Office for Environmental Protection

A review of the implementation of environmental assessment regimes in England

October 2023

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A REVIEW OF THE IMPLEMENTATION OF ENVIRONMENTAL ASSESSMENT REGIMES IN ENGLAND

Presented to Parliament pursuant to section 29(2) of the Environment Act 2021

October 2023

The Office for Environmental Protection is a non-departmental public body, created in November 2021 under the Environment Act 2021. We protect and improve the environment by holding government and other public authorities to account. Our work covers England and Northern Ireland. We also cover reserved matters across the UK.

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Contents

Foreword

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The environment is under serious threat. We continue to see extremely worrying and persistent trends of environmental decline, with some increasingly difficult to arrest. Government is committed by law to significantly improve the natural environment for future generations, but it aims also to meet the need for new homes and improved infrastructure, and such developments can damage the environment.

Development need not be at odds with the environment. As things stand, the objective of the planning system is to contribute to the achievement of sustainable development. And at planning authority level, regimes exist to assess the environmental effects of plans, programmes and projects as proposals for them are considered.

The Government intends to amend these regimes. It is commonly understood that these are not always operating as well as they should. Government aims to create a new outcomes-based approach through Environmental Outcomes Reports. For the system to work more effectively – for the environment and for development – reform should, in our view, be grounded in a clear-sighted understanding of the root causes of underlying problems with the current arrangements.

In this report, we look in detail at how three regimes operate: Environmental Impact Assessment, Strategic Environmental Assessment and Habitats Regulations Assessment.

Problems arise in various places, but our research identifies three fundamental root causes: access to information, the extent of post-decision monitoring, evaluation and reporting and access to expertise. These root causes arise less from the law itself, and more from shortcomings in the wider planning system that affect the way assessment laws are implemented. The issues are well recognised, deep-seated and not susceptible to easy (or legislative) fixes. We explore them in some detail here.

Addressing these issues will be increasingly important, not just to improve assessments, but because these matters underpin so much of the Government's environmental ambition. Successful implementation of biodiversity net gain and local nature recovery strategies, for example, rests on the same foundations. A planning system-wide approach is needed if Government is to improve environmental assessments and at the same time, boost the delivery of its environmental commitments.

We are grateful to all of those who have submitted evidence to us, and who have given generously of their time and expertise to inform our thinking. We trust that our report proves useful, as government considers options for reform.

Dame Glenys Stacey
Chair, Office for Environmental Protection

Executive summary and recommendations

Executive summary and recommendations

Existing environmental assessment regimes in England are not operating as well as they should to support planning decision-makers to contribute towards sustainable development. Problems with these regimes stem from many sources. However, root causes arise less from the legislation itself and more from shortcomings in the wider planning system that affect the way the legislation is implemented. These root causes relate to: access to information, the extent of post-decision monitoring, evaluation and reporting, and access to expertise. These are deep-seated issues, which are not susceptible to easy fixes. Yet, unless these issues are addressed, reform to environmental assessment legislation is unlikely to deliver Government's ambitions and may create new problems, for example to legal certainty. Without addressing these issues, it will be challenging for the existing regimes to deliver the positive outcomes for the environment that they should.

Urgent action is needed to deliver those outcomes, including as set through government's climate commitments and in its Environmental Improvement Plan (EIP) and associated, legally binding targets. Within a global context of climate and biodiversity crises, the UK has the least intact nature in Europe[1] and is Europe's second-highest overall emitter of greenhouse gases.[2] This underscores the urgent need for a step-change in how the environment is protected and improved. Environmental assessments must be made to operate as effectively as possible to help deliver this step-change.

The Government is currently developing new approaches to environmental assessments, partly in anticipation of gaining new powers under the Levelling-up and Regeneration Bill (LURB). Those powers would allow the Government to amend, repeal or revoke Environmental Impact Assessment (EIA) and Strategic Environmental Assessment (SEA) legislation to introduce a new approach based on Environmental Outcome Reports (EOR). Reforms to Habitats Regulations Assessment (HRA) have also been mooted.[3] As we have previously advised,[4] an outcomes-based approach could present real opportunities to align environmental assessment with the EIP and national environmental targets. However, if this, or any other legal reform, is to succeed, serious attention must be given to the root causes of current deficiencies in environmental assessment addressed in this report.

Environmental assessment

Since the 1970s, legislation has grown up around the world to protect and improve the environment by requiring the assessment and management of development's environmental effects. England's environmental laws include several longstanding environmental assessment regimes, including EIA, SEA and HRA. These generally aim to examine the possible environmental consequences of development activities to inform decisions on whether and how they should proceed. They also help to secure public participation in environmental decision-making. They can identify measures to avoid, mitigate or offset harm, as well as measures to deliver environmentally beneficial outcomes.

1 Katia Sanchez-Ortiz and others, 'Land-Use and Related Pressures Have Reduced Biotic Integrity More on Islands than on Mainlands' (bioRxiv, 14 March 2019) <https://www.biorxiv.org/content/10.1101/576546v1> accessed 5 October 2023.

2 ONS, 'Greenhouse Gas Emissions and Other Environment Measures, UK and European Countries' (2022) <www.ons.gov.uk/economy/environmentalaccounts/articles/comparinggreenhousegasemissionsukandeuropeancountries/2020> accessed 24 August 2023.

3 Defra, 'Nature Recovery Green Paper: Protected Sites and Species' (2022) <www.gov.uk/government/consultations/nature-recovery-green-paper> accessed 13 September 2023.

4 OEP, 'Response to Environmental Outcomes Reports: A New Approach to Environmental Assessment' (2023) <www.theoep.org.uk/report/new-assessment-approach-developments-must-lead-environmental-improvements-says-oep> accessed 7 September 2023.

This report examines the implementation in England of EIA, SEA and HRA, which we refer to collectively as the 'environmental assessment regimes'.

These regimes apply separately but are interrelated. They have different objectives, cover different (but overlapping) activities and follow different procedures. The regimes should each contribute to environmental protection and improvement. Each is essential to identifying pressures and drivers of environmental harm. EIA and SEA serve to encourage (though not mandate) decision-makers to ensure that such pressures and drivers are avoided, prevented, reduced or offset. They also encourage decision-makers to adopt identified opportunities for environmental improvement. In the case of HRA, it mandates that identified pressures and drivers which may affect certain protected wildlife sites are addressed.

Such assessments have been relied on extensively to deliver more environmentally sensitive outcomes. Environmental assessment will continue to be essential in helping secure Government's objectives to significantly improve the natural environment within a generation, whether that is in terms of improving air and water quality, restoring biodiversity, minimising waste or mitigating and adapting to climate change.

The environmental assessment regimes operate primarily through development control (whether via town and country planning or development consent processes for nationally significant infrastructure projects (NSIPs)). They do, though, extend beyond development control. For example, HRA can be required for activities such as gamebird management and groundwater abstraction, neither of which need involve 'development'. EIA can be required for agricultural land improvement and for certain types of permitted development (e.g. drainage improvement works). SEA requirements extend to plans and programmes arising outside the planning system, such as River Basin Management Plans and Flood Risk Management Plans.

In considering any reforms to environmental assessment laws, it is important to understand which aspects of the regimes work well, which do not and, in either case, why this is so. Changes to law or practice can then build on their strengths while addressing barriers to achieving the intended outcomes in the most efficient and effective way.

Our findings and recommendations

In this report we do not seek to directly address all the issues identified through our research. Rather, we focus on three fundamental matters that research has highlighted. They appear to us to be the deep-seated causes which underlie other inadequacies with environmental assessments, and which are therefore the key barriers to improving the regimes' effectiveness.

These root causes relate to: **data accessibility**, **post-decision monitoring, evaluation and reporting** and **access to the necessary expertise**.

Symptoms of these three issues include gaps in knowledge and practices, and inadequacies in how far practitioners effectively consider the environment early on in plan, programme and project development.

There are also problems with duplication of effort and processes becoming unnecessarily burdensome, causing expense and delay. In addition, environmental assessments can be poorly scoped, with environmental statements and reports excessively long and

inaccessible, making review and engagement difficult. These inefficiencies reduce the power of the regimes to bring about environmental protection and improvement through poor use of already stretched resources, particularly in Local Planning Authorities (LPAs).

In our view, the root causes to these issues do not come so much from the design of the law itself as from inadequate implementation of the law within the wider context of systems for development control overall.

Unless the root causes of that inadequate implementation are tackled, reforms to environmental assessment laws are unlikely to succeed. Other initiatives such as biodiversity net gain and local nature recovery strategies, which have similar data, expertise and monitoring needs, are also put at risk.

Data accessibility

Good-quality environmental data underpins good decision-making, but such data are not always readily available for environmental assessments. We therefore recommend:

RECOMMENDATION 1 – The Government should publish and implement a plan for resolving the shortfalls identified in this report, so that data used for environmental assessments (EIA, SEA and HRA; or any replacements such as EORs) is easy to find and available for reuse.

RECOMMENDATION 2 – The Government should publish environmental data standards that cover at least plan-, programme- and project-level data and set out principles such as those embodied in Q-FAIR (findable, accessible, interoperable, reusable and of the right quality that is fit for purpose).

RECOMMENDATION 3 – The Government should create a map-based portal (similar to MAGIC) that signposts users to data held across existing national and regional databases.

There is longstanding criticism about inefficiencies in the approach to the collection and use of data across the regimes. Data from the assessment of one plan, programme or project are not routinely available for assessment of the next.

Overarching problems with data appear to include the fact that there are no agreed standards for the quality of data used for environmental assessments. Nor is there an easy way to obtain data that has been collected by others.

These issues negatively affect all three environmental assessment regimes, including by deferring assessment from the early, strategic plan or programme level to the project level. At that project level, options to avoid or mitigate environmental harm may have narrowed before assessment takes place. Data issues also waste resource and cause delays, with schemes spending months or years gathering environmental data that others have already collected. Inadequate assessment can also lead directly to negative environmental impacts and uncertainty. For example, we found instances where adverse environmental effects have not been avoided or mitigated due to the use of incomplete or obsolete data.

These are not new issues. Defra's 2012 review of the Habitats and Birds Directives identified the availability and comparability of data as one of four key areas to improve.[5] Over ten years on, our research indicates that many of the same problems persist. We therefore welcome Government proposals reflected in the LURB that would go some way to tackling data issues. However, Government needs to go further if it wishes to secure a more efficient and effective approach that would allow information to be collected once and used many times.

Post-decision monitoring, evaluation and reporting

For assessment to deliver positive environmental outcomes, it must lead to actions that will avoid or mitigate harm, or else that secure environmental compensation. This often involves measures such as habitat creation or agreeing that certain thresholds will not be breached during construction, operation or decommissioning. Such measures are typically secured through consent conditions or other binding commitments.

Whilst the law makes provision for post-decision monitoring, its implementation is variable across all three regimes. We found recurring concerns over lack of post-decision 'compliance' monitoring to check that required actions have been taken, or of 'effectiveness' monitoring to ensure those actions have secured expected environmental outcomes. We also found little evidence of 'validation' monitoring, reporting on the accuracy of predictions made by individual assessments or of the results being shared to inform future assessments. We therefore recommend:

RECOMMENDATION 4 – The Government should take action to make post-decision monitoring evaluations nationally accessible and ensure local planning authorities provide evaluation reports annually.

RECOMMENDATION 5 – The Government should publish guidance to help resolve the shortfalls identified in this report in the monitoring, evaluation and reporting of post-decision activity

RECOMMENDATION 6 – Post-decision monitoring and reporting to the decision-maker should be overseen by a person with the necessary expertise and independence and paid for by the proponent.

RECOMMENDATION 7 – When publishing reports under regulation 9A of the Habitats Regulations, the Government should include information on the success of compensatory measures.

We have identified three main barriers to effective post-decision monitoring, evaluation and reporting.

First, local planning authorities (LPAs) and other public authorities can lack access to the skills and expertise needed to implement the environmental assessment regimes

5 Defra, 'Report of the Habitats and Wild Birds Directives Implementation Review' (2012) <www.gov.uk/government/publications/report-of-the-habitats-and-wild-birds-directives-implementation-review> accessed 23 August 2023.

well. Among other consequences, this can lead to a lack of, or variability in, monitoring and enforcement.

Second, the value of monitoring is not recognised and provided for by the relevant bodies and can fall away in the face of cost and resource pressures. Resourcing is a recognised problem. Developers, LPAs and other public authorities may also be unwilling to invest time and resources into monitoring if they are unable to see its purpose and benefits, for example by monitoring supporting evaluation activity and public reporting. The results of monitoring are rarely shared widely, so the opportunity to learn lessons for future environmental assessments is lost. Hence, inadequacies in post-decision monitoring, evaluation and reporting are a specific example of wider problems with data accessibility.

Third, LPAs can lack the time or confidence to seek to remedy and ultimately enforce failings identified through post-consent monitoring. Low levels of this activity undermine regulatory incentives. This leaves the delivery of post-consent measures reliant on the adequacy of the design, assessment and committed mitigation, and the quality and effectiveness of that delivery dependent on the developers' integrity and internal governance.

Access to the necessary expertise

Delivering effective environmental assessment regimes relies on the necessary skills, expertise and resources being available. This is not always the case, with an ongoing skills shortage and, in particular, inadequate in-house resources and expertise in LPAs and other relevant public bodies. We therefore recommend:

RECOMMENDATION 8 – As a priority, Government departments should work together, and with local planning authorities and other relevant public bodies, to develop and implement a strategy for resourcing and securing the expertise required by those public bodies to protect and improve the environment by effective implementation of the environmental assessment regimes (EIA, SEA and HRA; or any replacements such as EORs).

RECOMMENDATION 9 – The Government should work with local planning authorities and other relevant public bodies to revise the existing suite of guidance on environmental assessments to effectively guide practitioners in the performance of their functions.

Lack of skills, expertise and resources affects the operation of all three environmental assessment regimes. It is a significant barrier to their effective implementation and inhibits positive environmental outcomes.

Where relevant authorities lack sufficient skilled and expert staff, this can affect post-decision monitoring and evaluation. Authorities can also lack the confidence or ability to scope out issues in the initial stages of an assessment. This leads to lengthy environmental statements and reports, containing much unnecessary material. Excessively broadly scoped assessments contribute to disproportionate effort and dilution of the real issues of concern.

Lack of expertise and resources can also lead to poorer environmental outcomes through acceptance of lower-quality environmental assessments or inability to fully access and interpret relevant data, which then requires effective prevention, avoidance, mitigation or offsetting measures.

Practitioners want improved government guidance to help mitigate some of these issues, supporting both authorities and developers. This applies to all three environmental assessment regimes, but particularly to EIA and SEA.

The Government has recognised that LPAs need more resources.[6] It has acknowledged the challenges in recruiting and retaining staff, including skilled and experienced planners and other technical specialists like ecologists.[7] We welcome this recognition of the issue, and the Government's intention to develop a programme of support to build capacity and capability across LPAs. This should form part of a holistic strategy for securing the skills, expertise and resources needed for effective environmental assessment.

We invite Government to act upon these recommendations as soon as possible, while acknowledging that some (recommendations 1,2,4,5, and 9) will need to be aligned with any wider reforms.

Our findings strongly suggest that without Government commitment to providing those public bodies responsible for assessments with the skills, expertise, capacity and resourcing needed, environmental assessments, now or in future, will not deliver as they should to support positive environmental outcomes.

6 DLUHC, 'Technical Consultation: Stronger Performance of Local Planning Authorities Supported through an Increase in Planning Fees' (2023) <www.gov.uk/government/consultations/increasing-planning-fees-and-performance-technical-consultation/technical-consultation-stronger-performance-of-local-planning-authorities-supported-through-an-increase-in-planning-fees> accessed 5 October 2023.

7 ibid; HM Government, 'Written Evidence to the Built Environment Committee on the Impact of Environmental Regulations on Development (IER0030)' (2023) <committees.parliament.uk/work/7328/the-impact-of-environmental-regulations-on-development/publications/written-evidence/?page=2> accessed 5 October 2023.

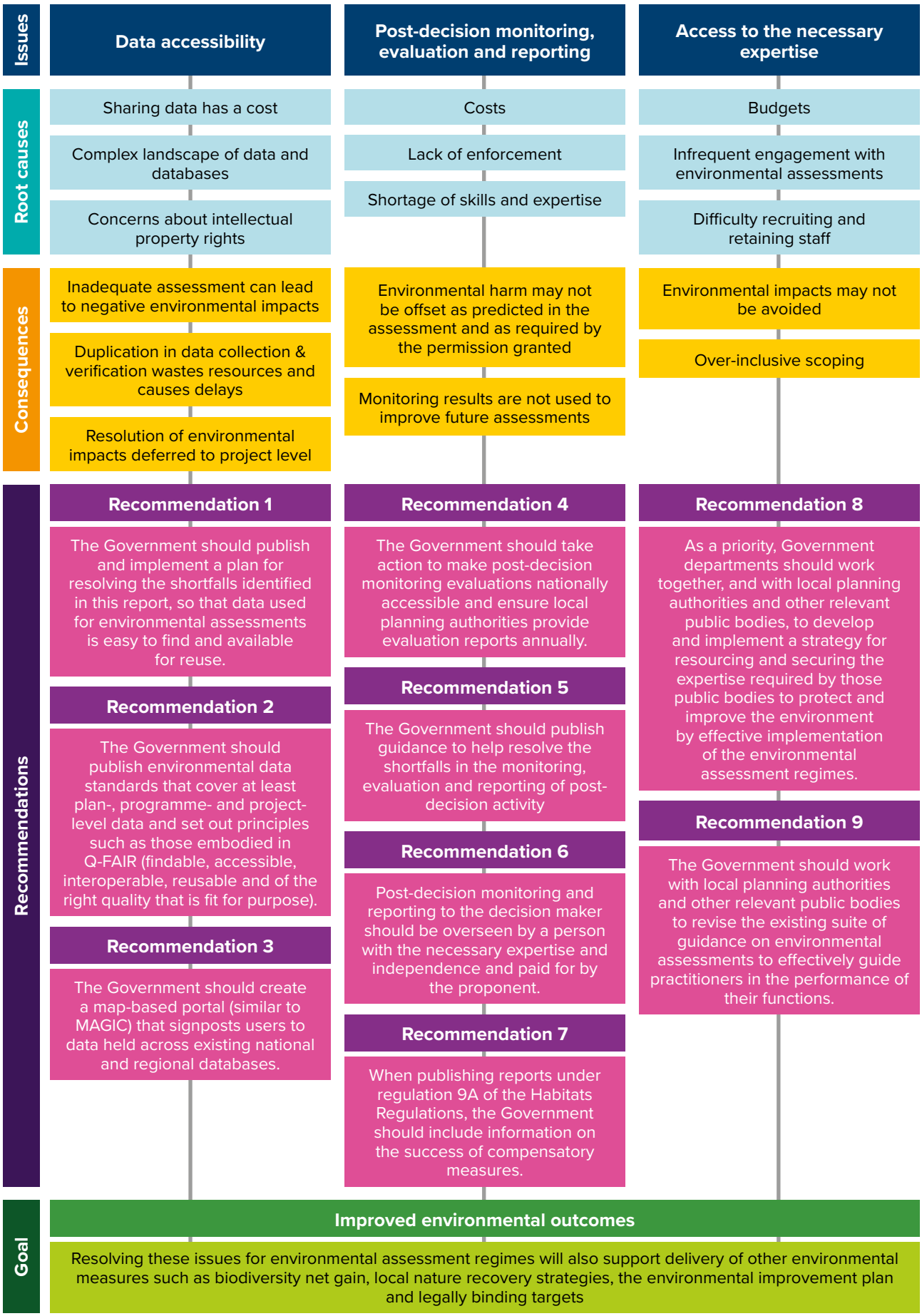

Figure 1. Summary of our report findings

Acronyms and defined terms

Acronyms and defined terms

Acronyms

AECoW	Association of Environmental Clerks of Works
ALERC	Association of Local Environmental Record Centres
ALGE	Association of Local Government Ecologists
CIEEM	Chartered Institute of Ecology and Environmental Management
Defra	Department for Environment, Food and Rural Affairs
DLUHC	Department for Levelling Up, Housing and Communities
EIA	Environmental Impact Assessment
EIP	Environmental Improvement Plan
EOR	Environmental Outcomes Report
HRA	Habitats Regulations Assessment
IEMA	Institute of Environmental Management and Assessment
LERC	Local Environmental Record Centre
LPA	Local Planning Authority
LUC	Land Use Consultants
LURB	Levelling-up and Regeneration Bill, 2022
MAGIC	Multi-Agency Geographic Information for the Countryside
MHCLG	Ministry of Housing, Communities and Local Government
NSIP	Nationally Significant Infrastructure Project
OEP	Office for Environmental Protection
PAS	Planning Advisory Service
RTPI	Royal Town Planning Institute
SEA	Strategic Environmental Assessment

Key defined terms

- ‘Birds Directive’ means EU Directive 2009/147/EC on the conservation of wild birds
- ‘EIA Directive’ means EU Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment
- ‘EIA Regulations’ mean the Town and Country Planning (Environmental Impact Assessment) Regulations 2017
- ‘Environmental assessment regimes’ or ‘the regimes’ mean, collectively, EIA, SEA and HRA or (where the context requires) their replacement(s)
- ‘Habitats Regulations’ mean the Conservation of Habitats and Species Regulations 2017
- ‘Habitats Directive’ means EU Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora
- LURB means Levelling-up and Regeneration Bill, 2022 HL Bill 173 (as amended on report)
- Our ‘organisational survey’ means the survey as described in Annex A.2.2
- Our ‘practitioners survey’ means the survey as described in Annex A.2.1
- ‘SEA Directive’ means EU Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment
- ‘SEA Regulations’ mean the Environmental Assessment of Plans and Programmes Regulations 2004

1. Introduction

1. Introduction

1.1 Context

This report concerns the implementation of environmental laws for assessing the environmental effects of development and other activities through Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA). These are referred to collectively in the report as the 'environmental assessment regimes'.

Our report falls in a period of potential and proposed change to the existing legislation and policy for these regimes. At such a time, it is important to understand which aspects of the existing environmental assessment regimes work well, which do not and, in either case, why this is so. This understanding can inform the work of the Government, Parliament and others as they consider potential reform. It is critical that any reforms get it right.

The Government expressed its intention to reform EIA and SEA in its 2020 white paper 'Planning for the Future', which proposed 'a quicker, simpler framework for assessing environmental impacts and enhancement opportunities, that speeds up the process while protecting and enhancing England's unique ecosystems'.[8] In its subsequent 'Nature Recovery Green Paper: Protected Sites and Species', the Government stated its aim of reforming HRA, which it described as a system in which 'process has become king and crowded out scientific judgement'.[9]

Some of these reforms have been brought forward in the Levelling-up and Regeneration Bill, 2022 (LURB). The LURB would give ministers powers to amend or replace 17 existing EIA and SEA laws with an 'Environmental Outcomes Report' (EOR) approach.[10] It is intended that the EOR approach is aligned with the Government's Environmental Improvement Plan (EIP), adopted under the Environment Act 2021, to ensure that decision-makers know how a plan, programme or project contributes to meeting environmental targets.[11]

The Government has recently consulted on high-level principles of the EOR proposal.[12] In our response to this consultation, we emphasised that such a significant reform should be introduced with proper supporting evidence and analysis.[13]

Through this report we therefore aim to provide an independently researched view of the effectiveness of the existing environmental assessment regimes.

8 MHCLG, 'Planning for the Future' (2020) 12, 22 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/958420/MHCLG-Planning-Consultation.pdf>.

9 Defra, 'Nature Recovery Green Paper: Protected Sites and Species' (n 3) 16–19.

10 111, pt 6.

11 DLUHC, 'Environmental Outcomes Report: A New Approach to Environmental Assessment' (March 2023) s 4 <www.gov.uk/government/consultations/environmental-outcomes-reports-a-new-approach-to-environmental-assessment/environmental-outcomes-report-a-new-approach-to-environmental-assessment> accessed 27 April 2023.

12 ibid.

13 OEP (n 4).

1.2 Our research

This report is based on research we undertook from late 2022 onwards, which principally comprises: a call for evidence, stakeholder meetings and three pieces of commissioned research and analysis. The commissioned work is as follows:

- an analysis of the legislation, caselaw and implementation of EIA, SEA and HRA undertaken by legal counsel at 39 Essex Chambers[14]
- a review of the implementation of these regimes, including surveys distributed to relevant organisations and practitioners, undertaken by WSP,[15] and
- research into the use of environmental assessment in other jurisdictions undertaken by Land Use Consultants (LUC).[16]

We have published on our website the reports from these commissioned studies and refer to them where relevant. Further details of our research approaches can be found in Annex A.

1.3 Other recent research

Government has recently published research from stakeholder user groups of the regimes.

Accompanying its Nature Recovery Green Paper, Defra published a summary of findings of its HRA Review Working Group.[17] That summary indicated many of the findings from the Working Group mirrored those suggested in the review of the Habitats and Birds Directive undertaken 10 years previously. In response to this Green Paper, we advised that Government pursue these opportunities and prioritise measures that have the greatest potential to support nature's recovery.[18]

More recently, DLUHC consulted on 'Environmental Outcomes Report: a new approach to environmental assessment', providing some detail from its user group feedback on EIA and SEA. Issues identified by the user group relate to implementation of these regimes. Group members highlighted that assessments commence too late in development processes, their reporting is long and 'impenetrable', their scoping is overly-inclusive, and that there are issues with data and poor monitoring.[19]

We have reviewed analysis from Defra of responses from stakeholders to two questions in the Nature Recovery Green Paper consultation. Analysis of the stakeholder responses are said to suggest strong levels of support for reforms to the assessments and consents (64%; 137 respondents), and limited support for keeping HRA as is (17%; 39 respondents). The least support is said to be for reform areas not discussed in the Green Paper (18%; 37 respondents).[20]

14 Stephen Tromans and others, 'Legislation, Case Law and Implementation of the Environmental Impact Assessment (EIA), Strategic Environmental Assessment (SEA) and Habitats Regulations Assessment (HRA) Regimes in England and Northern Ireland' (2022).

15 WSP, 'Analysis of the Environmental Assessment Regimes England and Northern Ireland' (2023).

16 LUC, 'Analysis of Environmental Assessment Regimes in Jurisdictions Outside the UK' (2023) 12290.

17 Defra, 'Habitats Regulations Assessment Review: Working Group Summary of Findings' (2022) <consult.defra.gov.uk/nature-recovery-green-paper/nature-recovery-green-paper/>.

18 ibid; OEP, 'OEP Response to Government on Nature Recovery Green Paper and Advice on Proposals to Reform the Habitats Regulations Assessment' (2022) <www.theoep.org.uk/report/oep-response-government-nature-recovery-green-paper-and-advice-proposals-reform-habitats> accessed 24 August 2023.

19 DLUHC, 'Environmental Outcomes Report' (n 11) ch 3.

20 This question appears to relate to section 3.2.1, Defra, 'Nature Recovery Green Paper: Protected Sites and Species' (n 3).

Through our own research, we obtained 187 survey responses (from 123 practitioners and 65 organisations). These responses broadly indicated support for modification of the regimes, with limited support for replacement of EIA and SEA as proposed by Government through the LURB and limited support for replacement of HRA (see Figure 2).[21] When asked to indicate examples of the most important changes needed for EIA, SEA and HRA, the most frequently cited changes were to: monitoring, earlier consideration of the environment in scheme design, data and increased resources for regulators (see Figures 4, 5, 6 in sections 2.1, 2.2, 2.3). The suggested areas of change tend to support our findings from other sources that concerns arise from how environmental assessment legislation is being implemented, rather than with the legislation per se.

21 For details of the methodology used, see Annexe A2 of this report. For the surveys, see WSP (n 15) app A-B.

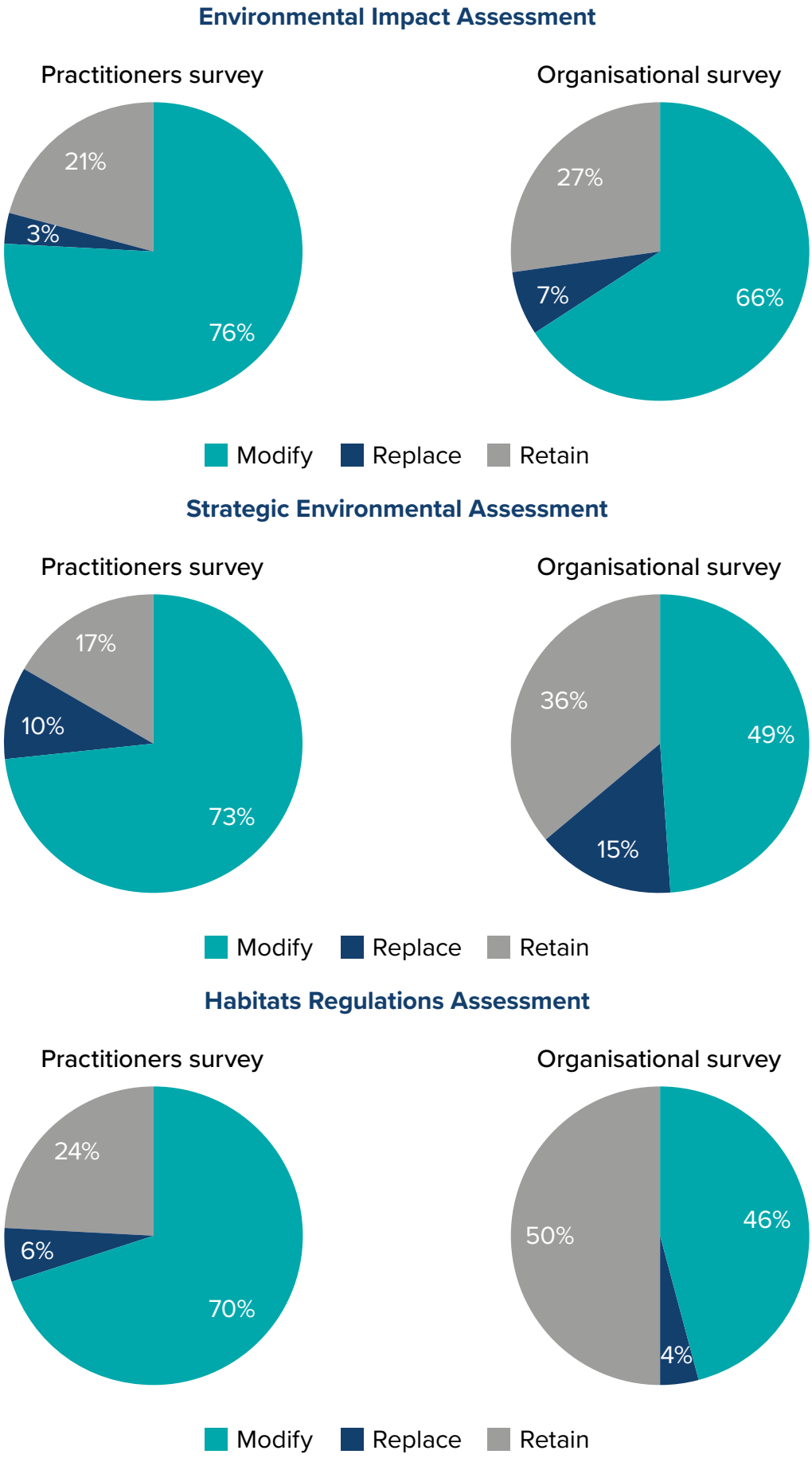

Figure 2. Perspectives from our practitioners survey (123 respondents) and organisational survey (65 respondents) on whether to retain, replace or modify EIA, SEA and HRA

Given the various sources of recent research, care is needed in identifying potential changes to EIA, SEA and HRA to pursue. As many of the issues identified in not only our research, but also findings reported by Defra and DLUHC, are associated with implementation rather than the actual legislation, these issues will likely persist even in the instance of introduction of new regimes if not explicitly tackled.

2. The environmental assessment regimes

2. The environmental assessment regimes

This section introduces three current environmental assessment regimes for England: EIA, SEA and HRA, and gives an overview of some of the strengths and challenges of each of these regimes.

2.1 Environmental Impact Assessment (EIA)

EIA is a process to identify and consolidate information about the environmental effects of certain proposed projects, enabling informed decision-making and public participation. This process does not dictate final decisions but should encourage integration of environmental matters into the early planning, design and approval of projects. EIA first entered English law through the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (implementing the first EU EIA Directive[22]), having emerged as a concept in the USA in the late 1960s.[23]

In England, EIA has since developed through a range of legislation covering different types of projects. For most people, the most familiar of these will be the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (referred to subsequently as the 'EIA Regulations'). Other EIA legislation applies to, for example, Nationally Significant Infrastructure Projects (NSIPs), drainage improvement works and certain agricultural and forestry activities. There is, however, much similarity between the different EIA regimes, all of which were intended to transpose the EIA Directive or its predecessors.[24] Many of the issues associated with the implementation of the EIA Regulations may also be present in relation to the other EIA legislation.[25] Hence, whilst we generally refer to the EIA Regulations and therefore to EIA in the context of town and country planning, we also refer to other regimes, for example for NSIPs, where relevant to do so.

EIA has two optional preliminary stages whereby proponents can require the decision-maker (local planning authority or Secretary of State) to give an opinion on screening and/or scoping. Screening is to determine whether a project is of a type which requires EIA. Scoping is to determine whether a full assessment is required and, if so, what it should cover. Thereafter EIA involves five main steps as follows:[26]

1. the preparation of an environmental statement by or on behalf of a proponent
2. public consultation
3. consideration of relevant environmental information, including the environmental statement, by the consenting authority[27]
4. the consenting authority arriving at a reasoned conclusion on the significant effects of the proposed development on the environment, and

22 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, [1985] OJ L 175/40.

23 *Scenic Hudson Preservation v Federal Power Commission* 354 F2d 608 (2d Cir 1965); National Environmental Policy Act 1969 (USA).

24 The first EU EIA Directive was amended four times, and those amendments have been codified into a single instrument, the EIA Directive. Domestic EIA legislation enacted before the passage of the EIA Directive (or before earlier amendments to the first EU EIA Directive) has been amended to give effect to changes made by the EU. More broadly, the EIA Directive is aligned with the Convention on Environmental Impact Assessment in a Transboundary Context ("the Espoo Convention").

25 We refer to these regulations throughout this report as representative of EIA regulations in England generally. For comparisons of the different regimes, see Tromans and others (n 14) 54–58.

26 EIA Regulations, reg 4.

27 i.e. the relevant planning authority or the Secretary of State.

5. the consenting authority incorporating their reasoned conclusion into their decision whether and on what terms to grant consent for the development.

This process applies to categories of projects set out in the relevant legislation. For the EIA Regulations, those types of projects listed in Schedule 1 to the regulations are projects which will always require EIA. These include, for example, crude-oil refineries, nuclear power stations, motorways, and hazardous waste landfill. Those projects listed in Schedule 2 require EIA only when they are likely to have significant effects on the environment for reasons of the project's nature, size or location.

The threshold to trigger EIA is high, resulting in only those projects most likely to be environmentally significant being subject to the process. In practice, EIA applies to very few projects relative to the number subject to development control overall. In the 12 months ending March 2023, LPAs in England received 395,624 planning applications, of which only 332 involved an environmental statement. This represents less than 0.1% of decided applications.[28] The Government has identified between 10 and 20 NSIP EIAs per year.[29]

A mitigation hierarchy is an important aspect of environmental assessment, by which decision-making is encouraged to favour preventative measures such as avoiding and minimising environmental impact, and only adopt measures for mitigating and offsetting the likely significant impacts where prevention is not possible (see Figure 3). Through this mitigation hierarchy, EIA is used to identify measures to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment. [30] A project's positive environmental effects must also be identified,[31] and may be supported in decision-making.

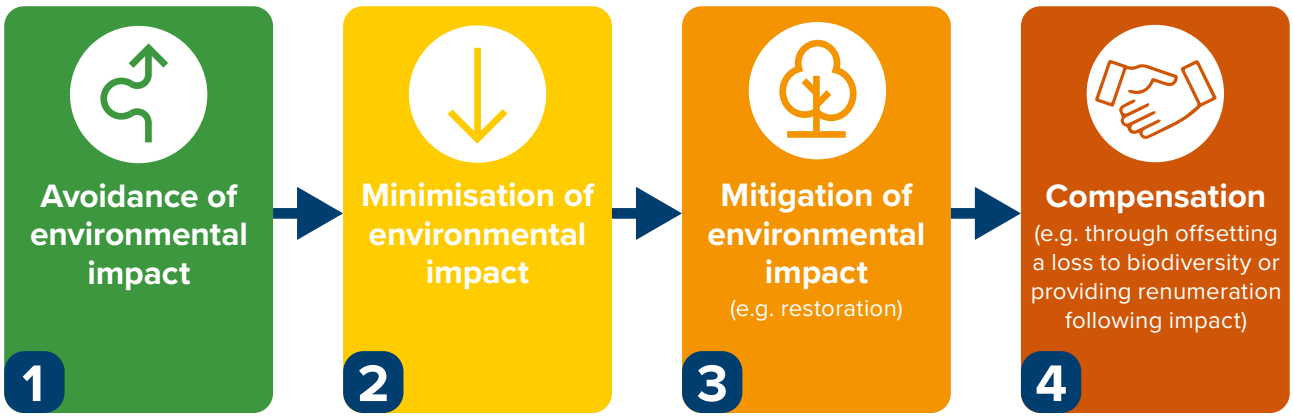

Figure 3. The mitigation hierarchy

In our view, EIA delivers its objectives by enhancing environmental awareness, compelling proponents and decision-makers to think through the environmental implications of proposed projects, and providing an opportunity for stakeholder consultation.

How far EIA leads to more environmentally beneficial outcomes is less clear. In a 2016 study only 13% of respondents felt EIA had led to extensive changes in project planning. Just over 4% suggested that EIA had led to the best environmental option being adopted. 42% of

28 DLUHC, 'Historical Live Tables: January to March 2023 (Table P134)' (2023) <www.gov.uk/government/statistical-data-sets/historical-and-discontinued-planning-live-tables> accessed 18 July 2023.
29 Explanatory memorandum to the EIA Regulations, para 7.5.
30 EIA Regulations, reg 18(3)(c).
31 Ibid, sch 4 para 5.

respondents thought EIA had mainly led to limited changes and only about 2% thought EIA had no effect on a project or on decision-making.[32]

Government and others have criticised EIA for being time-consuming and bureaucratic, resulting in lengthy, inaccessible reports.[33] The law could be clearer on the appropriate way to determine the indirect effects of projects[34] and how to correctly determine the extent of a project[35] – whether it forms a distinct 'project' which may have cumulative effects when considered alongside other projects, or would be more properly considered part of a bigger project. These judgments require skill and experience. For changes and improvements to the current EIA regime as identified by respondents to the practitioners survey, see Figure 4.

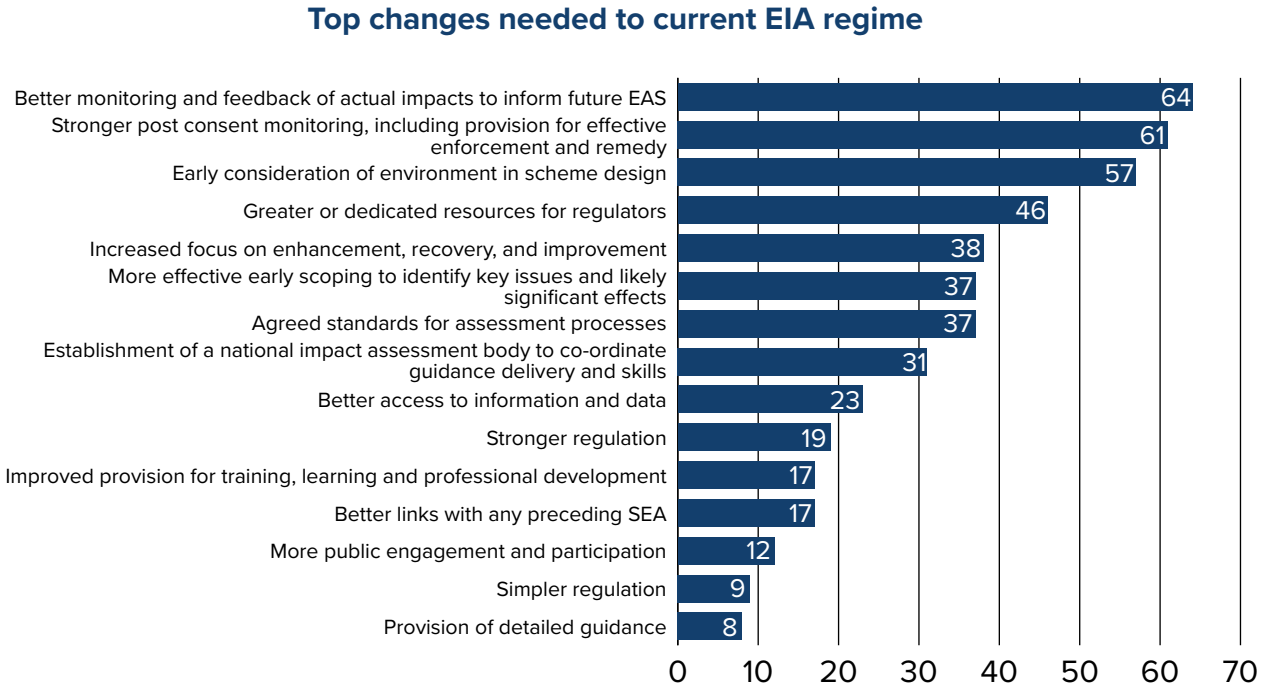

Figure 4. Identified improvements needed for the EIA regime by respondents to the practitioners survey

There are also criticisms about the practice of EIA, including poor resourcing of planning authorities, a lack of sharing of data and poor post-decision monitoring, evaluation and enforcement. We discuss these latter issues further in Chapters 3 to 5.

2.2 Strategic Environmental Assessment (SEA)

SEA is a process to consider and assess the potential environmental effects of certain plans and programmes which set the framework for development consent. As with EIA, a hierarchy applies to favour preventing significant adverse effects on the environment, before reducing and, lastly, offsetting such effects where possible.[36] A plan or programme's

32 Urmila Jha-Thakur and Thomas B Fischer, '25 Years of the UK EIA System: Strengths, Weaknesses, Opportunities and Threats' (2016) 61 Environmental Impact Assessment Review 19, 31.

33 For example, DLUHC, 'Environmental Outcomes Report' (n 11) s 3; MHCLG, 'Planning for the Future' (n 8) 57–58.

34 *R (on the application of Finch) v Surrey CC* [2022] EWCA Civ 187.

35 *R (Wingfield) v Canterbury City Council* [2020] EWCA Civ 1588

36 SEA Regulations, sch 2 para 7.

positive environmental effects must also be identified,[37] and may be supported in decision-making.

SEA operates at a more strategic level than EIA to identify environmental issues at an earlier stage in the planning system overall. Like EIA, it aims to support public participation and integrate consideration of the environment into decision-making.

The process for SEA is set out in the Environmental Assessment of Plans and Programmes Regulations 2004 (referred to subsequently as the 'SEA Regulations'). The SEA Regulations transposed the EU Directive on the assessment of the effects of certain plans and programmes on the environment ('the SEA Directive').[38] Examples of plans and programmes subject to SEA include: Local Plans, National Policy Statements setting the policy framework for NSIPs and the Flood and Coastal Erosion Risk Management Strategy for England.

SEA involves five steps as follows:[39]

1. scoping, including by establishing the context and objectives of the plan or programme and gathering baseline information

2. assessing environmental effects of the plan or programme and of reasonable alternatives

3. preparing an environmental report on the likely significant effects of the proposed plan or programme

4. consultation procedures, and

5. consideration of relevant environmental information, including the environmental report, when deciding whether to adopt the plan or programme.

The SEA Regulations require the responsible authority to undertake further monitoring of the significant environmental effects of the plan or programme, including identifying 'unforeseen adverse effects at an early stage' to 'undertake appropriate remedial action'.[40]

There are some acknowledged challenges in the operation of SEA. It can suffer from uncertainty and an unclear scope, in terms of which plans or programmes should be subject to SEA, and then which issues should be assessed. As with EIA, there are also challenges associated with publication of data and post-decision monitoring. We consider these more fully in Chapters 3 and 4. These aspects are impacted by systemic issues across all three regimes relating to capacity, skills and resourcing (covered in Chapter 5). For changes and improvements to the current SEA regime as identified by respondents to the practitioners survey, see Figure 5.

37 Ibid, sch 2 para 6.

38 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197/30. Following the passage of the SEA Directive, the Protocol on Strategic Environmental Assessment to the Espoo Convention was adopted by the UN. The Protocol is similar, but not identical, to the Directive.

39 SEA Regulations, pt 3.

40 SEA Regulations, reg 17.

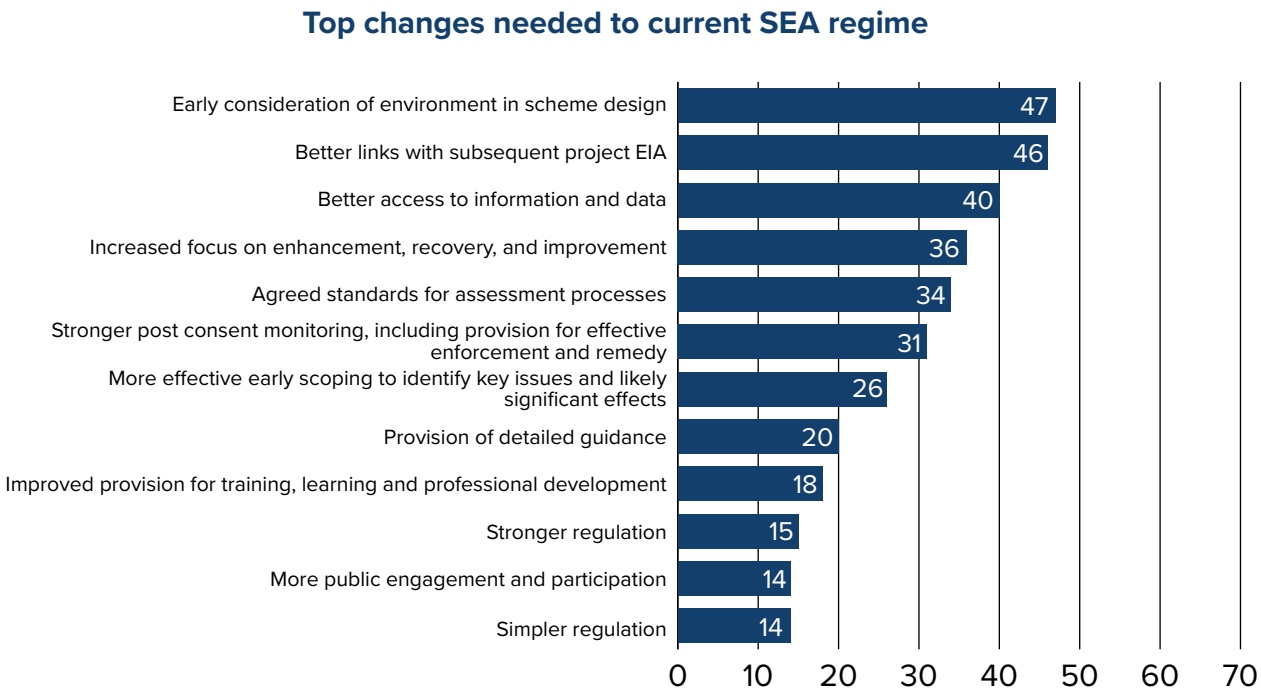

Figure 5. Identified improvements needed for the SEA regime by respondents to the practitioners survey

2.3 Habitats Regulations Assessment (HRA)

HRA is a process that decision-makers must use to assess the likely significant effects of plans and projects on 'European sites', including 'European marine sites' (together the 'national sites network').[41] The purpose of HRA is to assess impacts to and provide protection for such sites, with the aim of conserving natural habitats and wild flora and fauna. As a matter of policy, but not law, this protection is also given to other areas, including internationally important wetlands designated under the Ramsar Convention (Ramsar sites).[42]

The provisions for HRA are found in the Conservation of Habitats and Species Regulations 2017 (referred to subsequently as the 'Habitats Regulations'), as well as in the Conservation of Offshore Marine Habitats and Species Regulations 2017 and the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, which each transpose the Habitats and Birds Directives.[43]

HRA is a sequential process with up to four steps, as follows:

1. screening to determine the likely significant effects of a plan or project on European sites

2. conducting an 'appropriate assessment' of those effects

41 Special Areas of Conservation (SACs), Sites of Community Importance (SCIs), Special Protection Areas (SPAs), candidate SACs (cSACs) and potential SPAs (SPAs).

42 DLUHC, 'National Planning Policy Framework' (2023) para 181 <www.gov.uk/government/publications/national-planning-policy-framework--2> accessed 8 September 2023.

43 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2009] OJ L 20/7; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

3. assessing alternatives, and

4. consideration of imperative reasons of overriding public interest.

The appropriate assessment stage is required if the plan or project is not necessary for the management of any European site and if it is not possible to determine that it will not have a significant effect on a site. Once the appropriate assessment has been undertaken, if a decision-maker cannot be sure that a plan or project will have no adverse impact on the integrity of a European site, consent must be refused unless:[44]

1. there are no feasible alternatives that will cause less damage

2. there are imperative reasons of overriding public interest (the 'IROPI test'), and

3. compensatory measures are secured to support the overall coherence of the national sites network.

HRA has been considered by the courts in numerous cases. Much of the key caselaw was summarised by Lord Justice Jackson in *R (Mynydd Y Gwynt Ltd) v Secretary of State for Business Energy and Industrial Strategy* [2018] EWCA Civ 231 as set out below.

1. HRA is required when a plan or project is likely to have a significant effect on the conservation objectives of a European site.

2. In accordance with the precautionary principle, a project is 'likely to have a significant effect' and so require an assessment if the risk cannot be excluded 'on the basis of objective information'.

3. Regarding the 'appropriate' assessment, what is 'appropriate' will depend on the matter in front of the authority with the requirement being to satisfy the authority that the project will not 'adversely affect the integrity of the site' concerned. This is a matter of judgement for the authority concerned.

4. The authority undertaking the assessment should consider: 'What will happen to the site if this plan or project goes ahead; and is that consistent with 'maintaining or restoring the favourable conservation status' of the habitat or species concerned?'

5. After the assessment, the authority may only approve the project if convinced it will not adversely impact the site's integrity, and authorisation is to be refused if there is doubt.

6. There is no requirement for 'absolute certainty' – following the exhaustion of 'all scientific means and sources it will be necessary to work with probabilities and estimates which must be identified and reasoned'.

7. The decision-maker must consider secured mitigation and the evidence on its effectiveness.[45]

8. Explanation is required if the decision-maker chooses not to give 'considerable weight' to the views of the relevant nature conservation body.

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44 Habitats Regulations, regs 64, 68.

45 This must now be considered in light of *Case C-323/17 People Over Wind & Peter Sweetman v Coillte Teoranta* [2018] PTSR 1668., in which the Court found that measures intended to avoid or reduce the harmful effects of a plan or project (i.e. mitigation measures) could not be taken into account at the screening stage (but they can and should be at appropriate assessment stage).

9. The standard for review by court is the *Wednesbury* standard.[46]

While HRA is similar to EIA and SEA in that it supports informed decision-making, it goes beyond this to also constrain the decisions that can lawfully be taken where a plan or project is likely to harm a European site. This is a key strength. Other strengths are that the HRA process is considered to be clear and well understood by applicants and by the relevant authorities. HRA applies to an established, extensive and ecologically important network of sites across the United Kingdom (and beyond, through the 'Natura 2000' and 'Emerald' networks), contributing to strong environmental protection.

HRA has also been subject to extensive judicial and statutory review by the courts. The judgments arising from these reviews have provided clarity and legal certainty as to the proper approach to HRA.[47]

HRA has faced criticism, however, for example over the rigidity of the process and for impeding development.[48] Feedback from respondents to our practitioners survey indicates that HRA would benefit from better monitoring, more effective enforcement and remedy, increased focus on enhancement, and better resourcing, skills and capacity in planning authorities and other regulatory bodies involved in HRA.[49] We explore these issues further in Chapters 3 to 5. For further detail of changes and improvements to the current HRA regime as identified by respondents to the practitioners survey, see Figure 6.

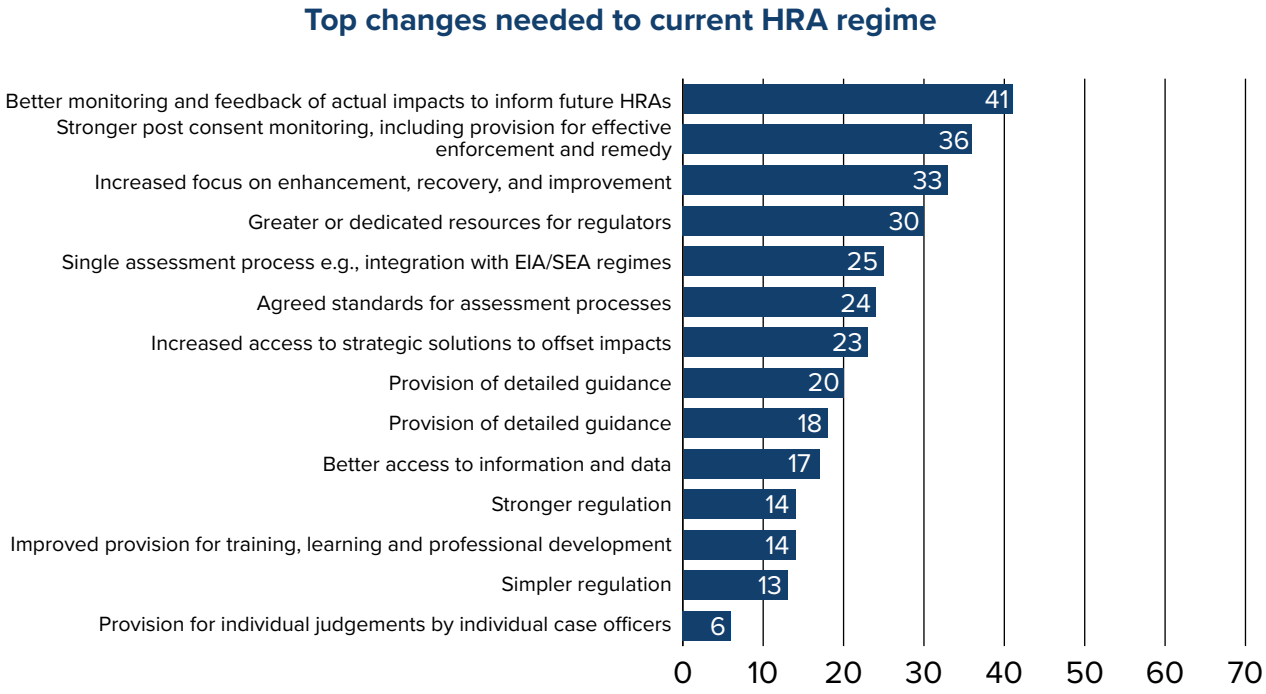

Figure 6. Identified improvements needed for the HRA regime by respondents to the practitioners survey

46 The Wednesbury standard is a test used in judicial review, originating in the case *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. The standard is that a decision was so unreasonable that no reasonable person acting reasonably could have made it.

47 See, for example, Tromans and others (n 14) 39–40; DTA Ecology Ltd, 'HRA Process' (2022) The Habitats Regulations Assessment Journal, DEFRA Nature Recovery Green Paper Supplement <drive.google.com/file/d/1FGm93fO3rMst38yy7z5PAoJtyhwY4SHJ/view?pli=1> accessed 28 July 2023.

48 Tromans and others (n 14) 44.

49 WSP (n 15) 71.

2.4 Overall strengths and challenges of the environmental assessment regimes

In Chapters 3 to 5 we set out the main themes arising from our research (covering data accessibility, post-decision monitoring, evaluation and reporting, and access to the necessary expertise). The remainder of this section covers important strengths and challenges of the three environmental assessment regimes raised through our research but not addressed elsewhere in the report.

2.4.1 Strengths

The objectives of each of the three regimes include procedural goals – public participation, proponents thinking through the environmental implications of their activity and more environmentally aware decision-making. In the case of HRA, objectives also include a substantive goal – affording protection to European sites.[50]

While each regime has a different focus, they can operate together with information flowing from one regime to another. SEA can provide a plan- or programme-level account of potential environmental effects, which can influence later project development that may be subject to an EIA or HRA.[51] For this to happen well, SEA needs to begin early enough to allow plan and programme preparation to be iterative, so it can be revised based on an understanding of the environmental effects.[52]

Practitioners have also noted that operation of the regimes cultivates a 'virtuous circle', in which non-government organisations and the public can test and challenge defective processes, thereby developing important points of law and raising standards of decision-making and environmental protection.[53]

A significant body of caselaw has formed, providing practical guidance and settling many key questions of interpretation. This provides a clear standard against which proponents and planning authorities (or their consultants and advisors) can judge their proposals. The environmental assessment regimes have been subject to significant attention and legal review, which provides clarity in application and legal certainty. Whilst gaps in judicial interpretation still remain, that is only likely to increase if material amendment to these regimes is not properly managed. This could then lead to uncertainty and costly litigation to resolve questions of interpretation.

A contrary view is that the broad potential for challenge can lead to risk-averse scoping for EIA and appropriate assessment (HRA), leading to unnecessarily burdensome assessment processes.[54] Again, however, without careful management legislative reform is liable only to increase uncertainty so scope for legal challenge.

50 For analysis of caselaw on this point, see Tromans and others (n 14) 7–9.

51 For a chart explaining how this process should occur in practice, see Office of the Deputy Prime Minister, 'A Practical Guide to the Strategic Environmental Assessment Directive: Practical Guidance on Applying European Directive 2001/42/EC "on the Assessment of the Effects of Certain Plans and Programmes on the Environment"' (2005) 13 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/7657/practicalguidesea.pdf> accessed 12 May 2023.

52 ibid 23.

53 Tromans and others (n 14) 9–10.

54 For example, see Thomas B Fischer and others, 'The Revised EIA Directive – Possible Implications for Practice in England' (2016) 30 UVP-report 106, 107; IEMA, 'Delivering Proportionate EIA' (2017) <www.iema.net/document-download/33945> accessed 28 July 2023.

2.4.2 Challenges

There are challenges associated with the three environmental assessment regimes concerning their complexity, ambiguity of key terms and the volume of reporting. In Table 1, we summarise the areas most frequently highlighted through our practitioners survey as in need of improvement.

Table 1. Top four areas for change identified by respondents to our practitioners survey

Four most important changes needed for EIA, SEA and HRA:

EIA	SEA	HRA
Monitoring and feedback of actual impacts to inform future EIAs Stronger post-consent monitoring Earlier consideration of environment in scheme design Resources for regulators	Early consideration of environment Better links to subsequent EIA Access to information and data Increased focus on enhancement, recovery and improvement	Monitoring, feedback of impacts to inform future HRAs Stronger post consent monitoring including provision for enforcement and remedy Increased focus on enhancement, recovery and improvement Resources for regulators

EIA is a process which is set out in 17 pieces of legislation, each applying to different types of project. This has been identified as creating complexity, making EIA difficult to navigate and understand. However, it has been suggested that the fragmentation of legislation simply reflects the diversity of environmental considerations addressed and is an appropriate approach to treating disparate matters consistently.[55] The HRA process is also felt by some to be complex, given its technical nature, with multiple steps to be followed.[56] For others, the structure of HRA is a strength, as there is a clear process to follow.[57]

For SEA, difficulties have arisen from the ambiguity of its scope,[58] which is dependent on the correct interpretation of the terms 'plan' and 'programme',[59] and from vague qualifications in the statutory wording as to whether plans or programmes are 'required' by legislative, regulatory or administrative provisions, or would 'set the framework' for future development consents.[60]

Other criticisms relate to EIA and SEA being approached as a formality, undertaken to justify development rather than to establish an objective statement of its environmental effects.[61]

55 Jha-Thakur and Fischer (n 32) 23; WSP (n 15) 41 citing an interview with Josh Fothergill.
56 Jha-Thakur and Fischer (n 32) 23–24.
57 See reflections from Tromans and others (n 14) 39.
58 Francis McManus, 'Strategic Environmental Assessment and the National Planning Policy Framework (Case Comment)' (2019) 193 Scottish Planning and Environmental Law 62.
59 SEA Regulations, reg 2.
60 Tromans and others (n 14) 25, 30; SEA Regulations, regs 2, 5(2).
61 ibid 22.

When any environmental assessment, but an SEA in particular, is started too late, inadequate attention can be paid to developing reasonable alternatives that could reduce environmental impact. Opportunities both for public participation and for SEA to meaningfully influence future projects subject to EIA and HRA are then also limited.[62]

Other identified issues with EIA and SEA relate to the volume of reporting. A criticism has been made since the 1980s that 'EIA has become a behemoth, whose size and complexity in both process and product have yielded many drawbacks without a balance of advantage'.[63] Whilst proponents can seek 'scoping opinions' from decision-makers to clarify what detail should be included in environmental statements for EIA, the issue of voluminous reporting persists. The overly inclusive 'scoping' of material into environmental statements has been stated as driven by risk aversion and fear of legal challenge.[64] Recurrent criticisms of the implementation of both EIA and SEA relate to issues associated with the collection of data and to the volume of environmental reporting that can be generated by a project.[65]

2.5 Conclusion

Despite the regimes' strengths in increasing public participation, increasing decision-making standards and providing for it to be well-informed, there are also challenges. Concerns about the unclear scope of SEA persist. There is concern that EIA and SEA commence too late in planning processes, leading to only superficial engagement with relevant environmental issues. Further, voluminous reporting makes meaningful engagement by others with the environmental statements and reports difficult.

These are significant issues. These issues are, in many respects, symptoms of deeper problems which are systemic and fundamental to successful environmental assessment. These can be grouped under three headings: data accessibility, post-decision monitoring, evaluation, and reporting and access to necessary expertise. We focus on these fundamental issues in subsequent chapters.

62 John Glasson, 'The First 10 Years of the UK EIA System: Strengths, Weaknesses, Opportunities and Threats' (1999) 14 Planning Practice & Research 363; Jha-Thakur and Fischer (n 32).

63 For details of examples, see WSP (n 15) 45.

64 ibid 45–47; Steven Smith, Jeremy Richardson and Andrew McNabb, 'Towards a More Efficient and Effective Use of Strategic Environmental Assessment and Sustainability Appraisal in Spatial Planning' (Department for Communities and Local Government 2010) 24–31, 65–68, 125. <webarchive.nationalarchives.gov.uk/ukgwa/20120919132719/http:/www.communities.gov.uk/documents/planningandbuilding/pdf/1513010.pdf> accessed 13 June 2023.

65 WSP (n 15) 47.

3. Data accessibility

3. Data accessibility

This chapter addresses issues relating to the environmental data used for environmental assessments, both in terms of the quality of data collected and its subsequent storage and reuse.

There has been much criticism about inefficiencies in the collection of data.[66] A more efficient approach would allow information to be collected once and used many times. Defra's 2012 review of the implementation of the Habitats and Birds Directives identified the availability and comparability of data as one of the four key areas that could be improved.[67] Over a decade later, our research has found these issues remain.

Access to reliable data is important, not only for the three regimes covered in this report, but also to support and inform other activities, such as assessing biodiversity net gain, development of local nature recovery strategies, taking steps to meet statutory environmental targets and delivering measures contained in the EIP.

Our sources for this chapter, particularly stakeholder responses, mostly relate to data accessibility issues with biodiversity data and that is reflected in the text.

3.1 The challenge

Our research highlights two main issues regarding data. First, that there are no agreed standards regarding the quality of data used in environmental assessments. Second, that there is limited data sharing.

The Department for Levelling Up, Housing and Communities' (DLUHC) Post-implementation Review report of the EIA Regulations recommends replacement of the regime. It states there is evidence of 'high costs and significant administrative burden associated with conducting an environmental assessment under [this] regime'.[68] It then states that research conducted by the Digital EIA Project in 2020 found that an average environmental statement for a 500-home development cost £150,000–£250,000 and took 8–18 months to complete. These costs are 0.07–0.11% of an average new-build home.[69]

We assume that part of the timescale and costs referenced by DLUHC relates to the collection and analysis of environmental data. In response to our call for evidence, Town Legal noted that the Government is intent on speeding up the planning process but highlighted that sufficient time 'must be allowed for data collection for both EIAs and SEAs, particularly when development sites are being promoted through the plan'.[70] The RSPB states that taking the time to properly assess environmental impacts 'should not

66 See for example, Shelly Rouse, 'Barriers and Challenges for Environmental Assessment' (Planning Advisory Service 2023) <www.local.gov.uk/pas/topics/environment/environmental-outcomes-reports/barriers-and-challenges-environmental> accessed 27 April 2023; Pete Davis and others, 'Sustainability Appraisal: From LPEG's "Little Genuine Assistance" to Making a Real Sustainable Difference' 4; RSPB, 'Towards Improving Environmental Assessment and Enabling Nature's Recovery' (2021) <www.rspb.org.uk/globalassets/downloads/pa-documents/fisheries/rspb-towards-improved-environmental-assessment-report-nov-2021.pdf> accessed 19 April 2023; 'Survey Response from the Wildlife and Countryside Link to the OEP (12 January 2023)'.

67 Defra, 'Report of the Habitats and Wild Birds Directives Implementation Review' (n 5).

68 DLUHC, 'Post Implementation Review: Town and Country Planning (Environmental Impact Assessment) Regulations 2017' (2022) <www.gov.uk/government/consultations/environmental-outcomes-reports-a-new-approach-to-environmental-assessment/post-implementation-review-town-and-country-planning-environmental-impact-assessment-regulations-2017> accessed 23 August 2023.

69 HM Land Registry, 'UK House Price Index England: May 2023' (2023) <www.gov.uk/government/statistics/uk-house-price-index-for-may-2023/uk-house-price-index-england-may-2023> accessed 23 August 2023. At March 2023, the average new build sale price was £439,033, see Chapter 5.

70 Results of a workshop with 'leading environmental consultants on 10 February 2021 to discuss the future of environmental assessment in the planning system', covering EIA, SEA and HRA. Evidence provided Town Legal to the OEP (24 December 2022).

be shortcut'.[71] We agree. The RSPB also observed that major infrastructure developments have long lead-in times (for example associated with land agreements) and that, for these developments, taking sufficient time to prepare an environmental statement should not create a significant additional burden. During our research, however, data issues were highlighted repeatedly, and we see the opportunity to make improvements.

3.2 Why is it an issue?

Those involved in environmental assessment need up-to-date, high-quality environmental data on which to base their decision-making. For EIA and SEA, plan, programme and project proponents use data to predict the impacts of their proposal on the environment, to explore how alternative approaches might alter those impacts and to demonstrate how they intend to offset any negative impacts to an acceptable level. For HRA, the decision-maker must make those judgements using appropriate data, including that provided by the plan or project proponent. Others, such as statutory consultees or local communities, rely on the data to determine their level of concern or interest in the proposal, or their views on whether it should proceed and, if so, with what conditions. Ultimately, the decision-maker in all three regimes will rely on the data itself, how it has been evaluated and how others have reacted to it, to determine whether the proposal can proceed in line with the relevant legislation.

The importance of data is highlighted in HRA caselaw. For example, before consenting a plan or project, a competent authority should have no reasonable scientific doubts remaining as to the absence of adverse effects on the protected site(s).[72] The appropriate assessment cannot have gaps; it must contain complete, precise and definitive findings and conclusions.[73] Data and information on which an appropriate assessment is based must be reliable and up-to-date.[74] The EIA regulations require an environmental statement to 'include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment'.[75] If necessary, the relevant decision-maker can require additional information to be provided by the applicant.[76] For SEA, the regulations require the assessment to 'identify, describe and evaluate the likely significant effects on the environment of implementing the plan or programme'.[77] This requires up-to-date, high-quality environmental data.

Potential synergies between assessment processes under EIA, SEA and HRA are undermined if data from one assessment regime is not routinely made available for another. This is too often the case and thought to be caused by a lack of data sharing between the relevant bodies.[78]

A recent study for the Irish Environmental Protection Agency found that published monitoring data were available for only two out of 18 SEAs. In Scotland, published

71 RSPB, 'Towards an Environmental Outcomes Report Approach to Environmental Assessment Fit for the Nature and Climate Emergency'. Evidence sent by the RSPB to the OEP (13 January 2023).

72 *R (An Taisce) v Secretary of State for Energy and Climate Change* [2014] EWCA Civ 1111; *R (oao Keir) v Natural England* [2021] EWHC 1059 (Admin).

73 *Sweetman and others v An Bord Pleanála* (Case C-258/11) [2014] P.T.S.R. 1092 (EU:C:2013:220).

74 *Nomarchiaki Aftodioikisi Aitoloakarnanias* (Case C-43/10) [2013] Env LR 21 (EU:C:2012:560) at [115].

75 EIA Regulations, reg 18.

76 EIA Regulations, reg 25.

77 SEA Regulations, reg 12.

78 European Commission, 'Evaluation of the Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment' (2019) <circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/d479c54e-d1c2-4f7f-a40e-4e0b41f6ff39/details?download=true> accessed 22 June 2023.

monitoring data were available for only one SEA out of 10 reviewed.[79] The situation in England is unknown, but there is nothing to suggest it would be dissimilar. This means that, even where data has been collected to support the development of a plan or programme, it is not always made available for subsequent EIAs or HRAs.

In a document prepared for the Cabinet Office, eftec assessed species data pathways[80] to central databases such as the National Biodiversity Network Atlas.[81] The aim was to identify how improved access to better location data could support environmental outcomes. It found that high-quality, current and accessible species data are essential to underpin environmental policy and land use planning.[82]

In its analysis of the current system eftec found confusing data pathways, a lack of clarity in data quality and access, and incomplete spatial coverage. Even with these issues, the benefit of the current species data pathway strongly outweighed its cost. Eftec found that the best estimate of benefits to the best estimate of costs resulted in a ratio of 28:1 (£23bn benefit to £0.8bn cost over 60 years).[83]

3.2.1 Why does the issue exist?

During our research we heard differing views on whether data collected by plan, programme and project proponents is submitted to a regional or national database post-decision. If this is done, it is normally done by consultants on behalf of their clients, rather than by the proponent themselves.[84]

A survey by the Institute of Ecology and Environmental Management (IEEM) and the Association of Local Environmental Record Centres (ALERC) found that data from consultants only makes up a very small proportion of the Local Environmental Record Centres' (LERC) databases. The report states that the LERCs' evidence suggests that 'data collected by consultants is not being used beyond its original purpose'.[85] This is supported by later work, when the national co-ordinator for ALERC found that only 3.5% of records collated by LERCs originate from consultants.[86] In contrast, 79% (10,880) of requests made to LERCs for data in England were to support planning applications.

Regarding other databases, Natural England told us 'it is common for developers to obtain data made available by others free of charge on the National Biodiversity Network Atlas, but comparatively rare for [them] to contribute data they have collected themselves to the [Atlas]'.[87] Eftec's report states 'species data collected by consultants to support assessments of projects that require regulatory approval do not normally reach the species data pathway and therefore are unavailable for re-use'.[88]

79 Details provided by Riki Therivel to WSP (n 15) 58.

80 A species data pathway sets out the steps involved in creating, checking and sharing species data so that it can be used. Described in eftec, 'Mapping the Species Data Pathway: Connecting Species Data Flows in England' (2021) <www.nbn.org.uk/wp-content/uploads/2021/06/2021-05-25-Speciesdataproject-final-report-forpublication.pdf> accessed 24 August 2023 10.

81 NBN Atlas Partnership, 'NBN Atlas – UK's Largest Collection of Biodiversity Information' <nbnatlas.org/> accessed 24 August 2023.

82 eftec (n 80).

83 The eftec report states that a 60-year appraisal period for the cost benefit analysis follows HM Treasury and Government Finance Function, 'The Green Book: Appraisal and Evaluation in Central Government' (2022) <www.gov.uk/government/publications/the-green-book-appraisal-and-evaluation-in-central-governent> accessed 28 September 2023 [2.18].

84 See for example, Richard Smith and others, 'Sharing Ecological Data: Using GIS Files' (2016) 91 In Practice 51.

85 Tom Hunt, 'Surveying Consultants' Attitudes to LRCs and Biodiversity Data' (Association of Local Environmental Records Centres 2012) 3–4 <www.alerc.org.uk/uploads/7/6/3/3/7633190/ieem_-_alerc_survey_article.pdf> accessed 24 August 2023.

86 See cited personal communications, Smith and others (n 84).

87 Meeting with Natural England and the OEP (27 July 2023).

88 eftec (n 80) 87.

We therefore conclude that data used in environmental assessments are not regularly submitted to publicly accessible databases for reuse by other plan, programme or project proponents.

Our research has identified three main barriers to data accessibility: concerns about intellectual property rights and client confidentiality, the complex landscape of data and databases, and the costs of sharing data. We discuss each below.

3.2.1.1 There are concerns about intellectual property rights and client confidentiality

One barrier to the sharing and reuse of environmental data used in environmental assessments is a concern about data ownership and the intellectual property rights that accrue to data.

While underlying factual data collected by consultants will not be protected by copyright, where data has been arranged into a means of representation (such as a table, graph or map), that means of representation will be protected by copyright.

Many ecological consultants who collect data for proponents are concerned and unclear about copyright issues related to that data, and about the commercial sensitivity of data that is owned by proponents. An inconsistent approach to data is therefore taken. While some consultants employ clauses in their clients' contracts allowing them to release data, others prioritise client confidentiality.[89]

Similar concerns regarding client confidentiality were also identified by the Chartered Institute of Ecology and Environmental Management (CIEEM) in 2016, which noted that many consultants do not like asking clients for permission to share commercially sensitive data.[90]

Other stakeholders have shared similar views with us, commenting on the difficulties arising from sharing data post-decision. Existing database rights may in some circumstances prevent the transfer by LPAs of data collected by proponents.[91] In practice this will only be the case if the environmental data has been put into a database by the proponent, and if the creation of the database itself (rather than simply the primary creation of the data) gave rise to substantial investment on the part of the database owner.[92]

There is clearly a degree of uncertainty and concern among some LPAs and consultants about which environmental assessment data is protected by database rights, and this lack of clarity is standing in the way of the extraction and reuse of that data.

3.2.1.2 There is a complex landscape of data and databases

When undertaking environmental assessments for the purposes of EIA and SEA, or gathering data for competent authorities to undertake HRA, ecological consultants usually seek existing data. The quality and age of this data, and whether it is comprehensive for the plan, programme or project they are considering, informs whether they need to gather new data.

89 Hunt (n 85).
90 Smith and others (n 84).
91 Copyright, Designs and Patents Act 1988; Copyright and Rights in Databases Regulations 1997.
92 Copyright and Rights in Databases Regulations 1997, reg 13.

The IEEM and ALERC survey found that ecological consultants seek or request biodiversity data from a range of sources. Whilst the National Biodiversity Network and LERCs were the most frequent sources, data from local groups, local wildlife trusts and national schemes and societies were also used.[93]

We can see that if consultants collect new biodiversity data and wish to submit this, post-decision, for reuse in another assessment, there could be confusion over where and how best to do this. The IEEM and ALERC survey found that almost 50% of respondents believe that 'easier submission systems e.g. an online single portal' would increase the supply of consultancy data to LERCs.[94]

This complex landscape of data and databases exists because of the similar complexity of methods used for collecting environmental data. Natural England highlighted the pressing need to align survey methods and standardise environmental data to better inform larger scale, whole system approaches to environmental improvement and climate change.[95]

3.2.1.3 Sharing data has a cost

Compiling and submitting data to regional or national databases has both financial and time costs. The fact there are no data standards and that it is difficult to extract data from environmental assessment documents only increases these costs.

The Association of Environmental Clerks of Works (AECoW) told us there is no incentive for developers to share the data they have paid to collect.[96] Even when there is a willingness to share data, the IEEM and ALERC survey found that consultants were concerned about the time requirements for submitting records.[97] In its report considering how London's LPAs take biodiversity into account in planning, Greenspace Information for Greater London noted that there is 'no efficient mechanism in place that allows this data flow to happen and overcome the time cost or technical difficulties of extracting records from survey results'.[98]

3.3 What is at stake?

At the heart of this matter is the risk of poor-quality or incomplete data leading to poor-quality or poorly informed decision-making, with all that this implies.

We have identified the following consequences that result from data accessibility issues. These issues have negatively impacted decision-making for all three environmental assessment regimes.

93 Hunt (n 85). Note that national scheme and societies are not defined in the report. Elsewhere on its website, ALERC provides detail on national schemes such as Butterflies for the New Millenium and Garden Birdwatch, and the National Biodiversity Network describes the role of national voluntary societies as being crucial to supporting the collection of data. See Association of Local Environmental Records Centres, 'Nature at Home: Record the Nature around You' <www.alerc.org.uk/schemes.html> accessed 24 August 2023; National Biodiversity Network, 'National Societies and Recording Schemes' (*National Biodiversity Network*) <nbn.org.uk/the-national-biodiversity-network/archive-information/national-societies-and-recording-schemes/> accessed 24 August 2023.

94 Hunt (n 85) fig 3.3.

95 Meeting with Natural England and the OEP (27 July 2023).

96 Meeting with AECoW and the OEP (18 July 2023).

97 Hunt (n 85) 4–5.

98 Eleni Foui, 'Biodiversity Evidence – Better Outcomes from Planning' (Greenspace Information for Greater London 2022) 38 <www.gigl.org.uk/wp-content/uploads/2022/11/FinalReport_Nov22.pdf> accessed 24 August 2023.

3.3.1 Issue: resolution of environmental impacts is deferred to the project level

We can see from our stakeholder engagement that the limited availability of data for SEAs has led to a weak evidence base for decision-making, resulting in 'many significant environmental effects, which should be considered at the strategic level … [being] 'stepped down' to the project level'.[99] We share the view of experienced strategic planning adviser Jan Bessell who stated that 'SEA is generally a poorly delivered process in the UK. It does not operate as the spatial design tool it was intended to be, informing and directing projects to the most appropriate locations'.[100] This leaves individual developers to collect their own data, assess the impacts of their development and resolve the co-ordination and management of these impacts on a case-by-case basis.

Without a clear assessment of impacts at the plan or programme level, development is not steered away from the most environmentally sensitive areas so that application of the mitigation hierarchy – particularly the 'avoid impact' stage – occurs too late in the process (see Figure 3 for an explanation of the mitigation hierarchy). At a project level, developers have often purchased or secured rights over an area of land they intend to develop before environmental data has been gathered and analysed. It may then be too late to avoid identified environmental impacts, for example loss of habitat. This increases potential for conflict, with considerable time and effort then expended by the developer, the LPA, statutory consultees and other interested parties in reaching an agreement on the significance of these impacts and how they should be addressed. In addition, it is best to consider environmental impacts at a wider ecosystem level i.e. through SEA not just EIA or HRA.[101]

Assessment of cumulative impacts and 'in-combination' effects of plans and projects should be more efficiently and usefully considered at the strategic level,[102] but often a lack of data makes such assessments impossible. This difficulty is often cited as a significant problem with the SEA regime as currently implemented.[103] Many projects are too small for their impacts to seem significant in isolation, but when considered in context – in combination with other projects and plans – those impacts mount up.

99 National Infrastructure Planning Association cited by WSP (n 15) 63.

100 Meeting with Jan Bessell and the OEP (24 August 2023).

101 NIC, 'Delivering Net Zero, Climate Resilience and Growth: Improving Nationally Significant Infrastructure Planning' (2023) 14 <nic.org.uk/app/uploads/NIC-Planning-Study-Final-Report.pdf> accessed 28 July 2023.

102 For example, see RSPB (n 71).

103 Ric Eales, William Sheate and Indre Vaizgelaite, 'Win-Win by 2020: How Better Strategic Environmental Assessment Can Help Deliver Biodiversity and Climate Change Mitigation Targets by 2020' (RSPB, WWF, Collingwood Environmental Planning 2009) <www.rspb.org.uk/globalassets/downloads/documents/positions/planning/win-win-by-2020---how-better-strategic-environmental-assessment-can-help-deliver-biodiversity-and-climate-change-mitigation-targets-by-2020.pdf>.

In the South Humber Gateway allocated development zone, a strategic approach has been taken to both facilitate development and safeguard protected birds in the Humber Estuary.

Due to the area's ecological importance, development can only proceed following environmental assessment of the impacts on wintering and migratory waterbirds. Previously, impacts were not assessed until the project stage, resulting in long delays and conflict over the amount of mitigation required to offset the loss of habitat from each development. Assessing cumulative impacts was difficult.

A strategic approach, based on partnership working and extensive up-front evidence-gathering surveys across the Gateway, has now been secured in the Local Plan. The LPA (North East Lincolnshire Council) has proactively created wet grassland habitat managed for birds. Developers make a financial contribution to 'draw down' on this available land in proportion to the size of their development site. This approach has removed the need for developers to gather their own evidence or establish their own mitigation strategies on a case-by-case basis. Monitoring and management are undertaken by the LPA.

The approach has been popular with developers. A developer of a £300 million energy from waste project stated 'The South Humber Bank mitigation scheme provides confidence to developers on the practical requirements of the Habitat Regulations. We found engagement with [the] Council to be a positive experience and the speed and scale of habitat delivery is impressive. We hope other local authorities set up similar schemes'.

Figure 7. South Humber Gateway strategic approach to mitigation[104]

3.3.2 Issue: duplication in data collection and verification wastes resource and causes delays

Limited data sharing and a lack of agreed standards for the data used in environmental assessments leads to duplication in data collection, repeated verification and time delays. This means that the limited resources available in LPAs and other relevant public bodies, particularly in terms of expertise (as discussed in Chapter 5), are not used in the most efficient way to deliver environmental protection. This affects all three regimes.

Data accessibility is a significant issue. The National Infrastructure Commission in its report 'Delivering Net Zero, Climate Resilience and Growth' notes that '[s]chemes can spend months or years collecting environmental data which other schemes have already collected'.[105] Likewise, WSP states that 'a single area may be surveyed … on multiple instances, often within the same survey period. This is considered a waste of time and financial resources, and a potential disturbance factor for those [protected] species.'[106]

The Planning Advisory Service's (PAS) 2023 report 'Environmental Assessment Barriers', drew on workshops with 67 councils. In that report, PAS states: 'everybody wants

104 North East Lincolnshire Council, 'South Humber Gateway' <www.nelincs.gov.uk/planning-and-building-control/planning-policy/the-local-plan/local-plan-background-information/south-humber-gateway/> accessed 26 September 2023. Email from North East Lincolnshire Council to the OEP (14 September 2023).

105 NIC (n 101) 4.

106 WSP (n 15) 73.

standardised data', with all workshops concluding that a consistent approach to data is a path to standardising the approach to EIA and SEA, reducing obstacles to create a more efficient process.[107]

PAS staff discussed this inefficiency with us, explaining that data collected by one group is then checked by others during the various environmental assessment processes.[108] A developer or their consultant collects data. That data may then be checked multiple times – by various statutory consultees, other interested parties (such as environmental groups) and by the LPA. We were also told that, due to the lack of expertise in some LPAs, ecological work may be contracted out.[109] This results in the LPA paying consultants to check data collected and analysed by other consultants.

3.3.3 Issue: inadequate assessment can lead to negative environmental impacts

Stakeholders frequently raised concerns on the consequences of poor assessment on environmental outcomes. Other issues we identify, notably the lack of post-decision monitoring, evaluation and reporting (Chapter 4), may explain why this widely held view is not corroborated in the literature we have reviewed.

We can illustrate this point by reference to a case concerning the Environmental Impact Assessment (Forestry) (England and Wales) Regulations 1999. A private landowner was given permission to plant trees on heathland and blanket bog. This resulted in afforestation proceeding in unsuitable areas and resulted in habitat damage that had to be restored when the error was identified. The Forestry Commission stated 'we took our decision… based on the evidence we had at the time we reviewed the proposal'.[110]

We understand that the Forestry Commission has since improved its assessment processes, including through closer working with Natural England.

3.4 Recommendations

In our view the current system of data collection and verification is inefficient. We see a need and an opportunity for improvement. We therefore welcome the Government's proposals, reflected in the LURB, that begin to tackle data issues.[111]

However, to resolve these longstanding problems, government ambition must be high, and this must be sustained for a sufficient period to see real change. These are not problems that can be resolved within a year or two, but require long-term government attention. We set out below our recommendations to improve data accessibility to support effective and efficient decision-making for the environment.

107 Rouse (n 66) 24–25.

108 Meeting with PAS and the OEP (19 April 2023).

109 For example, see section 5.2.1.2 of this report.

110 Defra, 'Channel 4 on Planting on Peat Bogs' (2020) <www.deframedia.blog.gov.uk/2020/12/09/channel-4-on-planting-on-peat-bogs/> accessed 27 September 2023. These impacts are discussed in Defra, 'Post Implementation Review – Environmental Impact Assessment Regulations' (September 2023) <www.legislation.gov.uk/ukia/2023/116> accessed 28 September 2023.

111 LURB, pt 6.

3.4.1 To resolve data issues

RECOMMENDATION 1 – The Government should publish and implement a plan for resolving the shortfalls identified in this report, so that data used for environmental assessments (EIA, SEA and HRA; or any replacements such as EORs) is easy to find and available for reuse.

The plan should be evidence based with a clear path to enable environmental data to be reused. It should include:

(a) a summary of the decisions that need to be made with the data under each of the environmental assessment regimes,

(b) a summary of proposals for data standards,

(c) a description of how the data used to reach decisions will be made available on a publicly accessible database,

(d) details of which body will be responsible for submitting the data, and

(e) an explanation of how improved data accessibility will be adequately resourced.

Once published, the plan should be implemented as soon as reasonably possible.

The LURB aims to standardise planning data, making it accessible and comparable across the country. It also would provide for planning data to be made available to the public, and for LPAs and other relevant planning authorities to use approved planning data software. The Government has stated that it hopes these provisions will move the planning system from being document based to being data driven.[112] We welcome these aims.

Ahead of exercising any new powers for planning data regulations, the Government should consider carefully why long-standing data issues have not been resolved previously, engage with LPAs and other stakeholders, and identify and resource effective solutions accordingly.

The plan should cover the following points.

(a) Data suitability – is the data suitable for its intended use? When assessing environmental impacts, does the decision maker need to conclude that the environmental baseline will be no worse after the plan, programme or project than before, or should there be an environmental improvement that contributes to delivery of the EIP and legally binding targets? Can coherence be achieved between data collected for environmental assessments and data collected for other environmental requirements such as biodiversity net gain or local nature recovery strategies? For example, is there a better way to collect data so that it feeds into an improved understanding of the wider environment, moving to evaluation and improvement and away from reactive data collection for individual plans, programmes and projects? This could enable measures to protect and improve the environment to be targeted to the right place. An adaptive approach is needed to reflect future opportunities and improved technology.

112 Hansard HC Deb (12 July 2022) vol 718, col 409.

(b) Data pathway – many data issues are introduced at the point of survey preparation and collection (e.g. in the methods used or landowner and recorder permissions) and then cannot be resolved in retrospect. To ensure that any new data standards are fit for purpose, they should influence how proponents plan for, prepare and conduct surveys, how the data will be used in environmental assessments, and how the data can be shared post-decision for use by others.

(c) Public accessibility – the LURB makes provision for certain planning data to be made available to the public through planning data regulations. Making data publicly available is not the same as requiring that the data is accessible and able to be reused by others. Given that Government has stated it wants to make data *accessible*, it should determine how environmental data can be submitted to a publicly available database so that it is accessible for reuse. To achieve this, Government will need to resolve issues around intellectual property rights.

(d) Responsibilities – the LURB identifies LPAs and other relevant planning authorities as responsible for making specific planning data available to the public. With regards to the data used in environmental assessments, we can see this is a sensible approach. During planning processes, information may have been received from multiple sources and environmental assessments may have been updated and comprise multiple documents. The LPA or other relevant authority will, therefore, generally hold the most comprehensive information. The Government should determine whether all relevant planning authorities have access to adequate data software that facilitates the analysis and sharing of data. The Government's plan should consider the practicalities and timescales required to enable relevant planning authorities to meet these duties.

(e) Resourcing – It appears to be widely accepted that relevant planning authorities are under resourced and are under increasing pressure to deliver new duties.[113] The plan should therefore set out how LPAs and other relevant planning authorities will be adequately resourced to improve data accessibility.

Government departments, such as DLUHC, Defra and the Department for Energy Security and Net Zero will need to work together to deliver a comprehensive plan. The Government should ensure the plan encompasses issues with data obtained in support of applications for planning permission, NSIPs, and other relevant consents.

3.4.2 To ensure data standards cover the complete data pathway

RECOMMENDATION 2 – The Government should publish environmental data standards that cover at least plan-, programme- and project-level data and set out principles such as those embodied in Q-FAIR (findable, accessible, interoperable, reusable and of the right quality that is fit for purpose).

The LURB provides for Government to make regulations to establish 'approved data standards' and define which 'planning data' will be subject to those standards. Two examples of where data standards would be beneficial are provided in the Bill's explanatory notes: 1) an LPA creating its local plan and 2) a government department seeking to identify national conservation areas from inconsistent terminology.[114]

113 See Chapter 5 of this report.

114 LURB, explanatory notes relating to HL Bill 84.

Comprehensive and up-to-date data are usually collected for each planning application that requires an environmental assessment (EIA or HRA). However, data availability at a plan or programme level is currently limited.[115]

If the Government is to meet its aim for LURB to be 'the foundation for changing the way planning authorities hold and present their planning information',[116] the scope of the proposed data planning regulations should include plan, programme *and* project-level data. A comprehensive scope will cover the complete data pathway, from data collection to reuse, enabling the three regimes to work together.

Data standards will help resolve the issue of data being repeatedly checked by different participants within the environmental assessment regimes, and of these participants disagreeing on the required data standards. We recognise that the various participants will still wish to verify data submitted by others. However, with comprehensive and effective data standards in place, this verification should focus on the interpretation of the data and not, for example, whether data is sufficiently recent and in the correct format. This would make the process more efficient.

The FAIR data principles were developed in response to 'an urgent need to improve the infrastructure supporting the reuse of…data'. They act as a guide, ensuring choices made through the data pathway deliver data that is Findable, Accessible, Interoperable and Reusable. This enables discovery and reuse of data by others.[117]

The UK Geospatial Strategy 2030 states that it will embed FAIR principles into data improvement programmes[118] and the Commission added 'Q' for 'quality' to the principles to ensure that data is of the appropriate quality and fit for purpose.[119]

Given that data used in environmental assessments is geospatial data, we recommend the use of the Q-FAIR principles.

EOR is described as a 'direct link between the government's Environmental Improvement Plan and planning decisions'.[120]

Coherence across regimes with national environmental objectives and targets (such as the EIP, the Environment Act 2021 targets and carbon budgets) is essential to ensure a co-ordinated and comprehensive approach to delivering the Government's environmental aims. Data are the cornerstone of such an approach, reflected in Defra's Outcome Indicator Framework.[121] Government should therefore consider whether the data standards created for environmental data used in the assessment regimes should align with the standards used for the EIP. If so, this will require a joined-up approach across government departments to ensure coherence in the collection and analysis of environmental data.

115 WSP (n 15) 63.

116 Hansard HC Deb (12 July 2022) vol 718, col 409.

117 Mark D Wilkinson and others, 'The FAIR Guiding Principles for Scientific Data Management and Stewardship' (2016) 3 Scientific Data 160018.

118 Department for Science, Innovation and Technology and Geospatial Commission, 'UK Geospatial Strategy 2030' <www.gov.uk/government/publications/uk-geospatial-strategy-2030/uk-geospatial-strategy-2030> accessed 26 September 2023.

119 Geospatial Commission, '"Byte-Ing Back Better" – Introducing a Q-FAIR Approach to Geospatial Data Improvement' (25 June 2021) <www.geospatialcommission.blog.gov.uk/2021/06/25/byte-ing-back-better-introducing-a-q-fair-approach-to-geospatial-data-improvement/> accessed 27 September 2023.

120 DLUHC, 'Environmental Outcomes Report' (n 11).

121 Defra, 'Outcome Indicator Framework for the 25 Year Environment Plan' (2023) <https://oifdata.defra.gov.uk/> accessed 24 August 2023.

The Government should explore options to ensure that the proposed data standards apply to data obtained during the course of both applications for planning permission, NSIPs, and other relevant consents.

3.4.3 To enable better spatial planning

RECOMMENDATION 3 – The Government should create a map-based portal (similar to MAGIC) that signposts users to data held across existing national and regional databases.

Spatial planning is key to delivering sound planning decisions as well as Government's welcome new measures to improve the natural environment such as biodiversity net gain and local nature recovery strategies. LPAs and the Planning Inspectorate need to understand how these measures will work together to help deliver the EIP goals and Government's legally binding targets. This relies on good geospatial data.

Numerous national databases of environmental information exist, for example the National Biodiversity Network Gateway, the Marine and Environmental Data and Information Network (MEDIN) portal[122] and the national network of regional coastal monitoring programmes.[123] MAGIC is an interactive map that has been operational since 2002 and holds public sector national datasets.[124] It also acts as a portal to other datasets that are held by organisations and may be available if requested.

Data are also held at local levels, such as in local environmental record centres. New data are collected all the time, but our research has found that it is not consistently submitted to any databases. This results in a complex system whereby, at the start of the environmental assessment process, data has to be collected from multiple sources.

We have looked at this issue in other places. The Taskforce on Nature-related Financial Disclosures has recently published the 'Findings of a high-level scoping study exploring the case for a global nature-related public data facility'.[125] The study found many of the same challenges we identified in our research across G20 members. One of the organisations involved in the research stated '[w]e are drowning in nature data but starved of insights'.

We note rapid growth in the availability and accessibility of spatial datasets for the environment in Ireland. This is attributed to the implementation of the European Infrastructure for Spatial Information in the European Community Directive, but also to government initiatives in Ireland to tackle knowledge and data gaps.[126] This Irish experience is informative.

In response to the lack of relevant skills in Ireland to understand and interpret the growing body of data, University College Dublin developed an Environmental Sensitivity Mapping webtool. The tool enables the user to visualise over 130 datasets in a geographical

122 MEDIN, 'MEDIN – Marine Environmental Data and Information Network' <www.medin.org.uk/> accessed 26 September 2023.

123 NNRCMP, 'National Coastal Monitoring – Map Viewer & Data Catalogue' (*National Network of Regional Coastal Monitoring Programmes*, 2023) <www.coastalmonitoring.org/cco/> accessed 26 September 2023.

124 MAGIC, 'MAGIC' <https://magic.defra.gov.uk/> accessed 28 September 2023.

125 Taskforce on Nature-related Financial Disclosures, 'TNFD Publishes Scoping Study Exploring Global Nature-Related Public Data Facility' (11 August 2023) <www.tnfd.global/tnfd-publishes-scoping-study-data-facility/> accessed 26 September 2023.

126 Ainhoa González, 'Environmental Sensitivity Mapping: Supporting Evidence-Based Strategic Environmental Assessment and Spatial Planning' (2022) 12 Impact Assessment Outlook Journal 22 22-24.

format using a simple colour-coded key from green (very low sensitivity) to red (extreme sensitivity).[127] Its purpose is as a decision support tool for SEA and other planning processes in Ireland, ensuring the environment is considered as plans are prepared.

The Government should develop an online map-based portal to bring together data in existing databases. This would enable users to find all environmental data for a particular location, including across terrestrial and marine environments. This should direct development to the most appropriate places, identify areas of environmental importance, and areas where there are opportunities for improved environmental outcomes. This has direct links to biodiversity net gain and local nature recovery strategies. It would also enable data gaps to be identified.

Given that this is a complex area, we suggest a pilot, building the portal initially to cover biodiversity data, and testing whether separate databases can be integrated. The portal would need to be adaptive and designed for a future where Artificial Intelligence or other technological advances may be able to play a greater role. The lessons learnt from this pilot should be used to expand the portal to cover other environmental data used in environmental assessments.

As we state above, data accessibility issues require long term government attention, and sufficient investment. The Humber 'in-combination database' was mentioned as an innovative solution in the Nature Recovery Green Paper consultation.[128] Whilst the database is still valuable for environmental assessments, the Humber Nature Partnership has found it difficult to get all public authorities to regularly submit data to the database, and to keep it up to date due to the ongoing resourcing requirements.[129]

Once the portal is operational, its use and feedback should inform its ongoing development. Together with implementing our other recommendations to improve data accessibility, the Government should consider how the portal could be used to provide a better understanding of the environment.

127 ESM, 'Environmental Sensitivity Mapping (ESM) Webtool Bringing Environmental Assessment to Your Fingertips' <www.enviromap.ie/> accessed 26 September 2023.

128 Defra, 'Habitats Regulations Assessment Review: Working Group Summary of Findings' (n 17).

129 Email from the Humber Nature Partnership to the OEP (8 September 2023).

4. Post-decision monitoring, evaluation and reporting

4. Post-decision monitoring, evaluation and reporting

This chapter considers post-decision monitoring by plan, programme and project proponents, and subsequent evaluation by enforcing authorities and others. We have found these activities to be lacking in respect of all three environmental assessment regimes.

In our view there should be more emphasis on monitoring, evaluation and public reporting following the adoption of a plan or programme, the granting of planning permission or making a development consent order. Currently proponents and decision-makers spend significant time and effort gathering and analysing evidence for environmental assessments, but comparatively little time after the decision ensuring effective delivery of mitigation measures. There is no requirement for decision makers to report whether mitigation or compensatory measures met their objectives.

Stakeholders also believe there should be more emphasis on post-decision activity.[130] Similarly, academic research has found insufficient monitoring of EIA and SEA outcomes a persistent challenge.[131] This view is also supported by our practitioners survey in respect of HRA. The top recommendations from this survey on improvements to HRA were 'stronger post-consent monitoring, including provision for effective enforcement and remedy' and 'better monitoring and feedback of actual impacts to improve future [assessments]'.[132]

4.1 The challenge

An important aspect of both EIA and SEA is the avoidance and mitigation of environmental impacts.[133] It is also a requirement of HRA that the decision-maker can ascertain that the plan or project would not have an adverse effect on the integrity of the European site(s).[134] This often relies upon mitigation measures. In relation to planning, these measures can be secured through planning conditions and planning obligations (such as Section 106 agreements).[135]

Achieving this environmental protection in practice is, however, dependent on adequate post-decision monitoring, evaluation and enforcement of such conditions and obligations. Research supports our finding that, whilst the law makes provision for these protective measures, their implementation is variable. This affects all three regimes.[136]

130 For example, outputs from a workshop in 2021 of EIA, SEA and HRA practitioners to discuss how these regimes could be improved. Evidence provided by Town Legal to the OEP (24 December 2022).

131 Thomas B Fischer, 'Simplification and Potential Replacement of EA in the UK – Is It Fit for Purpose?' (2023) 41 Impact Assessment and Project Appraisal 233.

132 WSP (n 15) 51, 78.

133 Explanatory memorandum to the EIA Regulations, para 7.1. The EIA Directive also states at Article 5(1)(c) that information provided by the developer shall include 'a description of the features of the project and/or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment' and at Article 5(1)d) 'a description of the reasonable alternatives… taking into account the effects of the project on the environment'. For SEA, Article 1 states that the objective of the Directive is 'to provide a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development'.

134 See section 2.3 of this report.

135 A section 106 agreement is an agreement establishing planning obligations under this section of the Town and Country Planning Act 1990. It can be entered into to secure mitigation of the impacts of a development proposal.

136 For examples, see WSP (n 15) 50; Glasson (n 62); Jha-Thakur and Fischer (n 32); Robert Jones and Thomas Fischer, 'EIA Follow-Up in the UK — A 2015 Update' (2016) 18 Journal of Environmental Assessment Policy and Management 1.

4.2 Why is it an issue?

Mitigation measures, and compensatory measures (HRA), are of little or no value unless they are successfully implemented. This relies upon monitoring and evaluation.

An environmental assessment will often state that construction or operational impacts on sensitive receptors will be reduced to acceptable levels through mitigation measures – for example, that noise levels will be reduced by acoustic screens or piling shrouds. For HRA, mitigation or compensatory measures may take the form of newly created habitat to offset losses resulting from the plan or project.

The proponent is generally responsible for securing the implementation of these measures. They may also need to monitor the measures to demonstrate that they do actually deliver the reductions in impacts relied upon in the environmental assessment process.

In the context of town and country planning, through planning conditions or other obligations, the proponent usually reports to the LPA on the success, or otherwise, of these measures. The LPA and other interested parties, such as statutory consultees, should evaluate the results of the monitoring to validate the proponent's conclusions. If remedial measures are required, the LPA and statutory consultees should work with the proponent so that the proponent implements these in a timely manner.

In 1999, a review of the first 10 years of the EIA regime in the UK identified eight weaknesses, including a lack of monitoring and auditing.[137] This review refers to the dangers of a short-sighted 'build it and forget it' approach, noting that EIA should not purely be an auxiliary to obtaining planning permission, but should be a means to delivering good environmental management over the lifetime of a project.[138] We agree. At least five other papers dating from 2000 to 2016 have continued to identify the need to improve post-decision monitoring.[139] The issue is known but unresolved.

A review of non-technical summaries of 50 developments dating from 2005 to 2011 found that, whilst many of the developers had committed to environmental management plans for the construction phase, only a third had made any provision for post-consent follow-up.[140] This review did not cover whether the proposed post-consent work actually took place. However, the authors note that: '[r]equirement through legislation is the simplest method for ensuring uptake, in particular if adequate enforcement measures are taken, too'.[141] A report by PAS confirms that 'there is a lack of monitoring, with many proposed mitigation measures either not implemented as proposed or ineffective'.[142]

The role of monitoring and remedial action is recognised in legislation as important. In 2017, amendments were made to the EIA Regulations and the Infrastructure Planning (Environmental Impact Assessment) Regulations to include the requirement that decision-makers consider whether to impose monitoring measures, along with remedial action, when granting consent.[143] Alongside its consultation on EOR, DLUHC published its Post-

137 Glasson (n 62).
138 ibid 368.
139 Jha-Thakur and Fischer (n 32).
140 Follow-up is defined as monitoring, auditing and evaluation. For further detail, see Jones and Fischer (n 136) 2–3.
141 ibid 15.
142 Rouse (n 66) 9.
143 EIA regulations, reg 26; Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, reg 21.

implementation Review reports of these regulations.[144] The policy objective to introduce monitoring requirements is mentioned in both reviews. Regrettably, however, its impact is not evaluated.

Our own research has found that, despite this new legislative provision, monitoring conditions are still often absent from consents or else are inadequate.[145] Enforcement of breaches is rare and is normally triggered by complaints from members of the public rather than through any active monitoring or auditing by LPAs or regulators.[146] PAS confirmed this in its report, stating that monitoring is limited to 'reactionary monitoring when complaints are received'.[147]

In relation to EIA, Thomas Fischer, (one of the authors of the 2016 paper on follow-up discussed above, see note 136) stated in his response to our survey that 'enhanced monitoring/auditing is required', suggesting that this issue still exists. In response to Defra's survey for its Post-implementation Review report on certain EIA regulations, the Institute of Environmental Management and Assessment (IEMA) stated that 'the greatest failing of the current system has been to secure mitigations, monitor impacts and implement enforcement'.[148] The National Infrastructure Commission's recent report also notes that monitoring and enforcement after scheme completion are limited.[149]

Town Legal's response to the Government's consultation on EORs highlights that monitoring the outcomes associated with local plan Sustainability Appraisals (another form of environmental assessment) was successful when this was a legal requirement under the Planning and Compulsory Purchase Act 2004. However, when this requirement was made less onerous in 2011, some LPAs stopped undertaking this monitoring.[150]

In 2016, the European Commission found it was unclear whether EU member states undertook monitoring systematically or took remedial action when unforeseen adverse effects occurred.[151] Its 2019 SEA REFIT report concluded that one of two key factors which reduce the effectiveness of SEA is the inadequate monitoring arrangements.[152] This prevents SEA from meeting its objectives, as the process 'seems to stop with the adoption of the plan'.[153]

144 DLUHC, 'Post Implementation Review' (n 68); DLUHC, 'Post Implementation Review: Infrastructure Planning (Environmental Impact Assessment) Regulations 2017' (2022) <www.gov.uk/government/consultations/environmental-outcomes-reports-a-new-approach-to-environmental-assessment/post-implementation-review-infrastructure-planning-environmental-impact-assessment-regulations-2017> accessed 26 September 2023.

145 WSP (n 15) 51.

146 ibid 52.

147 Rouse (n 66) 21.

148 IEMA, 'IEMA Response to: Defra's Environmental Impact Assessment (EIA) Regulations: Post Implementation Review Impact Evaluation Survey' (2022) <www.iema.net/download-document/237083> accessed 28 July 2023.

149 NIC (n 101).

150 Town Legal response to DLUHC's consultation on Environmental Outcome Reports: a new approach to environmental assessment. The response brings together the views of 38 practitioners from a series of workshops. Evidence provided by Town Legal to the OEP (09 June 2023).

151 Alicia McNeill and others, 'Study Concerning the Preparation of the Report on the Application and Effectiveness of the SEA Directive (Directive 2001/42/EC)' (European Commission, Directorate-General for Environment 2016) 97–98 <op.europa.eu/en/publication-detail/-/publication/ab9839c5-65be-42e2-a4a6-d8a27bb5dd97/language-en/format-PDF/source-260349339> accessed 25 September 2023.

152 European Commission (n 78) 28, 65. This evaluation was undertaken between December 2017 and February 2019 and included input from practitioners and academics in the UK.

153 ibid 27.

4.2.1 Why does the issue exist?

Our research has identified three main barriers to post-decision monitoring and evaluation which combine to make this aspect of environmental assessment a challenging one. They are: a shortage of skills and expertise, costs, and a consequent lack of enforcement. We discuss each below.

4.2.1.1 There is a shortage of skills and expertise

Monitoring is only valuable if it has a clear purpose – for example, to determine whether a mitigation measure is performing as required. If it is not, remedial measures will need to be designed, agreed and implemented. This means that effective post-decision monitoring, evaluation and reporting relies upon the skills and resources of decision-makers responsible for imposing relevant conditions, and the authorities responsible for receiving and evaluating the monitoring information.

As we discuss in Chapter 5, there is a known lack of skills and expertise in the authorities responsible for the implementation of environmental assessment regimes. In its response to the House of Lords Built Environment Committee, Natural England states that 'the sector lacks sufficient capacity and specialist environmental skills, particularly for ecology, landscape and soils'. In common with other government bodies, Natural England has had difficulty recruiting and retaining suitably qualified and experienced staff. It also believes that the lack of ecological capacity and capability in LPAs is a major barrier to effective implementation of the Habitats Regulations. It reports that this leads to an 'over-reliance on [Natural England's] advice and/or developer information, which can lead to over-precautionary decision-making'.[154]

Whilst Natural England's evidence refers specifically to HRA, our research has found that a lack of skills and expertise in public bodies also impacts EIA and SEA.[155] The Association of Local Government Ecologists (ALGE) found that 53% of survey respondents reported that 'their LPA has limited access to an ecologist for planning work (half or less full-time employee equivalent)', which could impact all three regimes.[156] PAS highlights the key barriers to LPAs undertaking their role in post-decision monitoring and evaluation as a 'lack of resources, officer time and expertise'.[157]

AECoW told us that a lack of guidance exacerbates this problem because LPAs are unable to determine what good post-decision monitoring should comprise. This leads to significant inconsistency between LPAs.[158] Natural England shares this concern, stating that 'post-consent requirements are often unclear and that this may stem from a lack of expertise in the bodies that create the obligations'.[159] This can undermine developers' confidence in post-decision requirements.

These issues risk that, even where monitoring is carried out post-decision, the public bodies that receive the information may be unable to identify that problems have arisen and require attention, resulting in environmental harm.

154 In response to Question 9, Natural England, 'Written Evidence to the Built Environment Committee on the Impact of Environmental Regulations on Development (IER0007)' (2023) <committees.parliament.uk/work/7328/the-impact-of-environmental-regulations-on-development/publications/written-evidence/?page=2> accessed 25 September 2023.

155 See, for example, WSP (n 15) 49–50, 68.

156 ALGE reporting survey results to WSP, ibid 68.

157 Rouse (n 66) 21–23.

158 Meeting with AECoW and the OEP (18 July 2023).

159 Meeting with Natural England and the OEP (2 August 2023).

4.2.1.2 Costs

This barrier concerns the costs to both proponents who undertake and pay for the post-decision monitoring, and to LPAs and other relevant public authorities who should oversee the monitoring and review its outputs.

Monitoring operational impacts or mitigation and compensatory measures can be a long-term endeavour and some types of development, such as housing, are not easily compatible with ongoing developer commitments. Cost is seen as a major barrier.[160]

Defra and DLUHC's joint response to the House of Lords Built Environment Committee inquiry into the impact of environmental regulations on development states that 'the lack of resources in the planning system is an industry-wide recognised and frequently raised issue'.[161] They note that the funding shortfall for the planning application service is estimated to be around £225 million annually. We have no reason to believe LPAs are better resourced for post-decision activities. Indeed, PAS comments 'LPAs have an aspiration to robustly monitor environmental effects but are currently unable to financially or time resource it'.[162]

Proponents may, therefore, be unwilling to invest in lengthy post-decision monitoring if they are aware that the authorities responsible for monitoring and enforcement lack the skills and the resources to review the information they submit.

The issue is exacerbated by a lack of digital technology in the planning system. The lack of a searchable, publicly accessible database, for example, makes it difficult to share the results of post-decision monitoring. This means that the opportunity for information and lessons learnt to feed into future environmental assessments is lost and the value of the activity is not clear to proponents.

4.2.1.3 Lack of enforcement

In general, levels of non-compliance with regulatory requirements can be viewed as a function of the probability and severity of punishment, with an 'optimal' level of enforcement activity existing to combat non-compliance while minimising the socioeconomic costs.[163]

Yet, in relation to planning conditions it is not at all clear that an optimal level of enforcement by authorities takes place.

The RTPI commented '[p]lanning enforcement sits at the heart of the planning system. Without it, planning legislation is meaningless'. 80% of respondents to its survey on enforcement reported there were insufficient staff to carry out the workload. 89% of the LPAs represented by the survey reported high levels of backlogs, leading the RTPI to describe enforcement as 'reactive'. Respondents stated they were 'often unable to monitor compliance', relying on third party complaints to identify issues.[164] Government figures

160 Jones and Fischer (n 136) 13-14.

161 In response to Question 9, HM Government (n 7).

162 We assume this refers to evaluation of monitoring information provided by the proponent, see Rouse (n 66) 22.

163 Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 169.

164 RTPI, 'Planning Enforcement Resourcing: The Scale and Nature of Resourcing Challenges Faced by Enforcement Teams' (RTPI Research Paper) 4, 13–14, 17 <www.rtpi.org.uk/research/2022/november/planning-enforcement-resourcing/> accessed 25 September 2023.

show that in the financial year to March 2023, 45% of LPAs did not issue any breach of condition notices.[165]

Proponents have less incentive to comply with monitoring requirements if those planning conditions and other obligations are rarely enforced. Insufficient resources and expertise can mean that LPAs lack the finances, time and confidence to enforce failings, and the implementation of post-consent monitoring measures.[166] Such monitoring can then depend on the governance mechanisms – and integrity – of individual developers.[167]

4.3 What is at stake?

There are several different types of monitoring which we have summarised in Figure 8 below.[168]

The first type is **compliance monitoring**. This is normally secured through a planning condition or other restriction on an authorisation. Compliance is monitored by the decision-maker to ensure that the measures necessary to avoid, mitigate or compensate environmental impacts are taken. A failure to comply with these measures can lead to enforcement.

The second type is **validation monitoring**. This is designed to verify the predictions made in an assessment. It can be valuable in providing an improved understanding of the potential effects of proposals and can be used in the assessment of subsequent plans, programmes and projects.

The third type is **effectiveness monitoring**. This determines whether the predicted impacts on the environment are avoided, mitigated or compensated in the way required in the permission granted. For HRA, it is expected that remedial measures will be triggered when required.

Figure 8. The different types of post-decision monitoring

The environmental assessment regimes cannot ensure good environmental outcomes without adequate monitoring.

4.3.1 Issue: Environmental harm may not be offset as predicted in the assessment and as required by the permission granted

Once environmental baseline data has been gathered, much of the environmental assessment process is about making predictions. The purpose of these predictions is to identify and assess the significance of identified change to the environmental baseline if a

165 Note that this data relates to all breaches of planning condition, not just to proposals that required an environmental assessment. See DLUHC, 'Historical Live Tables: January to March 2023 (Table P130)' (2023) <www.gov.uk/government/statistical-data-sets/historical-and-discontinued-planning-live-tables> accessed 26 September 2023.

166 Survey response from Josh Fothergill to the OEP (10 December 2022).

167 WSP (n 15) 50.

168 We have compiled the different types of monitoring from David Tyldesley and Caroline Chapman, 'The Habitats Regulations Assessment Handbook' (2013) <www.dtapublications.co.uk/handbook/> accessed 28 September 2023; and The British Standards Institute, *BS 42020 Biodiversity – Code of Practice for Planning and Development* (2013).

proposal is realised, in comparison to the situation without that proposal.[169] For example, avian collision risk models are used to predict the impact of windfarms on bird populations.

Environmental assessments often appear more certain in their predictions than they should.[170] A comprehensive post-consent audit was undertaken of predictions made in environmental statements for 28 developments across the UK. From the 865 predictions made, only 488 (56%) were auditable post-consent. Of these, 239 (49%) were determined to be accurate, 144 (30%) were nearly accurate and the remaining 105 (21%) were inaccurate. The authors of this research found that 'some significant impacts were "hidden" behind omissions about predicted impacts in the [environmental statement],' and 'some impacts that were deemed to be significant in reality were … inaccurately predicted in the [environmental statement]'.[171] A later study in Norway found similar results. When predictions were assessed after completion of the developments, only 42% were found to have been accurate. In that study, the authors noted 'a lack of both communication of such uncertainty and transparency in the prediction processes, especially in documents that most often reach decision-makers, the public and other actors'. [172]

AECoW has similarly noted that, in its experience, developments generally have a greater impact on the environment during construction than predicted and this is rarely assessed or shared with stakeholders.[173] Climate change will make predicting the impacts of development, and effectiveness of measures to offset those impacts, even more difficult.

We have concerns about the independence of monitoring. Developers normally 'mark their own homework' by employing consultants to provide information to the LPA to demonstrate compliance and to identify whether any remedial measures are required. LPAs told PAS that 'monitoring cannot rely on developers self reporting'.[174] WSP also questioned the adequacy of self-reporting, stating 'the implementation and monitoring of mitigations are routinely left to developers and contractors with little (or no) oversight from [...] regulators[...] The end result is that many mitigation measures are not carried out or are deficient in their implementation.'[175] AECoW confirmed this, stating 'the status quo, whereby [consultants] assess, and report on the compliance of their employers (frequently to their employer) encourages poor monitoring and significant under-reporting of environmental harm'.[176]

EIA and SEA do not mandate particular outcomes. For HRA, however, an environmentally protective outcome is a legal requirement (subject to narrow exceptions). The decision-making authority may secure such an outcome, relying on mitigation when granting consent. Where, exceptionally, an exemption is relied on to permit adverse effects on the integrity of a European site, compensatory measures must be provided.

Gov.uk guidance to decision-making authorities states 'you must be sure that the mitigation will be effective'. To demonstrate this, the decision-maker will need to show 'how the measures would be… monitored', and 'what changes [are necessary] if monitoring shows

169 John Glasson and Riki Therivel, *Introduction To Environmental Impact Assessment* (5th edn, Routledge 2019) 114–115.Routledge 2019

170 ibid 122.

171 Christopher Wood, Ben Dipper and Carys Jones, 'Auditing the Assessment of the Environmental Impacts of Planning Projects' (2000) 43 Journal of Environmental Planning and Management 38–39, 42.

172 Aud Tenney, Jens Kværner and Karl Idar Gjerstad, 'Uncertainty in Environmental Impact Assessment Predictions: The Need for Better Communication and More Transparency' (2006) 24 Impact Assessment and Project Appraisal 48, 55.

173 Meeting with AECoW and the OEP (18 July 2023).

174 Rouse (n 66) 22.

175 WSP (n 15) 51.

176 Meeting with AECoW and the OEP (18 July 2023).

the measures may fail'. In relation to compensatory measures, the guidance states 'all the necessary legal, technical, financial and monitoring arrangements' must be put in place.[177]

Our research has shown that post-decision monitoring may not occur, and even where it does, the authorities that receive the information may not have the resource or expertise to critically review it. This means that effectiveness monitoring is not regularly happening.

With regards to compensatory measures, there are no transparent requirements or mechanisms for public bodies to report to the Secretary of State on the success or otherwise of these measures.

Given the uncertainty we have found in predicting environmental impacts, there is a high risk that environmental harm is not being offset as anticipated. This may affect the Government's ability to meet its legally binding targets to significantly improve the natural environment and, in particular, has significant potential implications for protected sites given their already poor condition.[178]

4.3.2 Issue: Monitoring results are not used to improve future assessments

As evidenced in the studies mentioned in section 4.2, monitoring is 'essential for successful environmental impact auditing'.[179] The studies showed that predictions made during environmental assessment processes were often inaccurate. In the UK study, 44% of predictions could not be audited at all. PAS found that LPAs resort 'to an aspirational approach to the setting of indicators and monitoring in SA/SEA, when actually these cannot in practice be monitored'.[180]

The purpose of validation monitoring is to determine whether these predictions were accurate and to confirm that the expected outcomes have been achieved. Without this type of monitoring, the opportunity is missed to 'learn from past experiences; highlight the types and categories of impact that tend to be predicted less accurately than others; stimulate gradual improvement in prediction techniques … [and] provide baseline information for future [assessments]'.[181] Environmental assessments should serve as an adaptive process, where the lessons learnt are fed back into future projects and more widely.[182] Associated British Ports stated that 'better use should be made of [validation] monitoring…to ensure lessons are learnt and future consent obligations are proportionate'.[183]

Given the dynamic nature of the environment, it is often difficult to establish clear cause and effect relationships. However, 'it is through the use of monitoring that learning can possibly occur. Monitoring at one site can aid in predictive modelling for future effects elsewhere, leading to more accurate impact predictions in the future, and potentially reducing associated costs'.[184]

177 Defra and others, 'Guidance: Habitats Regulations Assessments: Protecting a European Site' (2021) <www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site> accessed 26 September 2023.

178 Assessments of the condition of Sites of Special Scientific Interest (SSSIs) reveal that only 38% of the area of SSSIs was in favourable condition in 2022. See, Defra, '25 Year Environment Plan Annual Progress Report: April 2022 to March 2023' (2023) 36 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1176448/25yep-annual-progress-report-2023.pdf> accessed 26 September 2023.

179 Glasson and Therivel (n 169) 173.

180 Rouse (n 66) 9.

181 Tenney, Kværner and Gjerstad (n 172) 53.

182 Glasson (n 62) 372.

183 Survey response from Associated British Ports to the OEP (10 January 2023).

184 Jones and Fischer (n 136) 2.

The National Infrastructure Commission highlights the issue of developers reinventing (and testing) the wheel when designing mitigation. '[A] great deal of care is rightly taken in designing and agreeing mitigations, but this work is duplicated by schemes with very similar impacts being developed in close proximity at the same time. These schemes can then experience the same delays when the appropriateness of mitigations is individually tested at examination or decision'.[185]

National Grid has calculated that at least 17 new energy transmission consents are needed over the next four years to support the Government's offshore wind energy ambitions, as set out in its British Energy Security Strategy.[186] This is more than a fourfold increase in energy transmission consents from historic rates. Government's consultation on EOR states its intention to consider adaptive management as a mitigation measure. Adaptive management 'allows mitigation to be adjusted in response to greater certainty on effects following implementation. We are exploring how adaptive management could help manage uncertainty in assessment of the effects of development on the environment.'[187]

Given the scale of just one type of development – energy transmission – predicted to occur over the next few years, alongside the Government's desire to trial a new approach to mitigation, verification monitoring should be undertaken more frequently, and the results shared.

4.4 Recommendations

Our practitioners survey found that the top recommendations for change to EIA and HRA were 'stronger post-consent monitoring, including provision for effective enforcement and remedy' and 'better monitoring and feedback of actual impacts to improve future [assessments]'.[188] We concur, and cover these aspects, along with the need for further guidance and a national database, in our recommendations.

4.4.1 To ensure evaluation is undertaken and regularly reported

RECOMMENDATION 4 – The Government should take action to make post-decision monitoring evaluations nationally accessible and ensure local planning authorities provide evaluation reports annually.

Post-decision evaluation does not always occur when it should and there is no requirement for planning authorities to report on the environmental outcomes that have been delivered. Further evidence is found in two reviews of HRA compensatory measures. The reports highlight the difficulties in finding relevant information, stating '[t]he reporting of the environmental monitoring for NSIPs is sent to the local authorities of the respective project area. The objectives and requirements of compensatory measures and the monitoring of the cases reviewed were difficult to find' and '[t]he primary barrier identified in this study is a lack of information'.[189] The same was found in the other review, stating 'we identified weaknesses in the ways data had been stored and the degree to which

185 NIC (n 101) 13.
186 Ofgem, 'Decision on Accelerating Onshore Electricity Transmission Investment' Appendix 1.
187 DLUHC, 'Environmental Outcomes Report' (n 11) para 7.8.
188 WSP (n 15) Figures 6.3 and 8.3.
189 Sylvia Blake and others, *Offshore Wind Farms Enabling Actions: A Review of the Use of Compensatory Measures and Applicability to UK Offshore Developments* (2020) 31, 40.

available information was retrievable. In several cases the documentation was substantially incomplete, making the process of assessment very difficult'.[190]

Agreeing appropriate mitigation and compensatory measures can be complex, in some cases taking several years. Post-decision monitoring can continue for at least ten years.[191] Despite the significant time and resources expended by proponents, the LPA and statutory consultees, there is no requirement for the LPA to report on whether these measures were successful in delivering their objectives. Not only does this have significant risks for the environment, it also misses opportunities for others to learn from successes and failures, and lacks transparency on the actual environmental outcomes delivered by plans, programmes and projects.

The LURB proposes a new approach to environmental assessment, requiring reporting against environmental outcomes. Government's consultation states '[w]e will need to be able to measure how a development contributes to the delivery of an outcome'. Government is also exploring greater use of adaptive management to help manage uncertainty in environmental assessments, allowing 'mitigation to be adjusted in response to greater certainty on effects following implementation'.[192]

Our research demonstrates that, without changes to the current system of monitoring, evaluation and reporting, this will present significant challenges for LPAs and other decision makers.

This is why we recommend that Government requires LPAs to regularly produce post-decision evaluation reports and that these should be made nationally accessible. This could be via a national database that operates with the data portal proposed in recommendation 3. The evaluation reports should demonstrate that the predicted environmental outcomes have been delivered as well as any remedial measures that have been implemented.

Interestingly, we note a similar system exists in Hong Kong. Environmental permits for major developments have a standard requirement that monitoring and auditing results need to be uploaded onto a dedicated website for public access. The website enables the public to compare EIA predictions with results, have real time monitoring and availability of data, and make comments and complaints about projects.[193]

The Government's consultation on implementing plan-making reforms refers to the power in the LURB, set out in schedule 8, that will allow the Secretary of State to prescribe how information on monitoring of local plan policies and environmental outcomes will be made public.[194] This should bring a more disciplined and consistent approach to reporting which is welcomed. The relevant parts of these reports should be included in the LPA's evaluation reports.

Additionally, the Government should exercise the powers proposed in the LURB, should they come into force, to make regulations requiring LPAs to publish post-decision evaluation reports obtained during the course of planning applications that are not caught by the

190 Roger Morris and others, *Review of the Effectiveness of Natura 2000 Sites Compensation Measures in England* (2016) para. 5.11.

191 Blake and others (n 189).

192 DLUHC, 'Environmental Outcomes Report' (n 11) para 7.8.

193 LUC (n 16) app D 101.

194 DLUHC, 'Levelling-up and Regeneration Bill: Consultation on Implementation of Plan-Making Reforms' (2023) <www.gov.uk/government/consultations/plan-making-reforms-consultation-on-implementation/levelling-up-and-regeneration-bill-consultation-on-implementation-of-plan-making-reforms> accessed 26 September 2023 now sch 8 in HL Bill 173.

schedule 8 powers referred to above. These reports, as well as evaluation reports for NSIPs, should also be included in the LPAs' evaluation reports.

4.4.2 To improve monitoring, evaluation and reporting

RECOMMENDATION 5 – The Government should publish guidance to help resolve the shortfalls identified in this report in the monitoring, evaluation and reporting of post-decision activity

The guidance should cover:

(a) roles and responsibilities for undertaking post-decision monitoring, evaluation and reporting

(b) the circumstances under which monitoring is required

(c) model planning conditions covering the different types of monitoring

(d) data standards the monitoring data should meet

(e) how the results of monitoring should be evaluated and reported upon, and

(f) actions required if remedial measures are needed.

Guidance should improve the consistency and quality of planning conditions, ensuring that purposeful monitoring is undertaken by proponents. Data standards and principles, such as those embodied in Q-FAIR, are needed so that data resulting from the monitoring is comparable and available for reuse.

It is important that the different types of monitoring are understood, and it is clear when each type is required to be secured via planning condition.

Validation monitoring is used to inform future assessments. It can be difficult for LPAs to determine when validation monitoring is *necessary* and, therefore, satisfies the legal criteria for planning obligations, reflected in the NPPF.[195] Guidance could help clarify this point.

For mitigation and compensatory measures required for HRA, effectiveness monitoring, evaluation and reporting should be standard. The guidance should clearly set out the requirements for the evaluation reports, as well as the actions required for remedial measures and who is responsible for each action.

The guidance could be implemented through an amendment to the NPPF – and, should the LURB come into force, the National Development Management Policies document – to require LPAs (and other decision-makers) to impose planning conditions securing compliance with the guidance. This would resolve the issue of when LPAs and other relevant planning authorities can and should ask developers to carry out validation monitoring.

A similar approach could be secured for NSIPs by amendments to the National Policy Statements, and could be explored in other consenting regimes.

195 DLUHC, 'National Planning Policy Framework' (n 42) para 57.

4.4.3 To ensure independent oversight

RECOMMENDATION 6 – Post-decision monitoring and reporting to the decision-maker should be overseen by a person with the necessary expertise and independence and paid for by the proponent.

Post-decision monitoring should be seen as an integral part of environment assessment, ensuring the required environmental outcomes have been met. To resolve the concerns identified in our research on 'self-reporting,' the Government should consider how and when post-decision monitoring should be overseen by an environmental professional and ensure this is implemented. This will improve accuracy and reduce the need for enforcement as issues should be identified and resolved before a point of failure or non-compliance is reached.

Our research has highlighted a lack of continuity through the environmental assessment process. The environmental consultants involved in the application stage may not be the same as those tasked post-decision with the detailed design of mitigation or compensation and its onsite implementation. This means the effective flow of essential information is often broken.[196] Where possible, the environmental professional should, therefore, be involved during the application process and on site during construction and delivery of the mitigation or compensatory measures. This should be a proactive role, overseeing the measures being implemented and directly influencing the outcome.

The environmental professional has a key role, helping to ensure the measures are effective from the outset, rather than to simply oversee monitoring later in the process and reporting that remedial measures are required.

If this expertise exists within the LPA, they could deliver this role with funding from the proponent.

We are aware that AECoW and CIEEM have both been developing proposals for an onsite environmental clerk of works and an accreditation scheme is currently being piloted by CIEEM.[197] We support these proposals and note that they could deliver the environmental professional role.

A similar role exists in Hong Kong. Independent Environment Checkers may be required to check, certify and report on mitigation measures. The Environmental Protection Department has set requirements for this role. The Checker must have at least seven years of experience in environmental monitoring and auditing, and must not be carrying out any other work for the proponent or on the project.[198]

Should the LURB come into force, the National Development Management Policies document should include a policy requirement that LPAs (and other decision-makers) should impose planning conditions requiring developers to use a suitably qualified environmental professional to oversee developers' post-decision monitoring. This will ensure that LPAs are confident in the post-decision monitoring undertaken by developers. The Government should also ensure that a similar approach is taken in respect of NSIPs and other relevant

196 See for example, Jha-Thakur and Fischer (n 32) 16; Email from Mike Oxford to the OEP (13 September 2023).
197 Evidence provided by AECoW to the OEP (25 July 2023); Email from Mike Oxford to the OEP (13 September 2023).
198 LUC (n 16) app D 106.

consents, for example by amending the NPSs to include a similar requirement to that recommended for the NDMP.

4.4.4 To ensure the coherence of the national site network is protected

RECOMMENDATION 7 – When publishing reports under regulation 9A of the Habitats Regulations, the Government should include information on the success of compensatory measures.

The reports should:

(a) confirm whether the coherence of the national sites network has been maintained,

(b) include the evidence base relied on in giving this confirmation, and

(c) if it cannot be confirmed that the coherence of the network has been maintained, specify the necessary remedial measures, who is responsible for undertaking them, and by when.

In preparing these reports, the Government should also seek advice from independent bodies with relevant expertise.

Regulation 68 of the Habitats Regulations places a duty on Secretaries of State to 'secure that any necessary compensatory measures are taken to ensure that the overall coherence of the national site network is protected'.[199] The gov.uk guidance to decision-making authorities requires that 'all the necessary legal, technical, financial and monitoring arrangements' be put in place to ensure the compensatory measures 'go ahead as agreed and will remain in place all the time they're needed, which in most cases will be indefinitely'.[200] However, we are not aware of any requirement or mechanism to report to the relevant Secretary of State on the success or otherwise of compensatory measures. We are also not aware of any regular, transparent reporting by Government that provides information on the successful delivery of these measures.[201]

We are, however, aware of two reports that have considered the effectiveness of compensatory measures.

The first was carried out for Natural England and Defra, and states that it is the 'first serious attempt to assess the success of compensatory habitat provision for loss of [European site] habitat in England. Nobody has previously attempted to assemble all of the relevant information on this suite of sites'. At that time (2016), 30 proposals that required compensatory measures had been consented in England. Fifteen cases, where compensatory measures had been delivered, were selected for further investigation.

Whilst noting that some measures were unlikely to deliver the target habitat and species, the report states '[t]he question of whether compensation measures were 'adequate' is highly subjective and, in the absence of an agreed framework against which judgements

199 Habitats Regulations, reg 68.

200 Defra and others (n 177) s 3.

201 The previous 'Article 17' reporting to the EU required the UK to simply provide a list of general plans and projects which required compensatory measures. See for example, section 5 of the last report submitted to the EU: JNCC, 'UK General Implementation Report (Annex A) for the Period 2013–2018' <data.jncc.gov.uk/data/49d215d2-3780-40dc-a777-dd956f3b9c7a/Article17-AnnexA-2019-A.pdf> accessed 27 September 2023.

can be made, we have not commented on the adequacy of the compensation measures in detail. In all cases, the measures were considered to be adequate at the point when consent was granted'. It highlights the benefits of a regulators group in establishing ongoing dialogue between regulators and developers, 'establishing a process to track progress and sign off key stages'.[202]

The second report, written by Cefas, Natural England and the Joint Nature Conservation Committee, covered 17 cases of compensatory measures in the UK, again, highlighting the beneficial role of stakeholder steering groups in guiding monitoring and adaptive management.

Whilst the earlier report notes that compensatory measures were adequate at the point of consent, this report found that '[d]esigning and implementing a targeted and appropriate compensatory measure does not guarantee its effectiveness, which is critically dependent on the management of the measure'. Concerningly, its conclusion states '[t]here appear to be some projects deemed to have failed in their objective to…ensure the coherence of the network but, it is not clear what, if any, follow up has been taken to remedy this'.[203]

Creating new habitat that is required to meet agreed objectives carries risk that it may not succeed. The current approach appears to rely heavily on stakeholder groups established on a case-by-case basis. It appears, therefore, that there is no authoritative, published view on whether delivered compensatory measures have, in fact, protected the overall coherence of the national site network.

Evaluation and reporting on individual compensatory measures should be delivered as set out in recommendation 4. This information would then be used by the Secretary of State to regularly report on the overall success of these measures in protecting the coherence of the national site network.

Government should aim to implement this recommendation in the next reporting round (by January 2026).

202 Morris and others (n 190) 3.12, XXXVIII.

203 Blake and others (n 189) 48, 58.

5. Access to the necessary expertise

5. Access to the necessary expertise

This chapter addresses an ongoing shortage of skills and expertise within the public authorities responsible for undertaking and/or considering environmental assessments. Our research indicates that this shortage is a significant factor in the implementation challenges mentioned in Chapters 2, 3 and 4.

5.1 The challenge

Environmental assessment processes are reliant upon appropriate expertise. Many of the challenges that we identified in previous chapters are, at least in part, the result of a lack of access to that expertise.

A Local Government Association member highlighted the challenge that the skills and expertise shortage creates: 'if you're an ecological officer in a local authority at the moment you're just drowning because you know there's you and you're just covering everything'.[204]

The RSPB also noted that skills shortages create cascading effects through the delivery of EIA:

> Resourcing EIA is an issue across government departments, statutory agencies and planning authorities in NI and England due to funding cuts and consequent reductions in staff (particularly access to technical specialists such as ecologists). This has impacted on EIA practice through, for example, delays in the process, reduced specialist scrutiny and input, reduced capacity to follow up on projects post-consent (e.g., monitoring and enforcement).[205]

In previous chapters, we identify that effective implementation of the environmental assessment regimes relies on access to data, and appropriate post-decision monitoring, evaluation and reporting of such conditions and obligations. Without addressing the shortage of skills and expertise within LPAs and other relevant authorities, it will be difficult to resolve these other issues.

5.2 Why is it an issue?

Public bodies require sufficient expertise to perform their role in environmental assessment effectively. In planning, LPAs are often the relevant decision-maker, and therefore the ability of LPAs to access sufficient environmental expertise is fundamental. Expertise is required at the plan or programme stage (for example when LPAs are preparing their local plans), at the beginning of the planning application process for scoping; during assessment processes, for example in the review and analysis of environmental data; for post-decision monitoring and for enforcement (see Chapter 4). If either the LPA or the other public bodies involved in these processes lack expertise or capacity, implementation will not be fully effective, leading to environmental harm.

This is recognised in the EIA Regulations requiring that the relevant planning decision-maker (e.g. an LPA) has, or has access to, sufficient expertise to examine the environmental statement and other environmental information.[206]

204 WSP (n 15) 49.
205 ibid.
206 EIA Regulations, reg 4(5).

The EIA Regulations make specific requirements of the relevant planning authority – that they must:

Regulation 4(5)
– ensure that they have, or have access to, sufficient expertise to examine the environmental statement

Regulation 26(1)
a) examine the environmental information,
b) reach a reasoned conclusion on the significant effects on the environment,
c) integrate that conclusion into the planning decision,
d) if granting planning permission, consider whether to impose monitoring measures.

Regulation 26(2)
The reasoned conclusion must be 'up to date', i.e. 'it addresses the significant effects … on the environment that are likely to arise as a result of the proposed development'.

Figure 9. Specific requirements of the relevant planning authority in the EIA Regulations

Similarly, SEA assessment should be based on expert judgement.[207] While SEA is carried out for many reasons, by a range of bodies, most SEAs (roughly two-thirds) are undertaken for local plans, suggesting a particular need for expertise in the LPAs.[208]

In contrast to EIA and SEA, HRA requires that the decision-maker (not the plan or project proponent) carries out the environmental assessment. Generally an LPA is the 'competent authority' when planning permission is required and is, therefore, required to undertake the HRA.[209] In practice, many developers may produce a 'shadow' HRA, which can be adopted by the competent authority if it is satisfied that it is sufficient to meet legal requirements.

Similar skills and expertise are needed in relation to the environmental impacts under all three regimes – though wider environmental expertise is required under EIA and SEA, compared to the narrower, ecological, focus of HRA. It is acknowledged that many LPAs and other relevant authorities do not have access to the expertise they require. The Climate Change Committee reported in July 2023 on barriers and opportunities for delivering net zero and climate resilience through the local planning system. It identified skills and resources issues as one of the barriers to the role spatial planning could play in climate mitigation and adaptation. [210] This correlates with our own observations on the importance of skills and resources.

Concerns have been raised about other public bodies also lacking access to sufficient expertise. For example, the Seabed Users and Developers' Group wrote to the Secretaries of State for DLUHC, Defra and the former Department for Business, Energy and Industrial Strategy highlighting its concerns about the proposed reforms to the environmental assessment regimes. The letter states that its members think the Government should focus

207 Glasson and Therivel (n 169) 322
208 Glasson and Therivel (n 169).
209 Habitats Regulations, reg 67 addresses the situation of more than one competent authority being involved in a single plan or project.
210 Centre for Sustainable Energy and Town and Country Planning Association, 'Spatial Planning for Climate Resilience and Net Zero' (2023) 5 <www.theccc.org.uk/publication/spatial-planning-for-climate-resilience-and-net-zero-cse-tcpa/> accessed 25 August 2023.

instead on 'ensuring that government arm's length bodies have the necessary skills to deliver their primary functions, and the resources and experience to do so'.[211]

Natural England told us that a lack of relevant expertise in LPAs can increase the need for basic level advice, which impacts Natural England's capacity to give specialist advice to other LPAs.[212] However, our assessment overall is that the lack of expertise in LPAs poses the greater threat to implementation of the regimes.

Under the three assessment regimes the decision-maker has to exercise discretion. This is made more difficult where there is a lack of expertise. If a decision taken under any of the environmental assessment regimes is challenged in court, the courts will adopt the usual *Wednesbury* standard of review rather than subjecting the decision to heightened scrutiny.[213] This means that poor decision making due to an LPAs' lack of expertise tends to go unchecked by the courts.

5.2.1 Why does the issue exist?

Budgetary pressures and difficulties in recruiting and retaining staff undermine capacity in LPAs and other public bodies. The Royal Town Planning Institute (RTPI) states that 'public sector planning as a whole has been crippled by a decade of cuts'.[214] Additional challenges for LPAs in terms of expertise arise from conflicting priorities and the infrequency with which staff encounter the assessment regimes.

In June 2022, ALGE undertook survey-based research to assess whether LPAs had the necessary expertise and capacity in relation to biodiversity net gain. In total 337 individuals working for 192 LPAs (57% of all English authorities) responded to a survey.[215] ALGE's findings confirmed what we heard from other stakeholders about access to ecological expertise:

> Only 5% of respondents say that their current ecological resource (including in-house and external sources) is adequate to scrutinise all applications that might affect biodiversity. The remaining 95% report that they have no or very limited capacity to ensure most, if not all, applications are assessed by an ecologist.[216]

Although the survey was to assess the ability of LPAs to deliver biodiversity net gain, it sheds valuable light both on LPAs' access to ecological expertise and on the solutions in use to improve access.

Of LPAs which had access to ecological expertise, 55% had an 'in-house' ecologist and 30% used a service level agreement with another organisation (for example, a county council, unitary authority or local wildlife trust). ALGE found that 'planners make use of a wide variety of sources to assist them when making decisions on applications that affect biodiversity'.[217]

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211 Letter to the Secretaries of State for BEIS, Defra and DLUHC from Seabed Users and Developer Group, 'Improve, Not Replace: SUDG Marine Industries Need Stability to Deliver Green Growth' (26 October 2023) <www.sudg.org.uk/blog> accessed 5 October 2023.

212 Meeting with Natural England and the OEP (02 August 2023).

213 See, for example, *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417 [78] to [81].

214 RTPI, 'Planning Enforcement Resourcing: The Scale and Nature of Resourcing Challenges Faced by Enforcement Teams' (n 164) 6.

215 Laura Snell and Mike Oxford, 'Survey of Local Planning Authorities and Their Ability to Deliver Biodiversity Net Gain in England: Do Local Planning Authorities Currently Have the Necessary Expertise and Capacity?' (Association of Local Government Ecologists 2022) 11 <www.alge.org.uk/local-planning-authorities-biodiversity-net-gain/> accessed 8 September 2023.

216 ibid iv.

217 ibid 51.

It was also found that 'the majority of respondents report that their current resource, capacity and expertise is not adequate to deal with their existing planning workload, let alone any increase required to address additional work on [biodiversity net gain]'.[218] We note that assessing environmental impacts is not limited to biodiversity, but also includes assessing a plan, programme or project's effects on air, water and climate (amongst other matters).[219] These findings broadly align to concerns that have been described by other organisations representing the staff who undertake environmental assessments, planning and related work.[220]

Issues associated with skills and expertise are not peculiar to England. Other research indicates that this competency gap has been identified as one of the core obstructions to EIA implementation internationally.[221] For example, a 2022 review of the key components of successful environmental assessment stated that capacity building is non-existent in most countries. The global review identified 14 essential elements for global improvement of environmental assessment. [222] At least three of them (relating to meaningful public participation; credible, accountable and authoritative decision-making; and effective, efficient and fair process) need to be underpinned by stakeholders with sufficient time, resources and expertise to engage with the environmental assessment process.

5.2.1.1 Budgets

Planning authorities' resources have decreased by 55% between 2010/11 and 2019/20.[223] In the financial year 2021/22, local authorities in England budgeted £9,312 million for cultural, environmental and planning services. Such budget pressures affect staff recruitment and retention, with longer-term effects on capacity and expertise. These effects can persist, even after budgets subsequently increase, because it takes time to build up expertise again.[224]

This budgetary issue can be exacerbated by the fact that planning budgets are set as part of wider budget, which cover other services. A government review of statutory duties placed on local government in 2011 found 219 duties under legislation for which the former Department for Communities and Local Government[225] was responsible and over 1,100 duties under other legislation.[226]

218 ibid 56.

219 EIA Regulations, sch 4.

220 For example, see Max Wade and Richard Handley, 'A Crisis in Our Sector' (*Society for the Environment, CIEEM*, 8 November 2021) <socenv.org.uk/cieem-a-crisis-in-our-sector/> accessed 7 September 2023; CIEEM, 'Ecology and Environmental Management Employment and Salary Survey 2022' (2022) <cieem.net/cieem-publishes-2022-employment-and-salary-survey-report/> accessed 7 September 2023; RTPI, 'Planning Enforcement Resourcing: The Scale and Nature of Resourcing Challenges Faced by Enforcement Teams' (n 164).

221 Andreea Nita, Stacey Fineran and Laurentiu Rozylowicz, 'Researchers' Perspective on the Main Strengths and Weaknesses of Environmental Impact Assessment (EIA) Procedures' (2022) 92 Environmental Impact Assessment Review 106690; Kultip Suwanteep, Takehiko Murayama and Shigeo Nishikizawa, 'Environmental Impact Assessment System in Thailand and Its Comparison with Those in China and Japan' (2016) 58 Environmental Impact Assessment Review 12.

222 A John Sinclair, Meinhard Doelle and Robert B Gibson, 'Next Generation Impact Assessment: Exploring the Key Components' (2022) 40 Impact Assessment and Project Appraisal 3.

223 National Audit Office, 'Financial Sustainability of Local Authorities Visualisation: Update' (2021) <www.nao.org.uk/reports/financial-sustainability-of-local-authorities-visualisation-update/> accessed 12 September 2023.

224 RTPI, 'Resourcing Public Planning' (2019) (RPTI Research Paper) 7 <www.rtpi.org.uk/policy/2019/november/resourcing-public-planning/> accessed 31 August 2023.

225 MHCLG, 'List of Statutory Duties – DCLG Owned' <www.gov.uk/government/publications/review-of-local-government-statutory-duties-summary-of-responses--2> accessed 12 September 2023.

226 MHCLG, 'Duties Placed on Authorities by Legislation for Which Departments Other than DCLG Have Responsibility' (21 March 2011) <www.data.gov.uk/dataset/01171494-e40b-463f-9967-56d158412321/statutory-duties-placed-on-local-government> accessed 12 September 2023.

In relation to HRA, the RSPB highlighted that 'the lack of adequate resourcing of and ecological expertise within statutory consultees, especially Natural England and decision-makers can be a huge issue in ensuring effective implementation, particularly of some aspects such as the monitoring of impacts'.[227]

The Mineral Products Association also raised concerns about the capacity and capability of regulators in its evidence to the House of Lords Built Environment Committee inquiry on the impact of environmental regulations on development, referring to 'inexperienced staff who are over-burdened'.[228] We heard that there is expertise in other public bodies, but not enough of it. A 2023 survey of people working in the natural environment (the largest number of respondents worked for the National Trust, Natural England and the Environment Agency), found that over 50% considered the reduction of specialist personnel in their organisation to be a barrier to effective working.[229]

5.2.1.2 Difficulty recruiting and retaining staff

We have heard from public sector stakeholders about difficulties in recruiting planners and keeping them when in competition with the private sector. A member of the Local Government Association said: 'Quite often we're asking officers to work across a number of disciplines [where smaller councils] cannot afford large teams…', adding 'we will need a lot of guidance for officers to ensure that they can carry out their responsibilities and in an efficient professional way'.[230] The RTPI reported in 2019 that:

> The impact of cuts to planning is felt keenly by local planning officers, who both have to operate with less resources, and to deal with public dissatisfaction that can arise from this. This not only limits the ability of local authorities to shape places, but also makes a career in local authority planning less desirable.'[231]

Concern has also been raised regarding salaries in other public bodies. The Chief Executive of the Environment Agency has referenced the challenges of both recruiting and retaining staff due to the pay disparity with the private sector.[232] Similarly, the Chair of Natural England cited the difficulty of trying to recruit staff, including in planning, in the face of 'uncompetitive salaries' offered by Natural England and trying to recruit from 'the same pool as the developers and everyone else'.[233]

227 Survey response from the RSPB to the OEP (13 January 2023).

228 Mineral Products Association, 'Written Evidence to the Built Environment Committee on the Impact of Environmental Regulations on Development (IER0017)' (2023) <committees.parliament.uk/work/7328/the-impact-of-environmental-regulations-on-development/publications/written-evidence/?page=2> accessed 25 August 2023.

229 Prospect, 'Working in the Natural Environment Survey – Key Findings' (2023) <library.prospect.org.uk/id/2023/July/25/Working-natural-environment-survey-Key-findings?_ts=25994> accessed 25 August 2023 chart 5.

230 WSP (n 15) 49.

231 RTPI, 'Resourcing Public Planning' (n 224) 7.

232 James Bevan and Alan Lovell, 'Environment, Food and Rural Affairs Committee Oral Evidence: Work of the Environment Agency, HC 221' (2023) <committees.parliament.uk/oralevidence/12822/pdf/> accessed 12 September 2023.

233 In response to Question 153, Tony Juniper and Alan Law, 'Built Environment Committee Uncorrected Oral Evidence: The Impact of Environmental Regulations on Development' (2023) <committees.parliament.uk/oralevidence/13366/pdf/> accessed 12 September 2023.

Horsham District Council gave evidence to the House of Lords Built Environment Committee that:[234]

> Horsham District Council has no in-house ecology expertise and is reliant on contracts with consultancies to supply this vital expertise. There are an insufficient number of candidates in the market to be able to attract an experienced in-house ecology expert which will assist the Council to implement and monitor biodiversity net gains.

This highlights the fact that even if resource is not the problem, LPAs may struggle to recruit ecologists because of the small available workforce. In 2021, CIEEM warned of a shortage of applicants in the ecology and environmental management employment sector.[235]

The high turnover rates of staff with planning and ecological expertise from public authorities to consultancies and private industry must be addressed. Unless this is done, it will be difficult for LPAs and other relevant authorities to be appropriately resourced with experienced and expert staff to perform their environmental duties.

Career progression is also an issue. In a 2023 survey, 58% of respondents working in the natural environment said there was no progression in their role. Of total respondents, 62% had been in their role for five years or less, with only 25% in post for longer than 10 years.[236] These figures are reflected in the comments we have heard from stakeholders about how challenging it is for public bodies to recruit and retain expertise relevant to environmental assessments.

5.2.1.3 Infrequent engagement with environmental assessments

LPAs may not deal with many EIA or HRA applications each year nor be frequently required to undertake SEA. This infrequency of engagement with environmental assessment can present a challenge to maintaining expertise. For example, Government data indicate that in the financial year to 31 March 2023, LPAs in England received 395,624 planning applications, only 332 (less than 0.1%) of which required EIA.[237] There are 322 LPAs but, while two LPAs (Tower Hamlets and Durham County Council) received 19 applications requiring EIA, 208 (64.6%) LPAs received none.[238]

234 Horsham District Council, 'Written Evidence to the Built Environment Committee on the Impact of Environmental Regulations on Development (IER0001))' (2023) <committees.parliament.uk/work/7328/the-impact-of-environmental-regulations-on-development/publications/written-evidence/?page=3>.

235 Wade and Handley (n 220).

236 Prospect (n 229) 3–4.

237 DLUHC, 'Historical Live Tables: January to March 2023 (Table P134)' (n 28).

238 ibid.

Table 2. LPAs which made decisions on five or more environmental statements, their engagement with NE on HRA, and their ecological expertise model[239]

Local Authority	No. of planning applications	Decisions with Environmental Statement	No. of engagements with NE on HRA	Ecological expertise model
County Durham	2,287	19 (1%)	4	In house
Tower Hamlets	1,106	19 (2%)	0	In house
Manchester	2,161	15 (1%)	1	SLA (GMEU)
South Cambridgeshire	1,819	13 (1%)	0	In house plus SLA with another LPA
West Suffolk	1,354	13 (1%)	6	In house, plus SLA with another LPA
Ipswich	625	11 (2%)	5	SLA with another LPA
East Devon	1,832	10 (1%)	22	In house
East Riding of Yorkshire	2,669	10 (<1%)	29	In house
Lewisham	1,983	10 (1%)	0	In house
Peterborough	892	7 (1%)	0	In house
Cherwell	1,608	6 (<1%)	0	In house
Islington	1,913	5 (<1%)	0	In house
South Norfolk	1,317	5 (<1%)	10	In house, shared with another LPA

Infrequent engagement with environmental assessment may matter less where planners are highly experienced, but the high turnover rates referred to above result in relatively inexperienced staff in LPAs. As regards access to ecological expertise, this would also be needed for HRA, and Natural England data show that in the financial year to 31 March 2023, Natural England engaged with 226 of 322 LPAs on HRA. The data show that although 208 (64.5%) LPAs had no planning applications accompanied by an environmental statement in the year to 31 March 2023, Natural England engaged with many of these LPAs on HRA. It is also clear that some LPAs did not engage with either EIA or HRA, highlighting a variable engagement with the environmental assessment regimes.[240]

The varying levels of engagement with EIA and HRA in individual LPAs, each requiring specialist technical knowledge and expertise, highlight that there is no single model that will fit to ensure LPAs are appropriately resourced to respond to the requirements of EIA, SEA

239 ibid; Natural England, 'NE HRA Interactions by LPA between 01/04/2022 to 31/03/2023' (unpublished 2023).

240 The OEP is not aware of a centralised database relating to annual numbers of SEA conducted in England. See, DLUHC, 'Historical Live Tables: January to March 2023 (Table P134)' (n 28); Natural England (n 239).

and HRA processes, and the other planning matters that require ecological expertise such as the forthcoming mandatory biodiversity net gain.

5.3 What is at stake?

We found that a lack of expertise in LPAs and other relevant public authorities undermines effective implementation of all three environmental assessment regimes.

Stakeholders, notably LPAs and environmental groups, described several issues caused, in whole or in part, by a lack of skills and expertise. These included delays and disproportionate reporting and assessment requirements by LPAs, and difficulty in undertaking technical scrutiny of the material related to the assessment.[241] For example, The Wildlife Trusts highlighted issues associated with implementation of EIA: "most of the problems and delays that arise are because of poor implementation – failure to follow the guidance, insufficient data, and failure to compete the EIA to an acceptable standard." In outlining potential ways to address these issues, The Wildlife Trusts suggest "investing in LPA ecological expertise, skills and capacity" to improve "implementation, transparency and evidence", adding that "this would allow them [LPAs] to provide more scrutiny, oversight and guidance to the developer responsible for the assessment and to the planners making the decisions".[242]

5.3.1 Issue: environmental impacts may not be avoided

Our concern is that a lack of skills and expertise in LPAs and other relevant public authorities leads to poor implementation of environmental assessments, undermining their purposes in securing better environmental outcomes.

Poor decision-making at one or more points in the processes poses clear risks to the environment. This can arise from of over-inclusive scoping (discussed below at section 5.3.2), barriers to assessing the scientific data in environmental assessments (see Chapter 3) and reduced post-consent enforcement (see Chapter 4).

ALGE found that, where LPAs have no access to ecological expertise, a higher proportion of applications are granted planning consent where little or no further information or mitigation is requested. It also found that more applications are either withdrawn or refused as the proposals are judged to be either inadequate or contrary to planning policy. ALGE inferred from these results that LPAs either found it harder to assess whether the ecological information submitted was adequate, and also to determine the significance of ecological effects, or to identify what further information or mitigation might be required. Alternatively, ALGE suggested that an over-precautionary approach was being applied, leading to some applications being withdrawn or refused where, with ecological input from the LPA, they could have been approved.[243] These findings relate to any applications where ecological issues should be considered and their significance assessed. This includes applications that require an EIA as well as those below the threshold.

241 WSP (n 15) 49, 68.

242 Survey response from The Wildlife Trusts to the OEP (20 December 2022).

243 Snell and Oxford (n 215) 52 (Paragraph 4.3.5).

5.3.2 Issue: over-inclusive scoping

Proponents of EIA and SEA can request a 'scoping opinion' from the relevant decision-maker to clarify the focus of their environmental statements or reports. However, significant issues of overly inclusive scoping remain, leading to excessively long reporting. As we discuss in sections 2.1 and 2.2, excessive inclusion of material in environmental statements may be driven by risk aversion, fear of legal challenge and a lack of skilled staff in LPAs who can confidently scope issues out. Our research suggests that a lack of expertise in LPAs is a factor in over-inclusive scoping of environmental assessments.

Failure of the LPA to narrow down the scope of environmental statements to what is necessary risks wasting time and money, failing to identify mitigation measures or enhancement opportunities, and failing to identify likely significant effects.[244] We heard from North Lincolnshire Council, that scoping requests are made by developers in most EIA applications. Town Legal's view is that:[245]

> Local planning authorities ('LPAs') and statutory consultees need more support in terms of resources, skills and training to provide confidence in scoping out issues. If they are not confident in their own understanding of the regulations, this can either mean that LPAs take a disproportionate approach making the process more arduous than it needs to be or result in some developments with significant environmental effects being consented without EIA.

The RSPB has also emphasised the importance of scoping in its series of recommendations for EIA and SEA reform. It observed that overly-long 'blunderbuss' assessments emerge from a risk averse approach to reporting due to concern of legal challenge; a point that has also been made by practitioners of EIA and SEA.[246]

5.4 Recommendations

5.4.1 Increase capacity

RECOMMENDATION 8 – As a priority, Government departments should work together, and with local planning authorities and other relevant public bodies, to develop and implement a strategy for resourcing and securing the expertise required by those public bodies to protect and improve the environment by effective implementation of the environmental assessment regimes (EIA, SEA and HRA; or any replacements such as EORs).

As we set out in this chapter, there is wide acknowledgment of the need to build up expertise in environmental assessment in relevant public bodies. We welcome the support that the Government has put in place, but we are concerned that more may be needed. The strategy should be developed in partnership with the relevant public authorities responsible for delivering the environmental assessment regimes, and other stakeholders who support and train them.

244 RSPB (n 66) 2. For practitioners' views, see WSP (n 15); Riki Therivel and Ainhoa González, 'Is SEA Worth It? Short-Term Costs v. Long-Term Benefits of Strategic Environmental Assessment' (2020) 83 Environmental Impact Assessment Review 106411, 6–7; Smith, Richardson and McNabb (n 64) 26–27, 51–52.

245 Evidence provided by Town Legal to the OEP (09 June 2023).

246 RSPB (n 66) 2.

The strategy should address the development of the expertise needed through the education system, as well as resources for LPAs, in particular, to fill short to medium term expertise gaps. The current level of resourcing does not appear to be adequate so Government should consider (in partnership with delivery bodies) how to increase and target funding available to the relevant public authorities as it addresses the skills and expertise shortage.

As we describe in this chapter, LPAs and other relevant public bodies have different methods of accessing expertise, and there is no universal solution. The additional demands on LPAs to implement biodiversity net gain from November 2023 should also be considered in the strategy.

We welcome the Government's acknowledgment that LPAs 'need more resource in order to perform their critical social, economic and environmental functions on planning effectively'.[247] Government has also acknowledged the challenges in recruiting and retaining staff (skilled and experienced planners and other technical specialists, including ecologists). We welcome the intention to 'design and deliver a programme of support to build capacity and capability strategy across local planning authorities'.[248]

However, this is not likely to be a quick fix. Horsham District council gave evidence to the House of Lords Built Environment Committee that:[249]

> The increase in planning fees will likely assist with [the pressure on local authority planners, and the lack of an ecologist at Horsham], but the Government cannot expect a significant increase in performance with immediate effect. It will take time and money to recruit to already hard to fill roles, and it will take time for the planning fee increase to become noticeable in budgets. Any fee increase cannot be coupled with an immediate requirement to improve performance when Councils need to see that increase first and recruit to much needed roles to manage additional environmental responsibilities.

The RTPI pointed out in 2019 that it will take years to address the 'major loss of subject and institutional expertise and a shortage in the supply of new planners' due to 'the damage that has been done by years of underfunding' of local authority planning.[250]

In addition to the proposed rise in planning fees, the Government told the House of Lords Built Environment Committee that it is 'providing £1 million funding to Public Practice to support their work in helping councils to recruit and develop skilled planners, increase awareness about careers in local government and share best practise around improving communities in the public sector.'[251] We are concerned that the Government may have underestimated the scale of the problem, as the RTPI has reported that 82% of local authorities had difficulties hiring planners between 2022 and 2023.[252]

247 DLUHC, 'Technical Consultation' (n 6) para 8.

248 ibid 45.

249 In response to Question 9, Horsham District Council (n 234).

250 RTPI, 'Resourcing Public Planning' (n 224) 7.

251 In response to Question 2, HM Government (n 7). Public Practice is a social enterprise "that recruits placemaking professionals to join forward-thinking local authorities". See Public Practice, 'About Us' <www.publicpractice.org.uk> accessed 31 August 2023.

252 This figure is from survey-based research by the Royal Town Planning Institute released in interim form ahead of reporting in late 2023. See, RTPI, 'Interim State of the Profession 2023' (2023) <www.rtpi.org.uk/policy-and-research/interim-state-of-the-profession-2023/> accessed 31 August 2023.

In evidence to the House of Lords Built Environment Committee, the Government stated that:

> Engagement with developers and promoters carried out as part of the evidence base for reforms in the Levelling-up and Regeneration Bill found that a shortage of planners in planning authorities, and particularly a lack of experienced planners confident in dealing with the environmental effects of larger-scale development, was the biggest impediment to effective process and decision-making.[253]

Evidence was also given that: 'the funding shortfall for the planning application service is estimated to be in the region of £225 million annually (approximately 33%). We want to reduce this funding shortfall and create greater financial sustainability for all local planning authorities.'[254]

We welcome the Government's acknowledgment of the need for more resources in the planning system.[255] However, we are concerned that there is no clear strategy in place for then also delivering the necessary increase in skills and expertise. The World Economic Forum assessed the need for a 224% increase in town and traffic planners in the UK by 2030, giving an indication of the scale of capacity deficit. [256]

We are not the only body calling for a strategy. The House of Commons Levelling Up, Housing and Communities Committee reported in July 2023 on proposed reforms to national planning policy. The Committee found an ongoing 'pressing need for additional resources for local planning authorities to ensure the efficient working of the planning system and to implement the Government's proposed reforms'.[257] These reforms relate to housebuilding and the national housebuilding target, but the committee's findings on the resourcing of local authorities apply to their overall planning role. The Committee recommended that the Government should publish a 'comprehensive resources and skills strategy for the planning sector' which should 'clearly explain how the resourcing and skill needs of local planning authorities will be met'.[258]

We have reviewed material developed by the Planning Advisory Service who have listed some of the forthcoming programmes, regulations, policies and strategies related to planning that will cumulatively require significant LPA resource and expertise to be delivered, underscoring our recommendation (see Table 3).

253 In response to Question 2, HM Government (n 7).

254 In response to Question 9, ibid.

255 See, for example, DLUHC, 'Technical Consultation' (n 6) para 9.

256 World Economic Forum, 'Jobs of Tomorrow: Social and Green Jobs for Building Inclusive and Sustainable Economies' (2023) White Paper 18 (Table 19) <www3.weforum.org/docs/WEF_Jobs_of_Tomorrow_2023.pdf> accessed 31 August 2023.

257 House of Commons Levelling Up, Housing and Communities Committee, 'Reforms to National Planning Policy' (2023) 24–26 <committees.parliament.uk/publications/40872/documents/199083/default/> accessed 23 August 2023.

258 ibid 26.

Table 3. Environment and planning programmes, strategies and policies that will require additional LPA resourcing (adapted from the Planning Advisory Service).[259]

Programme area	Origin	Owner	Resourcing implications for LPAs
Air Quality Management Framework and targets	NPPF para 186; Environment Act 2021 ss 1-5; Environment Act 1995; Air Quality Standards Regulations 2010	DLUHC, Defra	Medium
Biodiversity net gain	NPPF pt 15; Environment Act 2021 ss 98-101, sch 15 paras 1-12	Defra, Natural England, DLUHC	High
Changes to the NPPF	Government policy	DLUHC	High
Production of design code by each LPA	LURB sch 8; NPPF pt 12	DLUHC	Medium (?)
Enhanced biodiversity duty and five yearly reporting obligations	Environment Act 2021 ss 102-103	Defra, Natural England	Medium
Proposed changes to the EIA, SEA and HRA Regimes	LURB pt 6	DLUHC, Defra, Natural England	Medium (?)
Infrastructure levy	LURB sch 13	DLUHC, Defra	Low
Green Infrastructure and Greenspace provision	Natural England Green Infrastructure Framework, NPPF paras 98-103	DLUHC, Defra, Natural England	Medium
Local Natural Recovery Strategies	Environment Act 2021 ss 104-108	Defra, Natural England, DLUHC	High
Protected site strategies	Environment Act s 110	Defra, Natural England	Medium
Programmes and obligations regarding wastewater and pollution	LURB, pt 7; Environment Act 2021 s 1	DLUHC, Defra	High

The Climate Change Committee has also recently made an urgent recommendation for 'a long term strategy for funding and resourcing and securing skills required for local authority planning departments to address climate change'.[260] We believe that a similar approach is needed to address the skills and expertise gap in LPAs and other public bodies described in this chapter.

An effective strategy will support delivery of the Government's environmental ambitions if it addresses the expertise gap in public bodies and provides the support needed to plug this

259 Local Government Association, 'New Environmental Planning Jigsaw' (2023) <www.local.gov.uk/pas/topics/environment/planning-better-environment> accessed 2 October 2023.

260 Centre for Sustainable Energy and Town and Country Planning Association, (n 210) 74–75, 89 (recommendation 18).

gap in both the short and long term. It would also need to address the needs for additional funding of LPAs, for necessary guidance and training, for ensuring sufficient ecologists and professionals with other necessary skills are being trained for future roles.

We anticipate that the strategy will need to take into account that there is no 'one size fits all' for LPAs. For example, Warwickshire County Council employ 18 ecologists and offer a shared service to other LPAs.[261] Other LPAs have service level agreements with local wildlife trusts or employ external consultants. We note that the introduction of biodiversity net gain will increase demand for ecological expertise in LPAs.[262]

There is a preference in many LPAs for in house expertise.[263] As well as improving implementation of the regimes, building capacity in this way could address some of the challenges of staff retention. However, this may not be realistic for all LPAs. Their needs differ and they must have autonomy to put in place the method(s) of boosting skills and expertise they judge best. They require sufficient resource (whether from an increase in planning fees or additional support from government) to do this. Implementing biodiversity net gain might divert existing resource and expertise. These issues can all be addressed by means of a coherent and comprehensive resourcing strategy.

The environmental professional (paid for by the proponent) proposed in Recommendation 6 will be a beneficial addition of expertise for LPAs. They will ensure that post-decision monitoring and reporting is accurate and resolve issues as they occur. This should reduce the resourcing pressures on LPAs.

We understand that the Net Zero and Nature Workforce Action Plan will be published in the first half of 2024, and look forward to the cross-sectoral assessment of workforce needs.[264] A joined-up approach to delivering the various aspects of the skills shortage across the environmental sector is needed, and Government should develop and implement a strategy for resourcing and securing the expertise required for LPAs and other relevant public bodies to protect and improve the environment by effective implementation of the environmental assessment regimes (EIA, SEA and HRA; or any replacements such as EORs).

Many of these issues are not unique to England. In pursuing a strategy for resourcing and securing the expertise required to effectively implement the environmental assessment regimes, Government may wish to review how other jurisdictions have responded to similar issues of skills and expertise gaps. Other jurisdictions have pursued strategies relating to mandatory practitioner recognition, educational and professional development requirements, sharing of knowledge between practitioners and research organisations, and promoting careers in planning.[265]

This recommendation should be acted upon as a matter of priority noting that the forthcoming planning programmes outlined in Table 3 will involve significant resourcing and capacity implications for LPAs and other relevant public bodies.

261 Meeting with Warwickshire County Council and the OEP (23 January 2023).

262 Snell and Oxford (n 215) 9–18.

263 ibid 49.

264 HM Government, 'Green Jobs Delivery Group' (2023) <www.gov.uk/government/groups/green-jobs-delivery-group> accessed 2 October 2023.

265 For examples from other jurisdictions including South Africa, Belgium, the Netherlands, Ireland, Denmark, Hong Kong, the United States of America, and Australia, see LUC (n 16) 5.56-5.58, 5.101-5.133, app D 15-18.

5.4.2 Revise guidance

RECOMMENDATION 9 – The Government should work with local planning authorities and other relevant public bodies to revise the existing suite of guidance on environmental assessments to effectively guide practitioners in the performance of their functions.

Such guidance should:

(a) address the specific issues identified in this report regarding scoping, the production of accessible statements/reports, post-decision monitoring, evaluation and enforcement, and

(b) provide examples and case studies of effective implementation.

We see an urgent need for updated guidance to support LPAs and other decision-makers in implementing EIA and SEA in particular (or their replacement through EOR). In relation to HRA, detailed guidance was published in February 2021 and reflects amendments to the Habitats Regulations in 2019.[266] EIA and SEA guidance is much older. New guidance flowing from our recommendation 5 – guidance on post-decision monitoring – should form part of this suite.

Current guidance on EIA includes a 2012 handbook for scoping projects and information guidance on the requirements of the EIA Regulations, including a table of 'indicative screening thresholds' (published in 2014, updated in 2020).[267] The scoping handbook is detailed, but does not take into account changes made to the EIA Regulations in 2017. The EIA Regulations guidance does not include examples or case studies to assist LPAs and others with implementation. In relation to SEA, the guidance was issued in 2005 following adoption of the regulations and, in relation to onshore matters, has not been amended or updated since.[268]

Faced with such a gap, professional bodies have produced more recent guidance, but this does not have the same status as government guidance and may not be available to non-members. The important role of guidance has been identified by stakeholders. The Marine Aggregates Industry stated:

> The real issue with the delivery of EIA is the absence of meaningful guidance to support developers, but also regulators and advisors. Govts various 'better regulation' and 'cutting red tape' initiatives have removed guidance, which has created uncertainty and inconsistency across all the parties involved.[269]

By contrast to EIA and SEA, the Government has issued 18 detailed advice notes on the National Infrastructure Planning regime. Note 7 deals with EIA. In addition to explaining the process under the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, it gives detailed guidance and practical advice on screening, scoping and the contents

266 Defra and others, 'Habitats Regulations Assessments: Protecting a European Site' (2021) <www.gov.uk/guidance/habitats-regulations-assessments-protecting-a-european-site> accessed 31 August 2023.

267 Environment Agency, 'Handbook for Scoping Projects: Environmental Impact Assessment' (2012) <www.gov.uk/government/publications/handbook-for-scoping-projects-environmental-impact-assessment> accessed 14 September 2023.

268 MHCLG, 'Strategic Environmental Assessment Directive: Guidance' (2005) <www.gov.uk/government/publications/strategic-environmental-assessment-directive-guidance> accessed 31 August 2023.

269 Survey response from the Marine Aggregates Industry to the OEP (6 January 2023).

of the environmental statement. It provides the Planning Inspectorate's view of what a good environmental statement looks like, noting that it 'assesses in an open and robust way the assessment of likely significant effects explaining where results are uncertain' and 'demonstrates that the information is sufficient to enable a reasoned conclusion to be reached'.[270] The guidance states that experience to date has shown that applicants and others welcome detailed advice on aspects of the National Infrastructure Planning regime.

We believe this would also be the case in relation to EIA and SEA. Revision to the existing suite of guidance on environmental assessment will provide clearer direction to decision-makers who may be making important decisions on issues identified in this report such as scoping, accessible reporting, post-decision monitoring, evaluation and enforcement.

270 Planning Inspectorate, 'Advice Note Seven: Environmental Impact Assessment: Process, Preliminary Environmental Information and Environmental Statements' (2012) <infrastructure.planninginspectorate.gov.uk/legislation-and-advice/advice-notes/advice-note-seven-environmental-impact-assessment-process-preliminary-environmental-information-and-environmental-statements/> accessed 31 August 2023.

6. Conclusion

6. Conclusion

Government has proposed reforms to environmental assessment regimes and their associated legislation. However, we have found that barriers to effective implementation of these environmental assessment regimes stem from the wider systems of development control through which they operate, rather than from the law itself. Legal reform may also create new problems, for example to legal certainty.

Key fundamental challenges concern **data accessibility**, **post-decision monitoring, evaluation and reporting** and **access to necessary expertise**. These are longstanding, systemic issues that cannot be resolved with legislative reform alone. Although we have found many examples of good practice and effective work by LPAs and others, this tends to occur in spite of current systemic difficulties and cannot be taken for granted.

These challenges will need to be addressed if any new outcomes-based regime is to succeed.

Processes of environmental assessment can become more efficient and effective by overcoming the problems caused by inadequate data accessibility, with data 'collected once, used many times' (see Recommendations 1 to 3). Similarly, proper post-decision monitoring, evaluation and reporting can ensure learning is fed back into new assessments, improving their efficiency and effectiveness. This is also necessary to ensure that the environmental outcomes predicted when decisions are made are secured in practice (see Recommendations 4 to 7).

Our Recommendations 8 and 9 call for government to work with relevant public bodies to develop and implement a strategy for the skills and expertise needed for environmental assessment and for guidance to support practitioners in the performance of their functions. The EIP states that the development of green jobs and skills is needed to achieve environmental goals. The resources and skills gaps highlighted in this report identify an opportunity to build such capacity. The Climate Change Committee, among many others, has made similar requests for a sector-wide review. A proper strategy for access to necessary expertise, well implemented, is necessary to underpin any improvement in data accessibility and post-decision monitoring, as well as to overcome many of the other problems with environmental assessment described to us by stakeholders and arising in our research.

A strategy should also help to ensure the right skills and expertise are in place to meet government's wider commitment to significantly improve the natural environment by 2043.

Addressing these issues is therefore essential, not just to improve environmental assessment regimes themselves but also so that they can contribute fully to achieving EIP goals and targets, and to help deliver other major environmental programmes such as biodiversity net gain and local nature recovery strategies.

Annex A – Methodology

Annex A – Methodology

This report draws on several research elements.

A.1 Legislation, caselaw and implementation of the environmental assessment regimes

We commissioned external counsel, led by Stephen Tromans KC, to undertake an analysis of the implementation of EIA, SEA and HRA regimes.[271] This involved a review of the literature for each regime (peer-reviewed and grey literature) and a review of the relevant legislation and caselaw.

A.2 Analysis of the environmental assessment regimes

We commissioned environmental consultants, WSP, to undertake a review of HRA, SEA and EIA with a focus on their implementation and practice.[272] This involved: a literature review (peer-reviewed and grey literature) and analysis of the implementation of the regimes; a survey distributed to practitioners of EIA, SEA and/or HRA; and a survey distributed to organisations with an interest in EIA, SEA and/or HRA.

A.2.1 Practitioners survey

The practitioners survey was distributed via professional organisations with large memberships of environmental practitioners with knowledge and expertise of EIA, SEA and/or HRA. The aim of the survey was to understand practitioners' perspectives on the effectiveness of these regimes.

The survey was distributed to practitioners via: IEMA, CIEEM, the Local Government Association, and the Association of Directors of Environment, Economy, Planning and Transport. This survey was therefore distributed to a wide group of potential respondents, not all of whom would be the target audience. We did not target specific individuals. Participation was opt-in at the discretion of the recipient. In all, 123 responses were received. Further details of respondents are provided in Appendix A of WSP's report.

This survey included questions regarding the effectiveness of the three regimes. Primarily, respondents were required to select an answer from a series of options with some questions requesting a text response. All respondents were asked to identify if they have expertise in EIA, SEA and/or HRA. The survey asked questions on:

- the regime of their principal interest and their level of expertise with the three regimes
- their opinion on the effectiveness of the regime(s)
- their 'top four improvements' that could be made to the regime(s) with an opportunity to provide a short, free-text response
- whether the regime(s) should be replaced, modified or retained
- which aspects of the regime(s) should be retained (answered as free text), and

271 Tromans and others (n 14).

272 WSP (n 15).

- further thoughts.

The survey responses provided as free text were analysed and organised using a code frame for each question. The process involved developing themes that were used as codes. These were developed in an iterative manner, to be reflective of the diversity of comments received.

The survey was then analysed by WSP to identify trends and patterns regarding opinions of the effectiveness of the regimes; the areas identified as needing reform; attitudes towards replacement; and modification or retention of the regimes. These results provided some high-level indications of opinions of the regimes from self-identified practitioners of these regimes who opted-in to provide their views of EIA, SEA and/or HRA.

A.2.2 Organisational survey

The survey was distributed to approximately 100 relevant organisations. Respondents were asked to provide responses that reflected the views of their organisation. The respondents to this survey are listed in Appendix A of WSP's report.[273] There were 65 responses.

This survey included a mixture of questions requiring that respondents select from a series of options and questions allowing a free text response. All respondents were asked to identify the regimes of their interest. The survey asked questions on:

- respondents' opinions on the effectiveness of the regime(s) in securing environmental protection (specifically, protection of European protected sites and species for HRA) and environmental outcomes and, as free text, the reasoning for their answer
- whether the regime(s) should be replaced, modified or retained (answered as free text)
- the aspects of the regime(s) to be removed, replaced and retained, and why (answered as free text)
- new or amended aspects to be included in a new or modified regime (answered as free text), and
- any other thoughts (answered as free text).

Respondents were also invited to submit any written materials they wished of an analytical or factual nature regarding the operation of the three regimes in practice, suggested improvements, and what any new environmental assessment policy, legislation and operational achievements to replace EIA, SEA or HRA should aim to achieve and how this should occur (for further detail, see section A4).

The free text survey responses were analysed in accordance with the code frame method described at A.2.1.

These materials were then analysed by WSP to identify opinions of the effectiveness of the regimes, the areas identified as needing reform, strengths and issues, the source of the issues, attitudes towards replacement and suggested changes to the regimes. These results provided detailed qualitative information that reflected the positions of the respondent and allowed for more in-depth insights into the operation of the regimes.

273 ibid A.

A.3 Analysis of environmental assessment regimes in jurisdictions outside the UK

We commissioned environmental consultants, LUC, to examine EIA, SEA and ecological impact assessment[274] in 16 jurisdictions outside of the UK. This was with particular focus on identifying approaches to implementation and delivery, effectiveness, reform and the use of environmental outcomes in assessment.[275]

LUC undertook a literature review of peer-reviewed and grey literature using defined search terms to search academic publications, and targeted searches for grey literature from relevant bodies such as the World Bank, national agencies and professional organisations.

Following the development of a profile for each jurisdiction, LUC contacted external experts to verify and identify any missing material for each profile. A further workshop was held to discuss the perceived deficiencies of the EIA, SEA and HRA in England identified through our UK research. This allowed LUC to develop themes through which to identify how non-UK jurisdictions have responded to similar challenges. The identified practices were then classified as either having high or low desirability, potential delivery, challenges and if there is potential applicability to EIA, SEA and/or HRA.

A.4 Call for evidence

We issued a call for evidence asking relevant organisations to submit materials on how well the regimes' policy, legislation and operational arrangements work in practice and how this could be improved. We also requested materials on what any new environmental assessment policy, legislation and operational arrangements should aim to achieve and how that should occur.

We received 24 responses. We undertook an initial exploratory examination of the material to establish a first set of codes and themes by which to organise the material. This was reviewed and expanded in an iterative manner as a detailed analysis of the materials was undertaken. The following major codes were used to organise more detailed themes:

- overarching themes and overarching issues, strengths and opportunities across the three regimes
- EIA issues and strengths
- SEA issues and strengths
- HRA issues and strengths, and
- reform and replacement of the regimes, and any risks, opportunities and recommendations.

A detailed examination of the submitted materials was then undertaken having regard to these themes.

274 Ecological impact assessment was used as an alternative to Habitats Regulation Assessment as this is an assessment type specific to European Union member states. See LUC (n 16) 13.

275 LUC (n 16).

In addition, we assembled an expert panel to review our research focus, remit and our conclusions. This panel comprised the following:

- Peter Barham
- Jan Bessell
- Caroline Chapman
- Mike Oxford
- Colin Reid
- Riki Therivel
- Angus Walker

This report references issues associated with data, post-decision monitoring and skills with a focus on biodiversity and ecology. This reflects the evidence that we have received and our engagement with stakeholders. We acknowledge that there may be additional research and recommendations for other environmental matters relevant to environmental assessments such as water quality, air quality, dust and noise.

Annex B – Contributors to our research

Annex B – Contributors to our research

Those listed below submitted evidence for our research, or otherwise gave assistance. We are grateful to all these organisations and individuals for their valuable contributions to this study.

Government departments and central government bodies

- Department for Environment, Food and Rural Affairs
- Department for Levelling Up, Housing and Communities
- Department for Transport
- Environment Agency
- Forestry Commission
- High Speed Two (HS2) Ltd
- Historic England
- Homes England
- Institute for Apprenticeships and Technical Education
- Joint Nature Conservation Committee
- Marine Management Organisation
- National Highways
- National Infrastructure Commission
- Natural England
- North York Moors National Park Authority

Devolved administration departments and bodies

- Council for Nature Conservation and the Countryside
- Department of Agriculture, Environment and Rural Affairs
- Department for Communities
- Department for Infrastructure
- Loughs Agency
- Northern Ireland Environment Agency

Local government

- Armagh City, Banbridge and Craigavon Borough Council
- Fermanagh and Omagh District Council
- Greater London Authority
- Mid and East Antrim Council
- North Lincolnshire Council
- Plymouth City Council
- Sefton Council
- Suffolk County Council
- Warwickshire County Council
- Wyre Council

Other organisations

- Aldersgate Group
- Applied Ecological Services
- Associated British Ports
- Association of Directors of Environment, Economy, Planning and Transport
- Association of Environmental Clerks of Works
- Association of Inshore Fisheries and Conservation Authorities
- Association of Local Government Ecologists
- Bat Conservation Trust
- BDB Pitmans LLP
- Broadway Initiative
- Campaign for National Parks
- Corpus Christi College, Oxford
- Country Land and Business Association
- DTA Ecology
- Ecus Ltd
- Electricity Network Operator

- Environmental Assessment and Management Research Centre, University of Liverpool
- Fothergill Training & Consulting Ltd
- Friends of the Earth
- Greener UK
- Humber Nature Partnership
- Landmark Chambers
- Local Government Association
- Local Planning Authorities Northern Ireland
- Mineral Products Association/British Marine Aggregate Producers Association
- National Association of Local Councils
- National Farmers Union
- National Infrastructure Planning Association
- NIE Networks
- Northern Ireland Environment Link
- Northern Powergrid
- Northwest & North Wales Coastal Group
- Planning Advisory Service
- Plantlife
- Pinsent Masons LLP
- Royal Society for the Protection of Birds
- Royal Town Planning Institute
- Save Knock Iveagh
- Scottish and Southern Electricity Networks
- Seabed Users and Developers Group
- The Environment Gathering Group
- The Wildlife Trusts
- Town and Country Planning Association
- Town Legal LLP

- UK Environmental Law Association
- UK Major Ports Group
- Ulster Angling Federation
- Ulster Farmers Union
- University College London
- University of Liverpool
- WildFish
- Wildlife and Countryside Link
- Woodland Trust

We also received responses to our practitioners' survey from 123 individuals.

Expert Panel

In addition, the following have contributed directly to our research and this report:

- Peter Barham
- Jan Bessell
- Caroline Chapman
- Mike Oxford
- Colin Reid
- Riki Therivel
- Angus Walker

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