

NEW PLANNING REQUIREMENTS FOR BIODIVERSITY NET GAIN

The Government has published its plans for implementation of "biodiversity net gain" in the planning system in a response to consultation. Developers will be required to assess potential development sites against a standardised biodiversity metric to quantify how biodiversity net gain shall be achieved in respect of their sites. Biodiversity net gain must then be delivered through either onsite mitigation, local compensatory habitat creation or, if necessary, buying statutory biodiversity units.

In this briefing, we set out the Government's plans and offer some thoughts on what this biodiversity net gain proposal is likely to mean for developers going forward.

OVERVIEW

The introduction of a mandatory Biodiversity Net Gain (**BNG**) policy was set out in the Government's "25 Year Environment Plan" published in 2018. A consultation on proposals to mandate BNG in the planning system ran between December 2018 and February 2019. Subsequently the Chancellor confirmed, in his Spring Statement, that the Government would use the forthcoming Environment Bill to mandate BNG for development in England. The Government has now published its response (**Response**) to the recent consultation setting out its plans for mandatory BNG in more detail.

The BNG Policy is anticipated to be delivered within existing planning and development processes. In short, it would require potential development sites to be assessed using a standardised biodiversity metric – the 'Defra metric' – which would quantify the nature of any biodiversity harm caused, the quality of new green benefits to be provided, and the anticipated costs of achieving a 10% level of net gain. Informed by this assessment, BNG would then be achieved in one of three ways:

- the developer is able to avoid harm, mitigate and enhance on site; or
- the developer is unable to avoid harm, mitigate and compensation on site all impacts on site but secures local compensatory habitat creation; or

Key issues

- Government has published its plans for "biodiversity net gain" in the planning system.
- Developers will be required to assess development sites against a standardised biodiversity metric.
- Developers will need to deliver biodiversity net gain through either onsite mitigation, local compensation habitat creation or purchasing statutory biodiversity units from the Government.
- Uncertainty remains as to how biodiversity net gain outcomes will be secured in practice. Section 106 Agreements may be used for on-site gain, and new 'conservation covenants' may play a role in securing off-site gain.

- if neither of the above options are available, then developers will be able to buy statutory biodiversity units from the Government linked to investment into nationally strategic habitat sites.

The Government hopes that this single transparent metric-based approach will deliver a more consistent and predictable biodiversity net gain process for developers, while reducing the risk and uncertainty in planning permission processes.

THE PROPOSALS IN MORE DEPTH

The Response provides some further clarity on what a BNG mechanism would look like.

Scope of the proposal

The Government has confirmed that BNG will apply broadly to all development proposals subject to some narrow exemptions. Beyond the exemptions for permitted development and householder applications trailed in the consultation, it has now decided that it will also introduce narrow exemptions for the most constrained types of development including, for example, targeted exemptions for brownfield sites that meet certain criteria due to concerns over the viability of development faced with an additional biodiversity provision requirement. It will not, however, introduce any broader exemptions, e.g. for small sites. While small sites will, therefore, remain within the scope of mandatory net gain, they are likely to be subject to a simplified process and longer transitional arrangements, or a lower net gain requirement than other types of development.

Nationally significant infrastructure projects and net gain for marine development would also be exempted.

Threshold for net gain

The Government has confirmed its consultation proposal that developments will need to achieve a 10% biodiversity gain. Despite a mixed response from stakeholders, the Government has said that this level achieves the right balance between ambition, certainty in achieving environmental outcomes, and deliverability and costs for developers.

Habitats and mitigation hierarchy

The Government has accepted that mandatory BNG should not weaken existing legal and policy protections for protected sites, protected species and irreplaceable habitat. As such, it has confirmed that irreplaceable habitat sites (e.g. ancient woodland) shall be outside of the scope of the net gain requirement and will continue to be covered by generally more stringent policy requirements and protections. Locally designated sites will, however, remain within scope but will not be subject to specific higher net gain requirements, in order to avoid creating any confusion with other parallel methods of protecting sites through policy or legal protections.

The Government has said that it will not exclude any development from the general mitigation hierarchy that requires consideration of onsite enhancement options before the use of offsite compensation, but will use guidance to stress the need for planning authorities to continue to be proportionate in their application of planning policy.

Measuring biodiversity

The Government has confirmed that it will use the Defra biodiversity metric to measure changes to biodiversity. An updated version is expected to be published alongside new spreadsheet-based tool which will establish a standard format and automate some of the requirement calculations.

Calculating and delivering net gain compensation

The Environment Bill will make provision for local authorities to agree biodiversity net gain plans with developers. The priority will be to provide on-site net gain.

The Government had initially suggested establishing a tariff payment to deliver BNG where on-site provision was not possible and that incoming funds could be split between national and local schemes. Following concerns raised about the potential bureaucracy inherent in a new charging scheme, the Government has confirmed that it will not introduce a new tariff on loss of biodiversity. Instead, where offsite compensation is required, local authorities will be able to review developers' plans to deliver compensation through local offsite habitat creation projects.

Where no local schemes are available, the Government plans to supply statutory biodiversity units as a last resort. Funds from these units would be used for investment in nationally strategic habitat sites. The standard cost of these statutory biodiversity units is still to be determined but the Government has agreed to further review and stakeholder engagement before announcing this.

Practical guidance is expected to further clarify what will be required of developers and when, and how these requirements will interact with other environmental considerations. Measures will also be implemented to avoid developers intentionally "degrading" the biodiversity value of potential development sites.

Net gain improvements will be required to be maintained for a minimum of 30 years, or longer where acceptable to the landowner. In this respect, the Government acknowledged that conservation covenants, which will also be legislated for in the Environment Bill, provide one way of securing habitats for the long term. The Government has, however, acknowledged that further stakeholder engagement is necessary to understand how these conservation covenants may best support lasting biodiversity benefits. For more information about conservation covenants, see our associated briefing: ["Conservation covenants and their potential future use by developers"](#).

The Government has confirmed that the Environment Bill will provide a two year transition period. Further guidance will follow on the specifics of the transition, including accounting for sites with outline planning permission.

Delivering biodiversity outcomes

In response to strong support for habitat opportunity maps to guide provision of compensatory habitat, the Government has confirmed the Environment Bill will introduce new duties relating to the creation of Local Nature Recovery Strategies by relevant public bodies appointed as responsible authorities by the Secretary of State. It is hoped these strategies will encourage consideration of the wider benefits of habitats and promote greater connectivity between areas of habitat.

WHAT WILL BIODIVERSITY NET GAIN MEAN FOR DEVELOPERS?

The general consensus among respondents to the consultation was that a mandatory approach to BNG could bring significant benefits for development, the environment and society. However, to achieve those potential benefits, the BNG approach must be environmentally robust and clear in terms of what is required of the development sector. While the Response has clarified, to some extent, the Government's BNG proposals, questions still remain as to what this will mean in practice.

One obvious uncertainty is how biodiversity net gain outcomes will be secured and how they will interact with existing developer obligations. Will they be kept separate, or could they be secured through section 106 agreements or conservation covenants? It is clear to see how section 106 agreements could be used to secure long term biodiversity improvement on-site. Off-site schemes could potentially be secured through planning conditions requiring conservation covenants to be entered into. Will developers be able to simply buy units in a local scheme rather than enter into a covenant with a landowner? Ideally compensation markets will develop in local markets where biodiversity units could be earned (by over-supply biodiversity on one site) and traded among landowners and developers who might use them to satisfy a BNG requirement for their own site (where on-site improvement could not be achieved at all, or not fully). It is not clear whether this is going to be possible.

Similarly, there is still little detail regarding the anticipated statutory biodiversity units and creation of a compensation market at a national level - what will it look like and how will the pricing mechanism work? This detail will be of particular interest to developers within central London and other metropolitan centres where land is typically constrained such that the opportunities to deliver BNG onsite or locally is limited.

Another uncertainty is how the introduction of mandatory BNG will impact consented developments i.e. developments with outline planning permission. Further, could proposals to amend development by way of section 73 application give rise to obligations under this proposal? Similar challenges have affected the introduction and operation of the Community Infrastructure Levy for some years. More detail on transitional arrangements will be key. With much of the detail still to come, the Government's mandatory BNG proposal remains very much a watching brief.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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