

Insights

EMERGING DETAILS OF THE NEW BIODIVERSITY NET GAIN REGIME

Jan 20, 2022

SUMMARY

The DEFRA consultation published this month on the scope of the biodiversity net gain regulations to be introduced under powers in the Environment Act 2021, provides developers and landowners with a much clearer indication of when the new BNG requirement will be applied and how developers will be able to satisfy it. In this Insight we discuss these emerging details and their implications.

We discussed the new Biodiversity Net Gain (BNG) requirement in a [previous Insight](#) in November, when the Environment Act 2021 came into force. However, at that time there were many unanswered questions about how the new BNG regime will be applied and operated and how developers should prepare for its introduction, as most of the working details are deferred to secondary legislation.

The draft BNG regulations are still awaited, but a [DEFRA consultation](#) launched on 11 January 2022 (and open until 5 April 2022) on their scope, provides a much clearer idea of how the Government anticipates the new regime will work for developments consented under both the Town and Country Planning Act 1990 (for conventional planning permissions) and the Planning Act 2008 (for DCOs / NSIPs).

Background

As a reminder, the Environment Act 2021 introduced a new mandatory requirement for developments (including NSIPs) that results in loss or degradation of habitat to provide at least a 10% BNG which will take effect when the relevant regulations come into force. At this point, all planning permissions in England will be granted subject to a general pre-commencement condition that requires approval of a biodiversity gain plan that sets out how the biodiversity value attributable to a development will be increased by 10%. This could be through on or off-site habitat improvements or the purchase of biodiversity credits. To satisfy a developer's BNG requirement,

habitat enhancement works and their maintenance for at least thirty years must be secured by planning condition, planning obligation or conservation covenant and, for off-site enhancements, registered in the biodiversity gain site register.

In this Insight we discuss the emerging details and implications of the new BNG regime and how it will apply to developments in England.

When will BNG apply?

The BNG requirement will apply to new planning applications submitted pursuant the Town and Country Planning Act 1990 (TCPA) two years after royal assent of the Environment Act 2021, which will be **from November 2023** and to NSIPs **no later than 2025**.

Exemptions

The Environment Act 2021 exempts permitted development and urgent Crown development from the BNG requirement. However, the regulations will extend the list of exemptions to include developments that fall below a 'de minimis' threshold, householder and change of use applications. Permissions for self and custom built houses and developments whose purpose is to create biodiversity gain sites may also be exempt, subject to the outcome of the consultation.

The threshold exemption will apply to the **sum of all habitat types** within a proposed development site, rather than the size of the development site if the habitat impacted is of low/medium distinctiveness (as measured by the biodiversity metric). If the sum area falls below the proposed threshold of 50 square meters, the development will be exempt. However, no exemption applies if priority or irreplaceable habitats are impacted, regardless of size, as bespoke compensation will be agreed in this respect.

Notably, brownfield sites, temporary permissions and developments in conservation areas or national parks will not be exempt (as had previously been suggested).

Small sites

All sites are required to make a proportionate contribution, so small development sites will neither be exempt (unless they fall within one of the exemptions above) nor benefit from a lower BNG percentage. However, in recognition of the proportionately larger burden for small site developers, a 'small sites' metric that is simpler to use will be applied and a longer transition period introduced (up to November 2024) until the BNG requirement takes effect.

Natural England prepared a 'small sites' metric in July 2021 (which may not necessarily be the one approved under the regulations) which defines 'small sites' as less than 0.5 ha or up to 9 dwellings on sites less than 1 ha.

NSIPs

Delivering BNG may be more challenging for some NSIPs because areas for environmental mitigation or compensation are often incorporated within site boundaries to which BNG will also be applied.

Whilst the 10% BNG requirement is proposed to apply broadly to all NSIP projects in England, there may be more exemptions introduced than for conventional permissions. Exemptions for NSIPs in the marine environment, for targeted project types or individual projects, and habitats within development boundaries included for environmental mitigation are being considered, as are different BNG percentage requirements in certain cases.

In terms of land rights and compulsory purchase, the consultation offers guidance about powers of compulsion (and seemingly endorses the use of such powers to secure land to meet BNG requirements), albeit there is a preference expressed, for developers to deliver further gains without resorting to additional compulsory acquisition of land.

The BNG requirement for NSIPs will probably be introduced through a single 'core' biodiversity gain statement applicable to all NSIP projects that would be published at least 2 years before the requirement takes effect in November 2025. Projects accepted for examination before the commencement date would not be required to deliver the mandatory BNG (though might be delivering it in response to policy or voluntary commitments).

Securing and delivering BNG

New application requirements will be introduced that require the submission of certain core BNG information (e.g. the pre-development biodiversity value, the approach to enhancing biodiversity on-site, proposed off-site enhancements (including the use of statutory credits) and the completed biodiversity metric) with planning and DCO applications.

Planning conditions, planning obligations, conservation covenants or DCO requirements would secure a BNG requirement and specify the timeframe for delivery, with biodiversity gain plans required to be submitted in a standard format and approved before commencement of development.

A strategy setting out how the BNG would be achieved and the percentage gains to be delivered in each phase would need to be submitted with outline and phased applications. BNG would be expected to be front loaded into earlier stages, and a biodiversity gain plan submitted for approval before commencement of each phase.

Monitoring and reporting requirements, also secured through planning conditions, s106 obligations and conservation covenants (as appropriate) are likely to be standardised. Typically, reports may be required for years 2, 5, 10, 20 and 30. Failure to deliver BNG outcomes could result in enforcement action by a local planning authority using existing enforcement powers, but there is the possibility of other organisations such as Natural England becoming able to enforce BNG requirements.

Biodiversity units market

Fundamental to the working of this new regime will be the establishment of a new biodiversity units market and 'habitats' bank, from which biodiversity units can be traded.

Developers who cannot deliver the BNG requirement on-site will be encouraged to deliver off-site habitats enhancements either on other land they own or by purchasing biodiversity units from land local to the development site. Where local opportunities are insufficient, units may be purchased from land outside the local area.

As a result, landowners (including public authorities) can create or enhance habitat to the required standard and sell the resulting biodiversity units to developers anywhere in England, creating an off-site biodiversity units market. Transactions are expected to be brokered by intermediaries (which may include local planning authorities or financial institutions) rather than central Government, with buyers and sellers of units agreeing the unit price and terms of sale.

Developers who provide on-site habitat enhancements that exceed their statutory requirements could also sell the excess units as off-site gains for another development.

Further regulations and guidance will be published in due course to facilitate the operation of this market, an oversight function is proposed and probity rules will need to be upheld. However, a centralised trading platform is not proposed.

Habitat banks

Landowners will be able to carry out habitat enhancement works and, provided they meet the minimum requirements, 'bank' the resulting units so they can be sold to developers when needed, at which point they will be secured by legal agreement and registered to satisfy a developer's BNG requirement. Habitats created or enhanced after 30 January 2020 that meet the relevant criteria will be eligible for registration and sale in this way. Guidance on the minimum requirements for habitat banks will be published separately.

Statutory biodiversity credits

Developers will also be able to purchase biodiversity credits from a Government run digital platform as a last resort. The price of credits, to be published in advance of the BNG becoming mandatory, will intentionally be uncompetitive in order to drive growth in the biodiversity unit market as the principal means of achieving off-site BNG. These credits will be phased out once the biodiversity units market has matured.

Interaction with other environmental policies, legislation and markets

Environmental enhancements undertaken by developers in compliance with other environmental policies, legislation and markets may, in some cases, count towards a developer's BNG. For

example, green infrastructure and sustainable drainage provided on-site and mitigation and compensation measures for protected species may contribute towards the 10% BNG.

Payments received for biodiversity units may also be combined with other payments landowners may receive for environmental services from the same parcel of land (e.g. nature based carbon trading and Government schemes that reward environmental land management) to incentivise land managers to deliver a wide range of environmental benefits from a given parcel of land.

Summary

This consultation is helpful in that it provides a much clearer indication of when and how the new BNG requirement will be applied, the information developers will need to submit and what developers must do to discharge the BNG requirement. Consideration should be given to schemes in the pipeline now as to whether the BNG requirement will be applied, and if so how it can be accommodated within the scheme design and strategy

The BNG regime relies largely on third parties and market forces to create a workable system for the creation and trade of biodiversity units. However, landowners interested in pursuing these opportunities will need to carefully consider their ability to claim other available reliefs (further guidance on this has been promised) and the implications of maintaining biodiversity unit land for at least 30 years after completion of the works to establish the habitat available for BNG purposes in the first instance.

RELATED CAPABILITIES

- Planning & Zoning
- Environment
- Real Estate

MEET THE TEAM



James Good

London

james.good@bclplaw.com

[+44 \(0\) 20 3400 4381](tel:+44(0)2034004381)



James Parker

London

james.parker@bclplaw.com

[+44 \(0\) 20 3400 4132](tel:+44(0)2034004132)



Clare Eccles

London

clare.eccles@bclplaw.com

[+44 \(0\) 20 3400 4267](tel:+44(0)2034004267)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP’s principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.