

## BIODIVERSITY NET GAIN – DETAILED NOTES

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### 1. INTRODUCTION

#### The General Biodiversity Objective

Public authorities, including local planning authorities (LPAs), must consider what action they can properly take to conserve and enhance biodiversity in England.<sup>1</sup> This is referred to as the "general biodiversity objective", and is a key component of the government's 25-year Environment Plan.

Where before, LPAs were required only to *have regard* to the general purpose of conserving biodiversity, they are now duty-bound to conserve *and enhance* it. The effect is that public authorities must now take positive action to improve biodiversity, not just prevent it from getting worse.

### 2. KEY PRINCIPLES

#### "Biodiversity Net Gain" (BNG)

BNG refers to the outcome achieved when development leaves biodiversity in a better state post-development, than existed pre-development.

#### "Biodiversity Gain Objective"

The Environment Act 2021 ("the Act") introduced a statutory requirement for biodiversity improvement in the planning system.<sup>2</sup> This was effected by making the grant of planning permission in England subject to the condition to secure that the "biodiversity gain objective" is met.

Meeting this objective requires that the biodiversity value attributable to a (qualifying) development exceeds the pre-development biodiversity value of the 1) by at least 10% - i.e. that the developers achieve a BNG of 10%.

#### Reporting Progress

Local authorities and LPAs must publish biodiversity reports every five years, documenting policies and actions taken to comply with their biodiversity duty and BNG obligations. Reports must include a summary of actions taken, how compliance will be ensured in the next period, and any other relevant information.

<sup>1</sup> S.40(1) of the Natural Environment and Rural Communities Act 2006, as amended by s.102 of the Act.

<sup>2</sup> Schedule 7A of The Town and Country Planning Act 1990, as inserted by Schedule 14 of the Act.

### 3. HOW IS BNG ACHIEVED IN PRACTICE?

BNG aims to deliver measurable gains to the natural environment through the creation of habitats in conjunction with the development process. BNG can be successfully delivered by a developer in the following ways (or by a blended approach of all three):

- 1) On-site creation of habitats;
- 2) Off-site provision of habitats; or
- 3) Purchase of statutory biodiversity credits.

On-site delivery of biodiversity may prove difficult for many developers as it may be more profitable for the land to be used for other development purposes. If on-site delivery of BNG is not possible, the developer is required to look for alternatives off-site. The provision of off-site habitats is therefore a rapidly emerging sector, and the use of habitat banks is becoming increasingly prevalent.

Developers may also consider optioning larger areas of land in order to factor their biodiversity requirements into their planning proposals.

#### The Mitigation Hierarchy

Developers have a positive obligation to adhere to what is referred to as 'the mitigation hierarchy'. According to the hierarchy, efforts to manage the environmental impacts of development should be made in the following order of priority:

- 1) *avoiding* environmental loss;
- 2) *minimising* the loss;
- 3) *restoring* the loss; and
- 4) *offsetting* the loss.

In practice, this means that developers should follow these steps:

- 1) Aim to avoid or reduce biodiversity impacts through site selection/layout;
- 2) Enhance biodiversity on-site of the development;
- 3) Consider off-site options through creation of off-site habitats, either on their land or by purchasing biodiversity units on the market; and
- 4) As a last resort, purchase statutory biodiversity credits from the government. This is only where they can demonstrate that BNG is unavailable through on-site or off-site means and all other options have been exhausted.

The system therefore seems to have an in-built bias towards developers securing net gain on-site, which disincentivise developers seeking to achieve biodiversity gain off-site.

#### Using "SUDS" and "SANGS" to Achieve BNG

Sustainable Urban Drainage Systems (SUDS) and Suitable Alternative Natural Greenspace (SANGS) can both be used to achieve BNG on-site or off-site.

- SUDS are a type of drainage system that is designed to mimic natural drainage processes. They can provide habitat for a variety of wildlife, including birds, amphibians, and insects.
- SANGS are open spaces provided to mitigate the impact of development on existing recreational green space.

These sites provide a number of benefits, including reducing the risk of flooding, improving the quality of water runoff, creating habitats for wildlife, and contributing to the post-development biodiversity value of a development.

When assessing post-development biodiversity value (for the purpose of preparing biodiversity gain plans), developers can take into account the positive effect of green spaces incorporated in the development – SUDS and SANGS included.

## Local Nature Recovery Strategies

The location of off-site biodiversity sites may also be influenced by Local Nature Recovery Strategies (LNRS), a mandatory system of spatial strategies for nature, covering the whole of England.<sup>3</sup> Recent LNRS Regulations set out how responsible authorities must work with Natural England and other LPAs in their strategy area to prepare and agree their strategy.

### 4. HOW IS BNG MEASURED?

BNG will be measured using Natural England's Biodiversity Metric – which calculates and forecasts biodiversity value. Defra anticipates that the latest version of the tool, the Biodiversity Metric 4.0, will be mandatory from 09 November 2023, forming the basis of the statutory requirement to deliver a 10% benefit for nature, as required by section 98 of the Act.

The Biodiversity Metric calculates the pre-development baseline value of a development site. It then calculates future biodiversity value by measuring any biodiversity losses and gains resulting from the development or land management change.

The date for calculating the biodiversity net gain is the date of submission of the planning application. A baseline date of 30 January 2020 has been set so that any work undertaken after that date that reduces the biodiversity value of the site is disregarded.

The biodiversity value attributable to a development is the total of:

- 1) The post-development biodiversity value of the on-site habitat created;
- 2) The biodiversity of any registered off-site biodiversity gain allocated to the development; and
- 3) The biodiversity value of any biodiversity credits purchased for the development.

If a new habitat is to be delivered off-site, the Defra Metric takes into account the distance of the new habitat from the development site. The further the new habitat is from the development site, the lower the deemed biodiversity value of the habitat for the development.

For example, if the habitat is located in a neighbouring LPA, its biodiversity value is reduced by 25% (compared to its on-site value). If the habitat is beyond the neighbouring LPA, the value deduction is 50%. This is referred to as the "spatial risk multiplier", and is expected to act as a disincentive to developers seeking off-site solutions in preference to on-site solutions.

However, it is possible to qualify for a positive multiplier effect if the mitigation site is located within a LNRS area. The multiplier will reward strategic significance with an uplift of 1.1 to 1.15 with the higher rate applying when the location is identified within a local plan or strategy as being ecologically important.

### 5. CONSERVATION COVENANTS

The Act introduced a statutory scheme to enable landowners to enter into private agreements (conservation covenant agreements) with *responsible bodies*, to do or refrain from doing something on their land, for a conservation purpose, for the public good (conservation covenants).

#### Purpose

Conservation Covenants are intended to provide binding obligations to:

- conserve the natural environment or the natural resources of land;
- conserve land as a place of archaeological, architectural, artistic, cultural or historic interest;
- conserve the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic, cultural or historic interest.

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<sup>3</sup> Established by ss.104-108 of the Act. See Defra's [Policy Paper](#) and [Guidance](#) for details.

Such covenants will remain in place and bind subsequent owners of the land, even though they did not enter into the original agreement. The resulting public benefit is that the conservation value, generated through the covenant, can be preserved for future generations. Without this legal protection in place, the land could be used for other purposes, which may undermine those benefits.

Prior to the introduction of conservation covenants, the primary legal mechanism for achieving BNG goals was s.106 agreements – legally binding agreements between local authorities and developers that secure planning obligations for the benefit of communities. The benefit of covenant agreements is that they can be used outside a BNG planning requirement.

## Responsible Bodies

The 'responsible bodies' who may enter conservation covenant agreements include the Secretary of State (SoS) or bodies designated by the SoS (under section 119 of the Act), on application. These may include:

- Local authorities, provided that they satisfy the SoS that they are *suited* (s.119(2)–(3));
- Other public bodies, if they can satisfy the SoS that at least some of their main purposes, functions or activities relate to conservation; and
- Charities with mainly conservation-related functions may be included.

Failure to deliver BNG in accordance with the terms of the conservation covenant could result in enforcement action being taken by the responsible body against the landowner either under existing powers or new powers under the Act.

## 6. NATURE MARKETS AND THE ADDITIONALITY PRINCIPLE

### What are Nature Markets?

The UK government has published a framework for nature markets ("Framework") setting out how it hopes to encourage the scaling up of private investment in delivering net zero and nature recovery.

The main aims of the Framework appear to be to provide investors with the confidence to engage with these new markets and to ensure that tangible environmental benefits are delivered.

The market is growing all the time with the main drivers being regulatory (BNG and nutrient neutrality) or voluntary, as companies looking to improve their ESG credentials. The Framework recognises that nature markets can be accelerated through the introduction of policy which allows land managers to combine private income with public funding, replacing the agricultural subsidy regime.

The key to unlocking the opportunities that nature markets represent is the sound underwriting of the "credit" by real environmental improvement that can be quantified and validated. As such, a number of principles have been identified to ensure market integrity.

### Additionality

Additionality is the principle that nature markets should only reward environmental improvements that would not have happened without developers' intervention. We see it very simply as ensuring that Mother Nature gets her money's worth. The British Standard on BNG defines additionality as:

*"Property of measures to achieve biodiversity net gain, where the conservation outcomes it delivers are demonstrably new and additional and would not have resulted without it."*

The BNG Consultation makes clear that any nature-based interventions that are already required by law or agreement cannot be used to support claims for BNG or other emerging markets.

The Framework states that a move might be made to a single financial additionality test which could be applied across multiple nature markets.

## **Stacking and bundling**

*Stacking* is the practice of generating multiple types of credits from one or more activities on the same piece of land. *Bundling* is where several different environmental benefits are combined in a single credit. The bundle may be explicit in that the separate benefits are identified and quantified, or implicit in that only one benefit is identified with everything else thrown in as part of the deal.

The latest guidance from Defra confirms that it is open-minded about the use of stacking and bundling to achieve environmental goals, provided that the additionality principle is not breached.

## **Blending of public and private finance**

This is the practice of combining public funding with private investment to support nature recovery and BNG. This is important because public funding is insufficient to achieve these goals on its own.

The framework also recognises the need for clear governance arrangements to ensure that nature markets are operating fairly and transparently. This includes the need to prevent double counting of credits and to ensure that the secondary market in credits is efficient and transparent.

## **Investment Standards**

The Framework also confirms that a pipeline of investment standards for nature markets will be expedited, although governance is likely to be left to the industry itself.

## **7. PRACTICAL STEPS FOR DEVELOPERS**

Under the new legislation, a developer will need to submit a 'biodiversity gain plan' at the planning application stage which must be approved by the local planning authority. The biodiversity gain plan must include information such as:

- The steps to be taken to avoid and/or minimise the adverse effects of the development on the biodiversity value of the on-site habitat;
- Details of the pre-development and post-development biodiversity of the land;
- How BNG is going to be delivered;
- Information on statutory biodiversity credits.

Under the Act, developers are obligated to maintain and conserve the biodiversity gains for a minimum period of 30 years, to allow the longevity necessary for biodiversity gains to be achieved.