



IMPLEMENTING BIODIVERSITY NET GAIN IN REAL ESTATE DEVELOPMENT

The Government's plans for implementation of Biodiversity Net Gain (BNG) in the planning system in England have taken two steps forward with enactment of BNG framework powers in the Environment Act 2021 and a new consultation on implementation plans. Under the BNG framework, developers will be required to assess potential development sites against a standardised biodiversity metric to quantify how BNG will be achieved in respect of their sites. BNG net gain must then be delivered through either on-site mitigation, compensatory off-site habitat creation or, if necessary, buying statutory biodiversity credits.

In this briefing, we set out key elements of the BNG framework and the consultation proposals, and look at likely impacts for developers. We focus on the regime as it will apply to commercial development under the Town & Country Planning Act 1990 although we also make some comments about its application to major infrastructure projects.

KEY ELEMENTS OF THE BNG FRAMEWORK

The introduction of a mandatory BNG policy was set out in the Government's "25 Year Environment Plan" published in 2018. Following initial consultation (see our [2019 briefing](#)), the Government included powers to implement the BNG framework in the Environment Act 2021 (the Act) which was finally passed in November 2021. The BNG framework will operate broadly as follows:

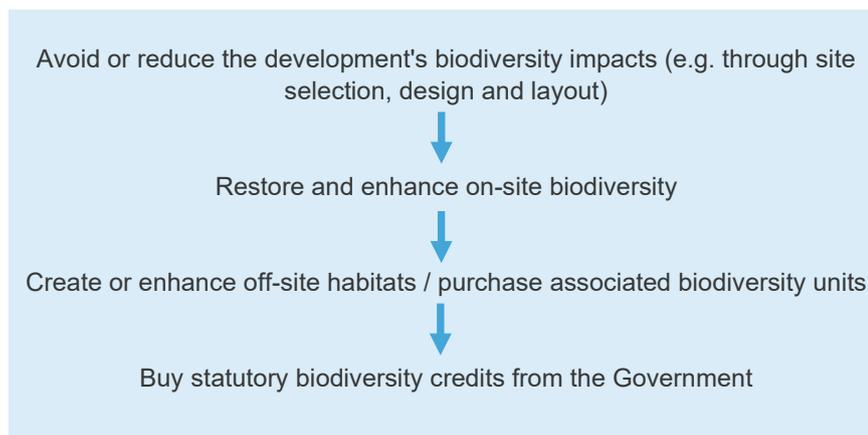
Each planning permission for development resulting from a planning application submitted after 9 November 2023 will contain a condition requiring approval of a Biodiversity Gain Plan before commencement of development.

Developments will need to achieve at least a 10% increase in biodiversity above the site's pre-development biodiversity value, although this may be increased voluntarily or as a result of local policies. Biodiversity value will be measured in *biodiversity units* using a metric published by Natural England (which will be subject to separate consultation).

Key issues

- Defra has published a consultation on implementation of biodiversity net gain requirements contained in the Environment Act 2021
- Developers will have to deliver 10% biodiversity net gain on development sites by on-site mitigation, off-site habitat creation or, if necessary, buying statutory biodiversity credits
- Planning condition will require a Biodiversity Gain Plan to be approved before commencement of development
- Biodiversity gains will need to be secured for minimum 30 years
- Exemptions will include sites with minimum threshold of bare earth or vegetation or zero biodiversity value, but brownfield sites will not be exempt
- Developers will be able to buy biodiversity units from off-site landowners and will be able to sell units if they have a surplus
- Statutory biodiversity credits will be priced uncompetitively to encourage developers to secure other mitigation options
- The new requirements will apply planning permissions granted after 9 November 2023

A developer will need to follow the hierarchy shown below to achieve BNG and acquire sufficient biodiversity units for its development, and its approach will be set out in the Biodiversity Gain Plan:



Biodiversity enhancements (whether on-site or off-site) will need to be secured by a planning obligation or conservation covenant (see box below) and maintained for at least 30 years. Details of enhancements will be inserted in a new national Biodiversity Gain Register.

Conservation Covenants

A conservation covenant is a new form of right attached to land which will be enforceable by a responsible body against the landowner and its successors in title. They will be similar in nature to existing private law covenants except that they will allow positive obligations to be enforced (rather than simply negative obligations), and will not require the responsible body to own land adjacent to the land burdened by the covenant. Conservation covenants can be put in place to conserve the natural environment, historical architectural features of land or its setting, and so will not be limited to implementation of BNG requirements. The powers to create conservation covenants are set out in the Environment Act 2021.

Responsible bodies will be designated by the Secretary of State and can be local authorities, charities or other public bodies which have conservation purposes or functions. Similarly to planning obligations, conservation covenants will be registered as local land charges.

Our [briefing](#) on the original proposals for conservation covenants contains more detail on their likely use.

CONSULTATION

Defra launched a Consultation on 11 January 2022 (Consultation) containing further detail of the BNG framework to be contained in forthcoming regulations. Below we discuss out some key proposals in the Consultation.

Exemptions

The Act provides for permitted development to be exempt from the BNG requirement. The Consultation proposes a number of other exemptions including significantly:

- Developments where the baseline biodiversity value is zero (e.g. sites entirely covered by hardstanding, or where development will not affect adjacent habitat);
- Change of use applications;
- Developments where the existing vegetation or bare earth area (habitat) is not of high distinctiveness and does not exceed a minimum threshold to be determined - possible thresholds floated are, for area-based habitat, between 2m² and 50m²); and
- Development on irreplaceable habitats, on the basis that compensation measures would be dealt with under separate arrangements.

It is possible that urban sites with minimal existing landscaping might escape the BNG obligation depending on where the threshold is set. Contrary to the initial proposals, development on brownfield land will not be exempt due to the complications this would be likely to cause to operation of the BNG framework.

While they would not be exempt, small developments (under 10 residential units or on sites smaller than 0.5 hectare) would be subject to a simplified biodiversity metric as long as they did not impact on priority or protected habitats).

The BNG provisions are minimum requirements and it should be noted that local or national policy might require exempted developments to include BNG in any event, or a BNG requirement that goes beyond the minimum 10% enhancement.

Outline planning permissions and variations to developments

For outline planning applications, applicants will be required to explain at the outline stage how the BNG objective will be met, including on a phase-to-phase basis for phased developments. Individual Biodiversity Gain Plans would then need to be submitted and approved before commencing each individual development phase.

Variations to development schemes often given rise to complex questions when new planning-related mechanisms are introduced - an example is the introduction of the Community Infrastructure Levy. Defra has helpfully confirmed that, where BNG has been secured for a development under a planning permission, a 'varied' permission resulting from a Section 73 application would only result in an additional BNG requirement to the extent the varied scheme results in additional biodiversity impacts. Another question which was similarly problematic in the context of Community Infrastructure Levy relates to whether a development for which permission was secured *before* the BNG requirement comes into force would be subject to BNG requirements if a variation is secured by Section 73 Application *after* the BNG requirements come into force. This is not yet clear.

Biodiversity Gain Information and Plans

Defra proposes that a certain amount of core information will need to be submitted with the planning application in relation to pre-development

biodiversity value, steps to be taken to minimise impacts and enhance biodiversity, and any off-site biodiversity enhancements proposed. However, where all information necessary for the formal Biodiversity Gain Plan is available before the application, this can be submitted with the application and compliance with the BNG condition would occur immediately after grant of planning permission. Local Planning Authorities (LPA) will be able to examine the developer's assessment of pre-development biodiversity value and proposed mitigation / compensation. While the use of a detailed metric will minimise the subjectivity of such an assessment, there will be scope for negotiation and potentially disputes with the LPA.

Delivering biodiversity gains

Developers may have to acquire biodiversity units from different levels of the BNG hierarchy for one site. Defra's proposals have set out further detail on each of these.

On-site gains

On-site biodiversity gains will need to be delivered within 12 months of the development being commenced, or in any event where that is not possible, before occupation of the development. Any further delays in providing gains would result in additional biodiversity units being required. This could potentially be an onerous burden for some developments.

It was previously unclear as to whether biodiversity enhancements that a developer was required to undertake to comply with statutory obligations or policy (for example sustainable drainage requirements) could be counted towards the BNG requirement. Defra has clarified that they will be counted, although mitigatory or compensation measures for impacts on protected species should not exceed 90% of the BNG provided.

Off-site gains

From the Consultation, it is now clear that an off-site landowner who enhances habitats on its land in compliance with the BNG framework will be allowed to sell *biodiversity units* to a developer needing to demonstrate BNG for its development. Biodiversity gains from such off-site schemes will need to be *appropriate* for the development in question. Policy will encourage this to be through local enhancements but it will be possible for developers to obtain units from further afield where necessary. However, off-site biodiversity gains provided will need to be appropriate in the context of the development and this is likely to require the LPA's approval. As well as securing off-site biodiversity gains by planning obligation or conservation covenant, the gains will need to be registered in a national *Biodiversity Gain Site Register* and allocated to the development before approval of the development's Biodiversity Gain Plan. Works to create the off-site gain would then need to begin within 12 months of the approval of the development's Biodiversity Gain Plan. Developers themselves will be able to sell excess biodiversity units if their on-site enhancements leave them with a surplus. The estimated BNG market is anticipated to be £135m - £274m per year (according to Government-commissioned analysis).

Off-site landowners will be subject to similar rules to developers on demonstrating, securing and measuring BNG on their sites in order to register biodiversity units and sell them to developers. A particular question that arises for off-site landowners is so-called stacking of payments; the idea that landowners might seek several payments for the biodiversity enhancement works they carry out, e.g. payments for selling biodiversity units for BNG, for

selling carbon credits for carbon sequestration, or other land management schemes. Defra confirms that landowners will be able to receive payments for all such schemes as long as it can be demonstrated that the outcomes are distinct from one another. It is not clear at this stage, how this would be enforced. Developers will likely need to carry out due diligence on proposed off-site biodiversity enhancement schemes to ensure that there are no major likely hurdles to creation and purchase of biodiversity units from such schemes.

Defra will encourage a practice of *habitat banking* such that off-site biodiversity enhancements will be created in advance of developments coming forward, allowing for future sale to different developers to offset the impacts of their developments. Only habitat created or enhanced after 30 January 2020 would be eligible for habitat banking to ensure that any habitat gains are *additional*. Finance is already available to assist landowners to create habitat banks through the Natural Environment Investment Readiness fund. With enactment of the Environment Act 2021 and the further clarity now available on implementation of the BNG framework, off-site landowners may well now have confidence to start working towards preparing habitat banks.

The Government plans to leave the price for biodiversity units and mechanics of payment up to the market subject to necessary regulatory controls and oversight. No centralised trading platform for biodiversity units is planned and the Government envisages that third party brokers are likely to assist in matching buyers to sellers. Developers may well form ongoing arrangements directly with landowners to provide for their off-site BNG needs.

Statutory biodiversity credits

Defra has confirmed that statutory biodiversity credits (SBCs) will only be available as a last resort and only in the early years of the scheme while the market in off-site biodiversity units develops. It intends to price them deliberately uncompetitively to ensure that developers do not immediately seek to secure SBCs to save them having to agree terms for, and await registration of, biodiversity units for off-site schemes.

Duration of gains

The Environment Act provides that all on-site and off-site biodiversity gains must be secured for at least 30 years. The Government will consider increasing this period over time once it evaluates how the BNG framework is operating in practice (but any change will not be retrospective).

Nationally Significant Infrastructure Projects (NSIPs)

Contrary to the initial consultation proposals, BNG will generally apply to NSIPs, with BNG policies ultimately being built into National Policy Statements. NSIPs would also be subject to a 10% BNG objective with a requirement to secure biodiversity gains for a minimum of 30 years (or possibly longer). The obligation would not apply to marine NSIPs below the water line, although a separate BNG policy for such developments is currently under consideration. BNG obligations would be established through the Requirements of the Development Consent Order.

The BNG obligation would begin for NSIPs accepted for examination after November 2025.

NEXT STEPS

Responses to the Consultation must be received by 5 April 2022. Defra will then consider Consultation responses and develop the implementing regulations. If they are not already doing so, developers should begin to look at their pipeline of developments and consider the possible BNG required and the extent to which they will require off-site biodiversity units. They may also wish to begin considering how those units might be acquired including identifying relevant landowners keen to get involved in the scheme.

Links: [Consultation on Biodiversity Net Gain Regulations and Implementation: Defra – 11 January 2022.](#)

[Natural England \(July 2021\) Biodiversity Metric 3.0](#)

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