

Environmental Assessment Reform Team
Department for Levelling Up, Housing and Communities
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Response submitted by email only to: eareform@levellingup.gov.uk

8th June 2023,

Dear Sir / Madam,

LPDF response to Environmental Outcomes Report: A new approach to environmental assessment

I am writing on behalf of the Land Promoters and Developers' Federation (LPDF) to respond to the current consultation 'Environmental Outcomes Report: A new approach to environmental assessment'. This response starts by providing a brief introduction to the LPDF and then moves on to answer the questions from the consultation document in turn.

About the LPDF

The LPDF was set up in April 2018 and represents land promoters and housebuilders, of all sizes, who due to their land interests interact with the planning system across England to establish the principle of development, normally for a residential use. As a consequence of these multiple daily interactions with Local Planning Authorities (LPAs) and consultees throughout the country we are uniquely placed to comment on both the plan making and decision taking components of our planning system. It has been estimated that the land promotion sector is responsible for over half of the outline planning consents for residential development on an annual basis.

Our members perform a vital service, firstly, to the government in helping to achieve their housing targets, secondly to the housebuilding industry who rely on a constant supply of developable land and thirdly, to local communities and homebuyers and occupiers who need housing. Sites promoted by developers and land promoters can range in size from 20-30 dwellings to major schemes with many thousands of homes. The LPDF now also includes a number of small housebuilder members who also play a critical role in the delivery of housing. LPDF members supply both the major housebuilders and smaller SME companies who are essential to securing diversity of delivery within the industry to meet the wide range of housing needs within the market.

Our role is to represent our members best interests, to encourage good practice and to disseminate information and advice so that they can perform their role better, more efficiently and more sustainably in the future.

The LPDF note that this consultation is just the first consultation on the initial thinking regarding Environmental Outcomes Reports (EOR) and that in the coming months, further consultation will be carried out to develop the detail of the new system which will be delivered through secondary legislation. The LPDF will submit further responses, where necessary, regarding the detail of this scheme in due course.

The focus of the proposed reforms is to address a number of central issues with the present system of environmental assessment including; inefficiency, duplication, risk aversion, loss of focus and issues with data. EORs will be a fundamental change for the development industry, replacing over 30 years of practice and case law with a new untested regime. It is critical that adequate consultation and engagement with the industry and in particular environmental experts, is undertaken to ensure that the new system addresses the issues raised and to ensure that it is a practical and workable response.

An outcomes based approach

Question 1. Do you support the principles that will guide the development of outcomes?

The principle of replacing EIA and SEA system with the new outcome-based system represents a significant change which will require careful drafting, implementation and timely guidance. The LPDF note that the intention is for outcomes to be set in the secondary legislation with a supporting set of indicators set out in guidance. The draft outcomes will be subject to public consultation.

In general the LPDF are supportive of the principles that will guide the development of options. Given that the proposals are for this to be an outcomes-based system ensuring that the outcomes are appropriate will be a key stage to the implementation of a successful system.

As such, we agree that it is fundamental to engage with environmental experts when establishing these outcomes as they will have the in depth understanding on what is necessary to be included and how this will work in practice. We also agree that the outcomes need to be reviewed on a regular basis to ensure they remain relevant and that it is important to avoid duplicating matters which are more effectively addressed through policy. With reference to reviewing and updating outcomes when necessary, consideration will need to be given to how any updated outcomes would be incorporated into EORs that are in production for plans or projects when a change to the outcome is made.

Paragraph 4.10 of the consultation document provides a list of matters that will be covered by outcomes, the LPDF note that climate change is a notable omission from this list along with other matters such as socio-economic, and health issues. It is also worth noting that the Habitats Regulations is also excluded from this list. The LPDF question whether these omission from the EOR system are a missed opportunity to further streamline the process.

Question 2. Do you support the principles that indicators will have to meet?

The proposals outline that it will be important to be able to measure how a development contributes to the delivery of an outcome and that this will be done using a national indicator set. In general, the LPDF are supportive of the principles that indicators will have to meet. Details of how outcomes are weighed in the planning balance will be important.

At paragraph 4.19 the consultation document notes that whilst there is a clear drive for measurable indicators there may be certain outcomes that may not be conducive to a quantitative metric and agreed assessment methodologies that draw on qualitative assessment, using professional judgement may have to be used. The LPDF support this acceptance but note that details regarding which specific outcomes will require qualitative assessment will be needed to ensure clarity within the system. It must also be recognised that the greater number of outcomes that rely upon qualitative assessment, the greater the propensity for challenge as part of the overall assessment process.

Question 3. Are there any other criteria we should consider?

The LPDF submit that greater clarity is needed on cumulative outcomes.

The LPDF note that the consultation document does not refer specifically to the issue of nutrient neutrality, which is currently having a significant impact on the delivery of housing across parts of the country. The LPDF request clarity over whether nutrient neutrality would be covered under the proposed EOR system. If nutrient neutrality is intended to fall outside of EOR consideration then it is important that this is made clear.

As noted in our response to question 1, the LPDF question whether the omission of socio-economic factors, health issues and Habitats Regulations is a missed opportunity. If the scope of EOR was expanded beyond that of environmental issues, to include further objectives, then we believe there would need to be further consultation to address these additions.

Question 4. Would you welcome proportionate reporting against all outcomes as the default position?

Whilst the LPDF note that the proposals for proportionate reporting and as such the removal of the scoping stage is borne out of the fact that users had reported that the scoping process is driven by the fear of legal challenge, we raise concerns about how this may work in practice and whether as mentioned in question 5 below, this will simply result in a similar amount or more documentation similarly due to that fear of legal challenge around what constitutes proportionate. The LPDF note that scoping is a useful stage in providing opportunity to engage with consultees on details of proposals, mitigation and assessment. Notwithstanding this, anything that seeks to address the current risk based system is welcomed.

Question 5. Would proportionate reporting be effective in reducing bureaucratic process, or could this simply result in more documentation?

The LPDF are not convinced that by removing the scoping stage that it would reduce the bureaucratic process, and as mentioned above through fear of legal challenge, this is likely to result in a similar amount or more documentation. In theory it might be less bureaucratic but the LPDF doubt this will be the case unless implemented properly.

The removal of the scoping stage will require developers to be more proactive about early engagement with stakeholders. A potential issue with this approach will be resources in both LPAs and other associated key stakeholders, who may not have the capacity for this proactive engagement process.

Question 6. Given the issues set out above, and our desire to consider the 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?

The government needs to be realistic in considering all of these issues through the planning context. There is a concern that too much is expected to be delivered through planning despite the laudable aims and that sometimes a neutral option might be ok.

What Environmental Outcomes Report will cover

Question 7. Do you consider there is a value in clarifying requirements regarding the consideration of reasonable alternatives?

Yes, the LPDF believe that further clarity regarding the consideration of reasonable alternatives would be helpful. Failure to consider reasonable alternatives could become a ground for legal challenge and therefore explicit guidance on this is needed. This would help address the ambiguity and ensure that the consideration of reasonable alternatives happens early in the process and provide developers with the reassurance that this is just intended to be a high-level summary not a comprehensive assessment of alternatives.

The LPDF make reference to the proposed planning reforms and specifically the proposed removal of 'justified' from the test of soundness which would in turn remove the reference to reasonable alternatives. It is therefore even more important that EORs consider carefully, such reasonable alternatives to ensure that LPAs can clearly justify why a specific strategy has been chosen.

Question 8. How can the government ensure that the consideration of alternatives is built into the early design stages of the development and design process?

A concern noted in the consultation document is how the consideration of alternatives is often retro fitted and as such through these proposals the government are looking for an increased focus on the consideration of alternatives and in particular an audit trail, including summary records showing the decision making process on alternatives.

Whilst seeking to ensure the consideration of alternatives happens in the early stages of the design process is a laudable aim, we are unsure how the government will guarantee that this happens in the level of detailed required to justify the reason for the chosen strategy. More emphasis is needed on the plan making stage in this regard. If done well, it would then avoid duplication at the project level.

When an Environmental Outcomes Report is required

Question 9. Do you support the principle of strengthening the screening process to minimise ambiguity?

Anything that minimises ambiguity from the process should be seen as a positive. The LPDF note that proposals to introduce Category 1 and Category 2 consents will replace the existing thresholds for assessment. This is a positive proposal and should result in it being more black and white about when an EOR is required or not and consequently there would be less likelihood for legal challenge. However this reads very much as an EIA solution and needs to also read across to the plan making SEA approach as well.

Question 10. 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, the LPDF believe that proximity or impact pathway to a sensitive area could be a better starting point as this would place protecting sensitive sites at the heart of the screening activity, with the scale of development as a secondary consideration. However, if this does become the starting point, then there would need to be clear guidance for how this is applied in practice.

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

The LPDF have no comments to make in response to this question, this would be for the experts to assist with.

Strengthening Mitigation

Question 12. How can we address issues of ineffective mitigation?

The LPDF suggest that it will be imperative to monitor / review mitigation and have powers to sanction.

Question 13. Is an adaptive approach a good way of dealing with uncertainty?

The LPDF agree that there will be instances where the agreed mitigation is not as effective as was hoped, however we are unclear how an adaptive approach would work in practice, particularly with regards to the time periods that an adaptive approach would cover.

Adaptive mitigation would result in a new 'risk' for the development industry, due to the potential for enforcement action further down the line to secure the outcome that was identified. Specifically in the context of the residential development industry we remain unclear and concerned over how this will work, following the transfer of plots from the developer for example. There is significant concern as to the ability of LPAs to undertake sufficient detailed monitoring and potential enforcement given their current resourcing issues. It is also entirely unclear as to who the LPA would enforce against if a particular scheme has been sold and the original developer no longer has any formal involvement in the site.

The LPDF see this as a key issue with the proposals as how or indeed who, when a site has been sold or developed, is responsible for adapting the mitigation to arrive at the outcome. Similarly, who is the subject of the enforcement if it is not achieved after monitoring, the householder?

Question 14. Could it work in practice? What would be the challenges in implementation?

Given that the details regarding an adaptive approach have not been provided within this consultation it is hard to consider how this would work in practice. The LPDF reiterate concerns regarding this proposed approach and how it would be applied to residential development. How this approach would work in practice is a question that the expert practitioners may be able to assist further with.

Mainstreaming Monitoring

Question 15. Would you support a more formal and robust approach to monitoring?

The LPDF would be supportive of a more formal and robust approach to monitoring, however this in principle support is on the basis that the monitoring is proportionate to the nature and scale of the project and that liabilities and timescales are clearly set out.

LPDF members have raised concerns regarding how long the monitoring will need to be measured over and how local planning authorities will achieve this. The detail regarding timescales for monitoring and the transfer of liabilities is not provided within the current consultation.

Question 16. How can the government use monitoring to incentivise better assessment practice?

The LPDF have no comments to make in response to this question.

Question 17. How can the government best ensure the ongoing cost of monitoring are met?

The LPDF note that the consultation document at paragraph 8.9 refers to exploring a range of options for securing resources required to take remedial action, such as when a developer is no longer present and that reference is made to the potential use of bonds.

LPDF members have raised concerns regarding the use of bonds for not achieving environmental outcomes. There remain numerous unanswered questions in this regard, including how the government expects to transfer liability and how local planning authorities will enforce these issues. The LPDF also believe that more funding would be needed for LPAs to resource this increased level of monitoring.

Question 18. How should the government address issues such as post – decision costs and liabilities?

The issue of post decision costs and liabilities is fundamental, and it is critical that further details regarding the intentions in this respect are provided, for example how will post consent liability issues be resolved and who will be responsible.

Unlocking Data

Question 19. Do you support the principle of environmental data being made publicly available for future use?

Yes, the LPDF would be supportive of this and the efficiency savings that could be made by re-using information as a reference point or baseline for future assessments. The ambitions regarding improvements with data are seen as a positive, however as with many of these proposals, the detail to support these ideas has not been provided at this stage.

The current consultation lacks detail on how this will be achieved, and in particular issues regarding validity of data, quality assurance, how and when data would become out of date and costs. Whilst we believe that this is a positive ambition from the government, the detail will need to be worked through to establish whether it will be a realistic ambition and how it will work in practice.

Question 20. What are the current barriers to sharing data more easily?

The LPDF suggest that the government needs to establish common data platforms and set regulations out regarding how data is held, establishing common formats. There would also need to be some form of robust quality control.

The LPDF also note that consideration may need to be given to sharing information about the location and distribution of sensitive species, as sharing this data could put them at risk.

A further point to raise with regards to data sharing would be liability. Currently consultants are liable for their work, however it is unclear how this liability would work for common data and therefore whether developers would be exposed to additional risks.

Question 21. What data would you prioritise for the creation of standards to support environmental assessment?

The LPDF have no comments to make in response to this question. The expert practitioners are likely to be able to provide further advice in this regard.

Reporting against performance

Question 22. Would you support reporting on the performance of a plan or project against the achievement of outcomes?

The proposals seek to provide government with the power to require public authorities to report on performance against specified environmental outcomes, enabling a picture of the national level to be developed. The consultation document notes that the detail on reporting is still to be developed and consequently the LPDF reserve the right to comment on this particular point at a later date. One point we would raise at this stage is that whilst in theory this may seem like a positive proposal this will only work in practice if the resources are available to deliver this.

Question 23. What are the opportunities and challenges in reporting on the achievement of outcomes?

The LPDF believe that a significant challenge in reporting on the achievement of outcomes will be resources and developing the skills and knowledge to do so. Another concern is that that these proposals may create a system only for specialist consultants.

Next Steps

Question 24. Once regulations are laid, what length of transition do you consider appropriate for your regime?

- i) 6 months***
- ii) 1 year***
- iii) 2 years***

Please state regime?

Whilst the LPDF do not have specific comments on the appropriate time period for the transition to this new regime, we would question what this would mean for EIA applications currently within the system.

The LPDF also note that, as with the proposed changes to the planning system, it may be more challenging for SME housebuilders to embrace and adapt to these changes than for the volume housebuilders and that this should be taken into consideration when deciding on the transitional arrangements. It will also be important that the transitional arrangements allow sufficient time for the upskilling of professionals needed to deliver the new system.

Consideration will need to be given to the transitional arrangements with regards to plan making, and how this will impact on plans at different stages in the process. Clarity regarding this will be needed to ensure that the changes to the environmental assessment regime do not end up delaying local plan preparation and in turn the delivery of much needed housing.

Question 25. What new skills or additional support would be required to support the implementation of Environmental Outcomes Reports?

The LPDF believe that LPA officers will need digital mapping knowledge and skills. Furthermore, the LPDF believe that local planning authorities are likely to be concerned over the additional resources, in terms of time, that will be required for officers to learn this new system so that they can apply it effectively and consistently. During the period of transition specifically this is likely to lead to delays in the process.

Question 26. 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.

With the aim of greater transparency, the proposals need to be “transparent” and easily understood by non-technical people; if there is no easy access to the process and agreed outcomes it will do nothing, and in particular nothing to reduce public distrust of the planning process.

Conclusions

The LPDF welcome the opportunity to comment on this initial consultation on EORs and reiterate the point that ongoing engagement with the industry will be critical to ensuring the that transition to this new system is as smooth as possible.

Key concerns regarding this consultation raised by LPDF members are in relation to the increased risks of legal challenge, due to this being a completely new and untested system and specifically the removal of the scoping stage, and also concerns regarding the potential use of bonds to ensure the delivery of mitigation.

The LPDF believe that resourcing of this new system may be problematic and result in the desired outcomes not being achieved in a consistent manner. It is unclear how LPAs will be able to achieve all that is required of them in relation to EORs. This is yet another proposed change within the planning system where much of the administration will fall on LPA planning officers who, as has been well documented recently, are already incredibly stretched and unable to provide the necessary planning services within appropriate timescales.

Whilst the real detail and scope of EORs will only become clear when the regulations are published and put into practice, I hope that this response is helpful and if you wish to discuss these matters in any further detail, the LPDF team would be only happy to assist.

Yours Faithfully,



Nicole Burnett

LPDF Senior Policy and Research Manager