

Briefing on Biodiversity Net Gain implementation

15 November 2023

Executive summary

Since the Environment Act 2021, the Government has stated its intention to implement mandatory Biodiversity Net Gain (BNG) by November 2023. This has now been delayed until January 2024. The delay is regrettable, creating uncertainty in the development of an important new market for nature. The Government should use the time to clarify rules for BNG implementation by:

- Publishing a consultation on the definition, expanded list, and compensation principles for irreplaceable habitats.
- Narrow the exemptions from mandatory BNG.
- Reverse the decision to enable the selling of excess units and support local planning authorities in raising their ambition above the national 10% minimum.
- Improve the monitoring and enforcement of onsite delivery, through requiring onsite gains to be registered on the BNG register and providing guidance and support for local planning authorities to carry out enforcement if BNG is not delivered.

Clear and robust regulations and guidance for BNG, supported by sufficient resources for local planning authorities for implementation, will ensure that the policy contributes to nature recovery and the achievement of national environmental ambitions in England.

Introduction

The introduction of mandatory Biodiversity Net Gain (BNG) through the Environment Act 2021 is a significant opportunity to slow the decline of nature in England, helping to achieve the Government's legally-binding environmental targets. Done well, BNG means that development must contribute to nature's recovery, rather than hindering it.

There is no time to waste if the Government is to meet its target to halt the decline of nature by 2030, so the recent Government announcement to delay the implementation of mandatory BNG to January 2024 was disappointing.

However, the Government should use this extra time to address final loopholes and weaknesses in BNG to improve its implementation and ensure it genuinely delivers for nature. In this briefing, we set out the changes to regulations, guidance, and resourcing that are needed to ensure robust implementation of BNG and good outcomes for nature.

Irreplaceable habitats

The BNG legislation rightly recognises that a ‘net gain’ cannot be achieved when there are adverse effects on irreplaceable habitats (IH), because their ecological value is so high and the habitat so unique. The legislation excludes onsite IH from mandatory BNG, meaning developers cannot achieve net gain where IH are damaged or destroyed, any compensation for the unavoidable damage to IH is separate from BNG delivery, and developers cannot use BNG units as compensation for IH loss.

The Government has [recently indicated its intention](#) to lay regulations including a short list of IH (those already identified in the National Planning Policy Framework (NPPF)) and promised a public consultation in the second half of 2024. However, the list of IH in the NPPF does not capture all rare and special habitats which cannot be replaced or would take so long to re-establish that they are virtually irreplaceable, such as ancient hedgerows, rivers, lakes, and ponds, long-established woodland and priority grasslands such as floodplain meadows. Without being defined or listed as IH in the BNG regulations, these special habitats are at risk of being traded away by BNG – harmed or destroyed and replaced by lower quality or commonplace habitats. The list of IH must be expanded with and informed by expert and stakeholder consultation.

The definition of IH, an expanded and more accurate list of IH, the rules to protect them, and the principles for compensation (after evaluating if there are wholly exceptional circumstances, in line with national planning policy and if impacts on IH are unavoidable) should be consulted on as soon as possible with experts and stakeholders to ensure they are robust.

We look forward to seeing the results of Defra’s review of the implementation of the NPPF protections for ancient woodland and veteran trees and improved planning protections for irreplaceable habitats being implemented in the upcoming review of the NPPF. BNG must support the strengthening of protections and not undermine them. Language in guidance

must support and reflect the NPPF and be clear that wholly exceptional circumstances are needed in addition to a suitable compensation strategy (based on current NPPF wording).

Guidance should recognise that not all impacts from development on irreplaceable habitats will be recorded via the metric and a precautionary approach should be applied – both in terms of applying national planning protections and determining a suitable compensation strategy.

Where wholly exceptional circumstances have been clearly justified and where impacts on IH are unavoidable, the IH regulations and guidance must set out robust and clear principles for compensation. These rules must recognise both loss and deterioration impacts of development on irreplaceable habitats that are both onsite and offsite. Compensation standards should be at least as strong as those required by the Habitats Regulations,¹ requiring compensation measures which are:

- tailored to address ecological integrity and ecosystem services of the IH that was damaged or lost,
- permanent,
- fully-funded,
- local or strategically located, and
- regularly monitored.

In effect, this should create a much higher bar for effective compensation than requirements for net gain and establish highly dissuasive requirements for any development that would affect irreplaceable habitat. Guidance will need to recognise that you cannot fully compensate for impacts to irreplaceable habitats.

Mitigation and compensation strategies should be agreed on a case-by-case basis, ensuring compensation sites and measures in perpetuity, along with the necessary long-term funding, as a part of any planning condition. Robust legal agreements should be in place to enable intervention and enforcement action where agreed compensation measures fail.

Compensation for IH should be transparently recorded on a register of compensation sites, administered in a similar way as the BNG sites register. Where IH, including unrecorded IH, are removed prior to the submission of a planning application, the planning application should

¹ https://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

be determined as if the IH is still present. This would be particularly important as consideration happens on expanding the list of IH.

Exemptions to mandatory BNG

The cumulative impacts of multiple developments, even at small scales, can result in serious loss of habitats and biodiversity, especially in areas of high biodiversity value. For example, the Government's impact assessment for mandatory BNG shows that 12% of permitted residential units are small sites – these will add up to have large cumulative environmental impacts. For this reason, **the Government should narrow the number and scope of exemptions to mandatory BNG.**

We strongly support the introduction of mandatory BNG for small sites from April 2024. BNG on small site developments is achievable and will make an important contribution to nature's recovery.

We recommend the Government does not exempt self-builds and custom housebuilding development from mandatory BNG. It is not always the case that self-builds are both sustainable and small-scale. There is an increased tendency for self-builds to be in more rural areas where the likelihood of biodiversity impacts is often greater. Small developments may have large indirect impacts upon adjacent sites or for ecological connectivity. Even when self-builds and custom house-building are of a small scale, they can still result in the loss of priority habitats. For example, the Wildlife Trusts reports that there have been applications approved for a self-build on a former Local Wildlife Site in Cheshire, which contains areas of dry heath and acid grassland. There should not be a blanket exemption which creates a loophole for developers or self-builders who are building multiple sites. Net gain can and should be delivered on self-builds and custom housebuilding developments. The small site metric could help simplify the BNG process for self-builds and custom housebuilding sites.

Selling of excess units

The Government has indicated that it will allow developers to sell excess on-site biodiversity units as off-site gains for another development.

This policy effectively limits the ability of BNG to recover nature and deliver nature targets. Currently, some major developments will deliver well above 10% gain and this should be

welcomed as a contribution to nature recovery. By allowing such excesses to simply be sold on, excess gains become part of another developer's gain, meaning the additional contribution to nature recovery is removed. In effect this means BNG is capped to deliver a maximum of 10% gain, which the OEP and the Government's own Impact Assessment have said is only likely to compensate for lost biodiversity.

In particular, solar farms and mineral sites often get approved with conditions for biodiversity gains much greater than 10%. Allowing the selling of excess units could see a backward step for some counties for nature recovery if big developments like these are allowed to sell off excess units.

In addition, the decision to allow developers to sell on excess units makes it harder for more ambitious local planning authorities (LPAs) to demand more from development. There are only four LPAs with policies requiring 20% net gain, including Greater Cambridge, Worthing, Guildford, and Maidstone.² The Government must support local councils and developers in going beyond the national minimum 10% requirement, rather than stifling ambition by effectively capping developers' contributions at 10%.

The proposed regulation effectively caps BNG at 10% by allowing any additional gains to be sold to another development, reducing their requirements for habitat creation. The Government should not proceed with its proposal to allow additional on-site biodiversity units to be sold.

Onsite monitoring and enforcement

High quality delivery of all biodiversity gains, both on and off site, is essential to delivering benefits for nature. Whilst off-site BNG units will be clearly registered with Natural England, on-site units will not. Information about on-site units will be on LPA portals, but these vary in quality and ease of navigation, making it difficult for some communities to understand the BNG commitments in their locality. We recognise the Government has stated its intention to explore "how on-site information can be extracted from planning permissions and published on the register". However, this is currently only a vague commitment. **Clear plans for adding on-site BNG to the register should be set out so that long-term gains can be effectively managed and monitored on site, and that this information is publicly available.**

² There are another ten LPAs with 20% BNG emerging (Local Plans not adopted, but expected): Richmond (2024/2025), Mid Sussex, Mole Valley (2023), South Cambridge, Birmingham, East Devon, Surrey Heath (2025), Canterbury (2024), Swale (2023), Swindon.

Registering gains alone will not be enough. There must be enforcement where developers fail to deliver and maintain promised gains. The burden of enforcement for BNG will fall largely on LPAs, particularly for on-site gains which will be secured through planning conditions or obligations. LPAs have limited funds for enforcing planning conditions with 80% of enforcement officers already reporting that there were not enough officers in their team to carry out the workload.³

In addition, existing LPA guidance on enforcement advises LPAs to only take action against violations of planning conditions where the violation represents a ‘serious harm to a local public amenity.’⁴ This is a high bar that is unlikely to capture violations of BNG planning condition.

International experience of biodiversity offsets shows that lack of capacity in and enforcement by local councils is a key reason why offsets fail to deliver.⁵ This mistake must not be repeated in England. **Further investment and guidance are needed to enable and empower LPAs to monitor and enforce the delivery of BNG.**

While the recent £9 million of funding from Government to support LPAs to recruit ecologists is welcome, this is not sufficient. Adequate funding will need to be provided to LPAs to carry out enforcement where gains have not been delivered or maintained.

We also welcome the Government’s commitment to “review the role of guidance in supporting when enforcement action can be taken, to clarify that a failure to deliver promised environmental enhancements can justify enforcement action”. However, further details are urgently needed on this to make clear failure to deliver or maintain gains is enforceable.

³ <https://www.alge.org.uk/wp-content/uploads/sites/15/2022/06/ALGE-ADEPT-Report-on-LPAs-and-BNG-2022.pdf>

⁴ <https://researchbriefings.files.parliament.uk/documents/SN01579/SN01579.pdf>

⁵ <https://conbio.onlinelibrary.wiley.com/doi/full/10.1111/conl.12820>

Conclusion

With an additional several weeks of delay before mandatory BNG in January 2024, there is still time to rectify the issues set out above.

Addressing these concerns and publishing BNG regulations and guidance with a robust approach to BNG will provide clarity and certainty for all stakeholders and improve the implementation of BNG, ensuring this policy genuinely protects and restores English nature.

Wildlife and Countryside Link (Link) is the largest nature coalition in England, bringing together 80 organisations to use their joint voice for the protection of the natural world and animals.

For questions or further information please contact:

Emma Clarke, Senior Policy Officer, Wildlife and Countryside Link E:

emma.clarke@wcl.org.uk

Wildlife & Countryside Link, Vox Studios, 1 – 45 Durham Street, Vauxhall, London, SE11 5JH

www.wcl.org.uk

The following organisations have inputted into this briefing and support for strengthening the implementation of Biodiversity Net Gain ahead of mandatory BNG in January 2024.

Bat Conservation Trust

Bumblebee Conservation Trust

CIEEM

Earthwatch Europe

Froglife

RSPB

The Wildlife Trusts

Woodland Trust

Wildfowl and Wetlands Trust