

BIODIVERSITY NET GAIN IN REAL ESTATE DEVELOPMENT – DEFRA RELEASES MORE DETAIL

Defra has published some further detail on the upcoming Biodiversity Net Gain (BNG) requirements in a [response](#) to its January 2022 consultation, confirming they will come into force on a phased basis beginning in November 2023. As a reminder, the BNG provisions will require real estate developments in England to provide a 10% increase in levels of biodiversity on- or off-site or through acquisition of statutory biodiversity credits. We have set out below some of the notable decisions contained in the response.

Exemptions

To the list of previously announced exemptions (including permitted development, biodiversity gain sites and sealed sites), Defra has added: development affecting habitat below 25 sq m (or 5m for hedgerows and other linear habitats). There is no further extension to the list of exclusions consulted upon (e.g. in relation to previously developed land or change of use applications).

Defra has also confirmed that the BNG requirement will not apply to *irreplaceable habitat*. Rather, development impacting irreplaceable habitat will be subject, among other requirements, to demonstrating why impacts on irreplaceable habitats were unavoidable, and dealing with appropriate mitigation and compensation as part of the planning application.

Phased development and amended permissions

Phased development will be subject to approval of a biodiversity gain plan before commencement of each phase, although Defra envisages that local authorities should have some discretion to determine the gain required at different phases, in order to avoid requirements being excessively front-loaded to early phases.

BNG requirements will be applied to Section 73 applications, but only where the original permission was granted after the requirements come into force.

Key issues

- Mandatory biodiversity net gain for real estate developments will be phased in from November 2023, with smaller sites phased in from April 2024
- Development affecting habitat below 25sq m is excluded
- Development subject to Section 73 applications is included but only where the original permission is granted after requirements come into force
- NSIP requirements will come into force by November 2025 with a similar 30 year period for which gains must be secured
- Developers will be able to sell excess gain biodiversity units to other developers who need them
- There will not be a centralised trading platform for biodiversity units

Entry into force

BNG requirements will apply for TCPA development in November 2023 for most sites, although small sites will be exempted until April 2024. Small sites are:

- For non-residential: where the floorspace to be created is less than 1,000 square metres OR where the site area is less than one hectare.
- For residential: where up to 9 dwellings are to be provided on a site of less than one hectare; OR where the number of dwellings to be provided is not known, a site area of less than 0.5 hectares.

The consultation suggested that the BNG requirement would apply to planning applications made after 9 November 2023, although this is not confirmed in the response.

Securing additional benefits on off-site gain sites

Defra wants to ensure that gains are retained after the end of the 30 year period for which they have to be secured. It floats the possibility of allowing a gain site to be entered back into the market after that period expires. At that point, after updating the site's biodiversity baseline, it could again be used to secure further gains for BNG purposes, with the possibility of new biodiversity units or tax advantages being generated.

During the initial 30 year period, where a site could offer additional gains beyond those already secured (and achieved), Defra has decided that these could be offered as long as the securing agreement (e.g. Section 106 Agreement or conservation covenant) was amended, and any additional gains secured for 30 years.

Market for biodiversity units

Defra has reconfirmed that there will not be a centralised trading platform for biodiversity units. Any sales of units will be purely subject to negotiation between buyer and seller (and subject to VAT).

Where developers manage to create more biodiversity gain than was required (i.e. more than 10% or such higher level as set by the local planning authority), they will be able to sell those excess credits as off-site gain for another development, as long as the additional gain is registered and identified in the original development's biodiversity gain plan.

Defra has separately published [guidance](#) explaining how gain site managers could sell biodiversity units alongside other incentive payments such as carbon credits, nutrient credits and public grants. This confirms, for example, Defra's view that it will be possible to sell biodiversity units registered under the BNG provisions from the same land as carbon credits, provided that enhancements do not impact the carbon value.

Statutory biodiversity credits

Credit prices will be published around May 2023 and will be intentionally uncompetitive to encourage private arrangements for off-site gain creation. Defra is considering whether to set different prices for different habitat types, although this would seem to be complex to manage. Defra confirms its

intention to phase out statutory biodiversity credits once the biodiversity unit market is mature.

BNG register

The BNG register is intended primarily to record the allocation of *off-site* gains to other developments, and as such Defra is not intending to require details of on-site gains to be included on the register. It is, however, considering whether such information could be added voluntarily.

A *habitat management plan* dealing with management of the gain site, and monitoring will need to be registered by the agreement securing the site.

Nationally Significant Infrastructure Projects (NSIPs)

Following consultation, Defra has decided to keep the date for assessing baseline biodiversity value as January 2020 for NSIPs (the same as for TCPA development), rather than providing for a later date. This is to ensure the provisions do not create an incentive for degradation of sites since 2020.

Gains will have to be secured for at least 30 years for NSIP (similarly to TCPA developments).

The regime will be brought into force for NSIPs 'by November 2025' to give promoters more time to incorporate the requirements into their projects.

Next steps

The Defra announcement states that legislation will be published later in 2023. Given the imminent entry into force of the provisions in November 2023, it is concerning that we still have not seen draft regulations and there is still . For complex regimes, the devil is often in the detail, and this will give little time for comment, corrections or even preparations for the new requirement.

Additional guidance is available in a new [collection](#) on the gov.uk website. The information currently contained on it is very sparse, although Defra commits to publishing more information 'throughout the Spring'.

Time is short before BNG requirements begin to bite. Developers should be looking at their development pipeline and considering the possible BNG required, the extent to which they will require off-site biodiversity units, and who they might acquire them from.

For more information on the January 2022 consultation see Clifford Chance briefing: [Implementing Biodiversity Net Gain in Real Estate Development](#).

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