this work in practice? What sort of initial information would be required?

30. We refer to the details provided in the response to Q.10 above.

Strengthening mitigation

Q12. How can we address issues of ineffective mitigation?

31. It is our hope that the mitigation hierarchy will be applied strictly and therefore EORs will place great weight on preventing any environmental harm. However, we realise that in practice that if mitigation is required, this may not be ass effective as originally proposed and further management may be required. This should be a requirement of the monitoring regime to ensure the best environmental outcome is achieved.

32. While we agree adaptive management could provide the monitoring and flexibility required to address ineffective mitigation, it will only effective if those with monitoring responsibilities have sufficient resourcing and professionals with the required expertise in different environmental fields to fully understand the environmental impacts of a project.

Q13. Is an adaptive approach a good way of dealing with uncertainty? [Yes/No]

33. It is our hope that the EOR process contains sufficient information and guidance to eliminate most uncertainty from the process. However, we realise there are some effects that are sometimes not foreseeable at the beginning of a project, particularly on long-term projects.

34. Therefore, while we believe the EOR process should focus on the elimination of uncertainty as much as possible, we would welcome an adaptive approach where necessary. Although, it is acknowledged

this may add a degree of uncertainty for developers.

Q14. Could it work in practice? What would be the challenges in implementation?

35. As stated above, a key challenge would be the resourcing needed to make an adaptive approach workable. Unless effective monitoring can take place, ineffective mitigation may not be properly considered and therefore adapted mitigation opportunities missed.

36. The stages at which a project may need to be adapted and who will be responsible for the costs of any adaptations will also need to be carefully considered so as to reduce the risk of a project becoming unviable.

37. Also whilst we support this measure, there must be a clear package of funding for local planning authorities which are already under resourced, under funded and over worked.

Mainstreaming monitoring

Q15. Would you support a more formal and robust approach to monitoring? [Yes/No]

38. Yes, we support it and agree this is key in ensuring the success of the EOR process. However, careful consideration needs to be given to who is to pay for the monitoring, who is to undertake the monitoring, how monitoring is to be carried out, and how often monitoring is to be carried out.

Q16. How can the government use monitoring to incentivise better assessment practice?

39. This is highly dependent on who is responsible for the monitoring and how they are resourced. Unless the body responsible is properly trained and funded, any monitoring process will be toothless and lack the power to incentivise better assessment practices.

40. The government should also support projects that promote best practice in this area.

Q17. How can the government best ensure the ongoing costs of monitoring are met?

41. As stated above, we believe the success of the EOR process is dependent on sufficient funding and training being provided to those responsible for monitoring. Environmental outcomes depend upon long-term monitoring, often taking place over decades. We are very concerned about the existing under resourcing of local authorities.

42. The cost of training staff, and then being able to retain staff, is also crucial here as this is a complex and specialist process. Any lacking in this area may leave the process open to legal challenge.

Q18. How should the government address issues such as post- decision costs and liabilities?

43. Given the importance of this point, the government should provide more information and suggestions, and consult further once some proposals have been put forwards. All parties involved in a development will require clarity on this point at the outset.

Unlocking data

Q19. Do you support the principle of environmental data being made publicly available for future use?

44. Yes, we support it.

45. Paragraph 3.17 of the consultation notes that '*all regimes felt that a lack of relevant accessible, robust and quality assured data hindered effectiveness and caused delays*'. The proposal (section 9) is to '*unlock the data*'. We support the suggestion that more data needs to be made accessible and that this will be a positive step.

46. However, where, particularly on local scale impacts, will the information come from, other than studies commissioned as part of the development proposal?

47. Additionally, the reuse of data has some intrinsic limitations. When any data is collected (including environmental data), it is collected for a specific purpose, which will determine the type of information collected and how detailed the information will be. This limits the ways on which the data can be used and might prevent reusing it for different purposes. We were happy to see that the consultation document has recognised these limitations in paragraph 9.3 and 9.4, so they are being taken into consideration by the government.

48. However, we also noticed that the consultation paper did not address the issue of data expiration. There is no set expiration date for baseline environmental information. As a general rule any baseline environmental information older than 5 years is normally outdated, but this period can be much shorter. For example, ecological data is normally considered valid only around 2 years. In other situations, the environmental data might become outdated even faster if the conditions existing on the area change, for example if there is a contamination event in the area. We consider that this should also be addressed and taken into consideration when determining the rules for the reuse of data.

49. The consultation document also provides that the reforms will "*ensure that data collected through monitoring current assessments can be re-used to provide the baseline or trend data to help inform future assessments*". While this is commendable and we support this idea, we need to express some concerns on the practicalities. First, a standard way for data collection would be needed nationally, which would need to be prepared ahead of the first data collection. This has not been addressed in the consultation. Second, assuming that the data would be collected by the developers, then it is unclear how this would be enforced. Making sure that the correct data is being collected means not only having the right experts to understand the data, but also to have the spare resources for doing that. If the government is expecting local planning authorities to enforce this, then it should take into consideration their already low resources and how these will be spread even thinner once they need to enforce BNG regulations.

Q20. What are the current barriers to sharing data more easily?

50. Data needs to be shared in a sensible way to allow it to be widely accessed and utilised by everyone, but we appreciate some data may be commercially sensitive and therefore a fair system needs to be established.

51. We consider that the main issues are the lack of a centralised place where environmental data is stored, the lack of digitalisation of the environmental information, and the lack of a uniform level of detail in the information. However, there are other relevant concerns.

52. For example, some landscape scale information is accessible (i.e. the EA's flood maps), but Nitrogen areas are broad scale and do not have the necessary detail that will be required for sharing and reusing. This brings several questions. How will this data be made available? Will existing EIAs be uploaded? What sort of database of information? Who will collate the data prior to the EOR being rolled out?

53. Biodiversity modelling is also an important feature. There are doubts on how BNG should work alongside EOR and how information will be shared for both purposes. For example, it is unclear how the system will interact between those engaged in the process. Concerns over the effectiveness of BNG implementation remain. Councils are nervous about implementation and there is a question of how the monitoring will take place. Also, it is unclear how things fit with the larger 30/30 goal.

54. We understand that some public bodies are now, due to constraints on resources, collecting less environmental data. It is not possible to share data if it has not been collected, so this would need to be addressed.

Q21. What data would you prioritise for the creation of standards to support environmental assessment?

55. This technical matter exceeds our legal expertise, but we suggest prioritising the following data:

    a. Location of the developments that require environmental assessment in an online mapping system.

    b. Base line information (following the standardised criteria to be prepared by the government) and the date when it was collected.

    c. Identification of impacts to the environment caused by developments and their corresponding mitigation measures.

    d. Details of environmental incidents (i.e. unauthorised discharges of wastewater, spillages of hazardous substances, etc.) and their location in an online mapping system.

Reporting against performance

Q22. Would you support reporting on the performance of a plan or project against the achievement of outcomes? [Yes/ No]

56. We support reporting on the performance of plans, as this would give relevant feedback on the progress for achieving the outcomes. Although the government will need to identify how would this work with other similar reporting, such as the reporting on the delivery of local plans which is already required by Local Plan Monitoring and the Authority Monitoring Report.

57. We do not support reporting on the performance of projects as this would not be advisable if the government is looking to avoid duplication in reporting. Any assessment prepared at project level will need to be addressed at a plan level, so all information at project level would be duplicated in some way at plan level. The government could explore other alternatives like requesting standardised information from projects (i.e. implementation of mitigation measures, environmental incidents, etc.) and then using this data as an input for the reporting o the performance of plans.

58. However, it is difficult to foresee how could this operate in practice without knowing what the outcomes are or what kind of details are expected to be sent in these reports against performance.

Q23. What are the opportunities and challenges in reporting on the achievement of outcomes?

59. We identified the following challenges:

    a. Outcomes can be scoped out based on a desktop analysis, which can make it harder to get an accurate view on the progress of the outcomes. Regulations should provide that outcomes should only be scoped out if it is shown that the project or plan will have no effect at all on that outcome.

    b. While the consultation document provides that "*Reporting against agreed outcomes will allow for concise summaries that pinpoint relevant sections in supporting technical analysis*", it is unclear how this would be achieved. Environmental reporting tends to be voluminous because there are several methodologies and techniques used for collecting and analysing it. The same exercise will be required whether the reporting is against environmental impacts or environmental outcomes. Clear guidance on how and what to report will be needed.

    c. The consultation document does not clarify whether the reporting will be done by local authorities. If this is the case, then a realistic evaluation of the local authorities' capacity and budget needs to be carried out, as their resources are already running low. On this point, it is also necessary to determine how this reporting will interact with the reporting on BNG and nature recovery strategies.

Next steps

Q24. Once regulations are laid, what length of transition do you consider is appropriate for your regime? i) 6 months; ii) 1 year iii) 2 years. Please state regime.

60. We consider that this change of regime from EIA to EOR will be challenging for both developers and decision-makers, so the longest length for transition should be chosen (2 years).

61. The government should also analyse if a transition period of 2 years will be enough to allow time for the upskilling of professionals that will prepare the EORs and the professionals in the local authorities that will review them. Longer periods should be explored if this cannot be achieved within 2 years.

Q25. What new skills or additional support would be required to support the implementation of Environmental Outcomes Reports?

62. The main skill that needs to be developed should be the ability to identify and properly assess the widespread and long-term effects of environmental impacts in a national context.

63. This skill was already part of the EIA regime, but here the professionals only needed to focus on the impacts of one development into the area of influence of a development. The EOR regime will involve analysing whether a development will affect nationally determined outcomes. In this new regime, while the impacts from a development will still be the same, it will be necessary to address them in a different way as the new outcomes will be set: (i) for a longer period of time as the example provided in Annex A of the consultation shows that the government is connecting the outcomes to the environmental targets in the Environment Act 2021, and (ii) for a wider area, because even when there will be "project level indicators", the outcomes will be created and apply to the whole UK.

Q26. The government would be grateful for your comments on any impacts of the proposals in this document and how they might impact on eliminating discrimination, advancing equality and fostering good relations.

64. We consider that ensuring a system that is accessible to all is clear, including that it should not be necessary whether formally or practically to have to engage specialist consultants, practitioners or lawyers to effectively participate in the policy and decision-making processes. There is no evidence presented in the proposals that suggest this is going to be likely. The EORs are likely to be complicated and requiring specialist technical and possibly legal expertise. In answer to question 26 it is likely that the current consultation proposals will have an adverse impact on the goals to eliminate discrimination, advance equality and foster good relations.

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