

B(UILD)ING BACK GREENER: BIODIVERSITY NET GAIN AND NSIPS

Almost all development proposals in England – no matter how big or small, and no matter what the current state of the land is – will soon have to demonstrate a measurable increase in biodiversity.



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The new requirement, known as biodiversity net gain (BNG), was introduced by the Environment Act 2021 and will apply to both conventional planning applications under the Town and County Planning Act 1990 and to nationally significant infrastructure projects (NSIPs) consented under the Planning Act 2008.

The [government is currently consulting](#) (until 5 April 2022) on some of the detail of how BNG will be implemented and operate in practice.

WHAT IS BNG AND WHAT WILL THE BNG REQUIREMENTS FOR NSIPS BE?

In a nutshell, BNG is an approach to development or land management that aims to leave the natural environment in a better state than it was beforehand. BNG requires that the biodiversity value of land affected by an NSIP must exceed by at least 10% the pre-development biodiversity value of the land.

BNG can be achieved in a number of ways: on-site gain,

off-site gains (eg in both cases by the creation or enhancement of habitat) and the purchase of credits.

The [impact assessment for NSIPs](#) published alongside the current consultation document estimates that in the absence of BNG, approximately 740 hectares of habitat would be lost annually as a result of NSIP development.

Under the Environment Act 2021, for NSIP applications where a national policy statement (NPS) has effect, if that NPS requires BNG then the application cannot be approved unless it provides at least the requisite BNG (set at 10%).

All NPSs will be required to include BNG the next time they are reviewed. A stand-alone biodiversity gain statement can be produced to sit alongside them (see below).

CURRENT CONSULTATION ON BNG

A consultation was launched by Defra on 10 January 2022 on the details of BNG for planning permissions and



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NSIPs, which closes on 5 April 2022. The consultation sets out a number of issues which give an idea of how the government is considering implementing these requirements. There is a specific section on NSIPs (but only their onshore elements down to the low water mark) and we discuss some of the issues for NSIPs below.

Biodiversity Gain Statements

For NSIPs, the government is currently proposing a core 'biodiversity gain statement', which is essentially a free-standing version of the part of an NPS that would require BNG and which will ensure that all types of development subject to the Planning Act 2008 system will be required to demonstrate BNG.

The new statement(s) will initially set out the biodiversity gain requirement for all types of NSIP, the date from which the objective must be achieved and the stage of project design that the commencement threshold applies to.

As the biodiversity gain statement will be published no later than November 2023, this may suggest that we can expect a consultation on a draft biodiversity gain statement later this year.

Interestingly, Defra is considering whether, for NSIPs, a distinction should be drawn between on-site habitats in the development area and any dedicated mitigation areas. This is to avoid

the percentage net gain required also applying to environmental mitigation or compensation areas provided within the Order limits of a DCO application, which could otherwise see NSIP schemes having to provide additional biodiversity gain. Infrastructure developers should consider making representations on this in their response to the consultation.

Timing

The government indicates that it will provide promoters at least two years' warning before the requirement kicks in, and there is a long stop date of November 2025. This is in contrast with the position in relation to the Town and Country Planning Act system, where BNG is to become a requirement by November 2023.

Although not entirely clear, it seems that DCO applications that have been accepted by the implementation date are proposed not to be subject to the BNG requirement, so that projects currently in the pre-application stages will not be caught out at a later stage by having to comply with the BNG requirement which is currently not in force, as long as the applications have been made at least 28 days before it does come into force.

November 2025 may seem a long way off but this grace period doesn't mean that you can ignore biodiversity, but it does mean that you have some time to develop an understanding of the requirements before it becomes standard practice.

'Estate' BNG approach?

The government has given an initial endorsement to the 'estate' BNG approach for multiple promoters of NSIPs such as National Highways, Network Rail and National Grid (and others), who have existing organisational plans to increase the number of their projects delivering biodiversity net gain. It may be possible for these and other organisations to make use of their existing estates, or other strategically located land, to meet a biodiversity gain requirement in relation to an NSIP which they are promoting.

Given the number of energy NSIP applications on the horizon, it's useful that the government seems open to other 'organisations' being capable of utilising the 'estate approach', in addition to naming specific bodies. In this context, it is also worth noting that the government is consulting on types of projects where BNG need not be provided where

such projects 'are unable to deliver a 10% biodiversity net gain but may be able to deliver a lower percentage target'.

How BNG could be delivered for NSIPs in practice

The consultation proposes that the BNG regime will be consistent with the traditional mitigation hierarchy (ie avoid, minimise, mitigate, compensate).

The preference will be for developers to avoid projects giving rise to negative effects in the first place and, where they cannot be avoided, to keep them as low as possible and mitigate the residual effects on-site.

Where on-site mitigation is not practicable, developers will be able to rely on off-site habitat creation or enhancements to count towards the BNG requirement. This is partly incentivised through the biodiversity metric, since land that is at least two local authorities away has its score discounted by 50%, so twice as much land would be needed.

Some controls over relying on off-site habitat creation and enhancement or the purchase of biodiversity units will plainly be appropriate in order to encourage the delivery of gains local to the development site. There may



however be circumstances where it is not possible to secure the appropriate habitat type local to the development site, in which case developers will be able to meet the net gain requirement by delivering habitat enhancement and creation outside of the principal development area.

Off-site gains will need to be secured, either through a conservation covenant (a new mechanism introduced under the Environment Act 2021 to commit land to conservation that is recorded at HM Land Registry) or through a more conventional planning obligation.

Further policy and guidance will be needed to support the implementation of off-site biodiversity gains as part of the net gain requirements.

Securing and delivering BNG in NSIP applications

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

It is anticipated that BNG could be secured through DCO requirements specifying the timeframe for delivery, with biodiversity gain plans required to be submitted in a standard format and approved before commencement of development.

Monitoring and reporting requirements, also secured

through DCO requirements 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 either a local planning authority using existing enforcement powers, but also there is the possibility of other organisations such as Natural England becoming able to enforce BNG requirements.

Compulsory acquisition of land for BNG

The consultation document sets out the government's current thinking on the use of compulsory purchase powers as follows:

'There may be instances where NSIPs need to deliver gains close to their site but do

not have the flexibility to do this. NSIP providers might, in such circumstances, want to use compulsory acquisition powers to extend the boundary to deliver on-site biodiversity gains. However, we expect that it would generally be preferable for developers to deliver further gains within the existing project boundary or through the purchase of market off-site biodiversity gains without resorting to additional compulsory acquisition of land.'

The government appear to be stopping short of allowing compulsory acquisition of land purely for BNG in all cases. Guidance from government on what 'generally be preferable' means and which factors support compulsory acquisition would be helpful.

If seeking compulsory purchase powers for BNG, applicants are likely to be required to explain why the purchase of available off-site biodiversity units would not be appropriate in the specific circumstances of the project.

Furthermore, in the consultation, the government states that it: '...does not intend to set a minimum [maintenance] period for [BNG included in] NSIPs that is shorter than the 30-year period

specified for other kinds of development' (with a heavy hint that it could be longer in some cases). The potential for a 30 year (if not longer) maintenance period will require promoters to consider whether temporary possession powers alone would be sufficient, and if not whether permanent rights or indeed outright compulsory acquisition of land may be required.

Market for biodiversity units

The government is encouraging a market for biodiversity units to be bought and sold. Biodiversity units will need to meet the requirements of net gain, and demonstrate that they would not adversely affect protected and priority habitats.

There will be a national register of biodiversity units, with robust criteria for land to qualify for inclusion to ensure that biodiversity units provide legitimate biodiversity gains.

The price paid for a biodiversity unit must be sufficient to cover the costs of the initial habitat creation or enhancement, together with its maintenance for a minimum of 30 years.

Developers who exceed the net gain requirement through on-site provision could also sell the 'excess' units to be counted

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as off-site gains for another project. In the NSIP context it is doubtful that compulsory purchase powers could be granted in respect of any 'excess' biodiversity gain.

The creation of a biodiversity unit market will need clear regulatory guidance and direction. At present, the government's intention is that it will not establish a centralised system for trading biodiversity units.

Habitat banking

This refers to the ability of landowners to carry out habitat creation and enhancement works and, so long as the relevant conditions are satisfied, 'bank' the units that result from the works which can be sold to NSIP developers at a future date. The works must have taken place after 30 January 2020 to count.

Detailed guidance on the minimum requirements for habitat banks is expected.

Statutory biodiversity credits

The Environment Act 2021 establishes a framework for statutory biodiversity credits. In short this will provide for

a mechanism whereby an NSIP developer may purchase biodiversity credits from the Secretary of State in order to count towards the BNG requirement, which would be applied towards carrying out habitat enhancement works or purchasing land for that purpose.

The policy intention is that the use of biodiversity credits will be a 'last resort', where NSIP developers can demonstrate that they are unable to meet the net gain requirement on-site or off-site (whether by providing off-site habitat or purchasing biodiversity units on the market).

As the government intends that the biodiversity unit market will be the primary means of achieving off-site net gain, the price of statutory biodiversity credits will be intentionally uncompetitive, ie expensive, so as to minimise their use, which will be phased out at the 'earliest opportunity' once the market for biodiversity units has matured.

CONCLUSIONS

The Defra consultation provides welcome clarification of the government's policy intentions

for the BNG requirement and how it will apply to NSIPs.

Further detail is awaited on certain key issues such as the content of the proposed 'core' biodiversity gain statement for NSIPs and whether environmental mitigation areas within the Order limits of an NSIP will be excluded from the calculation of BNG.

It will also be interesting to see how the Planning Inspectorate and examining authorities will consider BNG in forthcoming NSIP applications which will be examined and determined before the BNG requirement is formally implemented for NSIPs, given that a commitment to environmental net gain is reflected in other government policy such as the Defra 25 Year Plan for the environment and the clear direction of travel is towards BNG.

In the meantime, it's clear that we will need to add yet another acronym to our infrastructure planning lexicon.

This publication is not meant as a substitute for advice on particular issues and action should not be taken on the basis of the information in this document alone.

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