

Insights

BIODIVERSITY NET GAIN: FURTHER CLARIFICATION WITH 6 MONTHS TO GO

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SUMMARY

Whilst the draft regulations that will bring mandatory biodiversity net gain into force are still awaited, new guidance recently published by DEFRA and the Biodiversity Metric 4.0 Calculation Tool published by Natural England in the spring, provide more clarity on what developments will come within scope, the procedure, what can count towards a development's BNG and how biodiversity units can be sold.

We have been closely following the [emerging details of the new biodiversity net gain \(BNG\) regime](#) and the [emerging market for off-site BNG](#) which is expected to come into force for most planning applications in November 2023 with significant implications for developers, local planning authorities and landowners who wish to create and sell biodiversity units.

Navigating the new process will be complex as there are multiple components and it requires an understanding of how the biodiversity metric published by Natural England is used to assess the biodiversity unit value of land and to calculate the losses and gains resulting from development and habitat interventions.

Whilst the draft regulations (made under powers in the Environment Act 2021) that will bring the BNG process into force are still awaited, details of how BNG will work in practice continue to emerge in a piecemeal way.

New guidance published by DEFRA in May, along with publication of the Biodiversity Metric 4.0 Calculation Tool by Natural England in March, provides more clarity on elements of the BNG process including what development will fall within scope, the procedure, what can count towards a development's BNG and how biodiversity units can be sold. In our latest blog we summarise some of the key points to note from these recent documents.

WHAT DEVELOPMENT IS WITHIN THE SCOPE OF BNG?

From November 2023 (subject to regulations coming into force at this date and transitional provisions that may apply) planning permissions granted under the Town and Country Planning Act 1990 (TCPA) will be granted subject to a mandatory condition to secure habitat improvements that amount to a 10% BNG over the baseline biodiversity value for the site at the 'relevant date', save for small sites for which the requirement is expected to come into force in April 2024 and subject to the exemptions listed below. Biodiversity gain at a site has to be secured for a minimum period of 30 years.

This means that full, outline and s73 planning permissions and new minerals permissions will be granted subject to the mandatory BNG requirement.

However, the following types of developments will be exempt, so the BNG requirement will not apply:

- permitted development;
- urgent crown development;
- development impacting habitat below a 'de-minimis' threshold of 25m² or 5m for linear habitats (for example hedgerows);
- householder applications;
- sites where habitats are being enhanced to provide BNG;
- small scale self-build and custom housebuilding (to be defined to avoid the exemption of large sites made up of many custom plots);
- Reviews of Old Minerals Permissions (ROMPs).

This means that planning applications for brownfield land, change of use applications, temporary applications and developments which would be permitted development but are not on account of their location in Conservation Areas all fall within scope.

In addition, application of the biodiversity metric takes projects that have a baseline of zero biodiversity units out of scope (for example involving sites with sealed surfaces such as existing buildings or tarmac), so there will be no BNG requirement for developments on these sites. Similarly, temporary impacts on habitats that can be restored within 2 years can be excluded from BNG calculations.

IRREPLACEABLE HABITAT

Where development takes place on 'irreplaceable habitat' the quantitative mandatory biodiversity gain objective will be disapplied for that habitat area and other compensation and mitigation

requirements will apply. However, information about such habitats will need to be included with the planning application and the biodiversity metric will be used to calculate the value of enhancements where there are no negative impacts to it. 'Irreplaceable habitats' will be defined in secondary legislation and a consultation will be carried out on the scope of this definition.

NSIPS

The BNG requirement will apply to development consent orders for NSIPs from 2025, but the government is encouraging projects to adopt BNG earlier on a voluntary basis wherever possible. It will be applied without any broad exemptions, other for development on irreplaceable habitats, and using the same broad approach as for TCPA applications. However, it will be governed by a separate, albeit similar, procedure and further details are awaited on this and the draft biodiversity gain statement for NSIPs, expected to be published for consultation this year.

HABITAT ENHANCEMENTS THAT CAN COUNT TOWARDS BNG

BNG is unique in that it is a mandatory requirement to deliver quantified habitat improvements, but there are other statutory regimes that require environmental or habitat improvements for development.

New [guidance published by DEFRA](#) confirms that habitat enhancements delivered as part of a development under these separate regimes can also count towards BNG in some cases if they are provided in compliance with a statutory obligation or policy.

River basin management plan (RBMP) mitigation and enhancement measures, and off-site mitigation or compensation for protected species or sites, can also count towards the total BNG provided that at least 10% of the BNG is delivered through separate activities. This means that if there is a net loss in the biodiversity value on a site as a result of development, other mitigation or compensation measures delivered by these statutory regimes can also be counted as a biodiversity gain, but only up to the point where there is no net loss of habitat at the site from the baseline value calculated at the 'relevant date'. The 10% net gain above the baseline must be delivered from other on or off-site enhancement activities or the purchase of biodiversity units.

HABITAT ENHANCEMENTS THAT CANNOT COUNT TOWARDS BNG

However, if habitat enhancements are delivered in accordance with a restocking condition under a tree felling licence, a marine licence or under the environmental damage regulations, these enhancements cannot be counted towards BNG, so separate enhancements must be delivered to account for any net losses and reach the 10% net gain required.

SELLING OFF-SITE BIODIVERSITY UNITS TO DEVELOPERS

As [confirmed by DEFRA](#) almost any landowner (including local authorities), land agents, land advisors and a habitat bank operator can create or enhance habitats and sell the biodiversity units arising from that land to a developer, either in partnership with a local authority, through a habitat bank operator or broker or on a trading platform. However, enhancements made pursuant to a tree licence condition, a marine license or to remediate land under the environmental damage regulations cannot be re-purposed and sold as biodiversity units.

The guidance clarifies what steps unit sellers must go through in order to sell units to developers. This includes:

- Calculation of how many biodiversity units there are on site using a qualified ecologist and application of the biodiversity metric;
- Registration of the site as a biodiversity gain site from November 2023 either before or after the creation and allocation of units to a development;
- Securing the land by a legal agreement – either a s106 agreement with a local planning authority (LPA) or conservation covenant with a ‘responsible body’ containing a 30 year management commitment;
- Agreement on a habitat management and monitoring plan with the LPA or responsible body;
- Pricing the biodiversity units by taking into account factors such as management, monitoring, insurance costs and agree payment details.

STACKING CREDITS AND UNITS FROM DIFFERENT NATURE MARKETS

Biodiversity units and nutrient credits (created by reducing or capturing nutrients that would otherwise end up in protected water bodies) can be created from the same piece of land and sold to the same or different developer (known as ‘stacking’). However, land managers should not sell credits for other nature markets (such as carbon credits) from the same nature-based intervention if they are also selling biodiversity units and/or nutrient credits.

Landowners can also sell more units from an existing biodiversity gain site if the planned habitat condition has been achieved before the end of the existing agreement and the land can be further enhanced. However, a clear baseline from what the existing obligation has achieved is needed for landowners to do this.

CONSERVATION COVENANTS

BNG can be secured via planning conditions, planning obligations or conservation covenants (or a combination of these methods). Some [general guidance](#) on the use of conservation covenants is already available, but further guidance is expected on how and when they should specifically be

used to secure biodiversity gains for the purpose of BNG. This is expected to include reference to thresholds for on-site gains which will need to be explicitly secured through these mechanisms, along with details of what will need to be included in a conservation covenant or planning obligation.

LPAs and other eligible organisations can apply to Defra from early 2023 to become responsible bodies and use conservation covenants to secure and enforce positive (and restrictive) land management obligations.

MORE DETAILS NEEDED

Whilst a more detailed picture of the BNG process continues to emerge, with only six months to go before it comes into force for TCPA applications there remain a number of areas where details remain scant. These include the information requirements for biodiversity gain statements submitted at the pre-application stage, what should be included in a conservation covenant or planning obligation which secures biodiversity gains for the purpose of BNG and the definition of 'irreplaceable habitat'. More information on how BNG will apply to NSIPs and particularly the information requirements for biodiversity gain statements and how on-site habitats (which are subject to BNG) will be considered in the context of other environmental mitigation areas included in the project boundary are awaited.

However, following the clarification of the position on stacking and additionally, there is a potentially attractive opportunity for landowners that have suitable land available to create biodiversity units for sale.

RELATED CAPABILITIES

- Planning & Zoning

MEET THE TEAM



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