



ENVIRONMENT AND LAND USE

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REFERENCE

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# BIODIVERSITY NET GAIN - AN OVERVIEW (ENGLAND ONLY)



## 1. INTRODUCTION

The purpose of this guidance note is to provide information on biodiversity net gain, as introduced into the planning system in England via the Environment Act 2021. The introduction of mandatory biodiversity net gain in the planning system is expected in 2023, following consultation, publication and implementation of regulations.

The new policy will require, as a condition of planning permission, that any new development demonstrate a net gain of a minimum of 10% of the biodiversity value of the site, measured using Defra's Biodiversity Metric. For the purposes of this Guidance Note, biodiversity refers to all plant and animal life and is used interchangeably with nature and wildlife. It is usually described using types of wildlife habitats as a proxy

This Guidance Note covers the following areas:

- 1. Introduction**
- 2. What is biodiversity net gain?**
- 3. How will biodiversity net gain be achieved?**
- 4. The Defra Metric**
- 5. Biodiversity net gain and the planning system**
- 6. Implications for landowners offering biodiversity units**
- 7. Legal mechanisms for delivering biodiversity net gain**

This Guidance Note will be updated over time as new information and detail emerges about the implementation of Biodiversity Net Gain.

## 2. WHAT IS BIODIVERSITY NET GAIN?

The concept of biodiversity net gain (BNG) is fairly straightforward. For any piece of land put forward for development, whether under the Town and Country Planning Act 1990 or as a Nationally Significant Infrastructure Project, there must be a demonstrable gain in the biodiversity value of the land after the development is complete, compared with the pre-development biodiversity value. Biodiversity value is measured using an agreed metric and a plan is put in place to demonstrate how any reduction in biodiversity value will be avoided, mitigated or compensated for on or off site.

Development is one of the causes of the decline of biodiversity, and although environmental assessments are already required, at a national scale there are few development sites that do not have at least some impact on biodiversity. Indeed, the National Planning Policy Framework was amended in 2018, following publication of the Defra 25 Year Environment Plan, to include biodiversity enhancement as an aim.

The forthcoming BNG regulations (expected in 2022) will require the developer to either avoid damaging nature to begin with; to restore or reinstate habitats that are harmed; or to create new compensatory habitat to replace what was lost.

By requiring a positive gain, the policy should mean that development projects not only avoid contributing to the decline of biodiversity but actually help contribute to its restoration. By putting back more than what was lost, over time development that delivers a net biodiversity gain should contribute to national nature restoration targets set by Government.

### 2.1 Implications for land managers and rural businesses

The introduction of BNG has implications for CLA members in several ways. Members putting forward land for development, or undertaking development on their own land, whether to improve their business or as a diversification, will have to plan in advance how to achieve net gain as a condition of receiving planning permission.

For other landowners, BNG offers opportunities to use agricultural or other un-developed land as a source of biodiversity units. As explained in more detail below, in order to achieve a biodiversity gain, many developers will need to pay for the creation and maintenance of new wildlife habitat beyond the boundaries of the development site [or their land]. Landowners who are prepared to dedicate land to creating this habitat can either enter a contract directly with a developer or generate biodiversity credits that can then be sold to developers via a broker or private agreements/deals. This represents a new income stream for the rural economy based on private sector contracts for environmental management of land.

### 3. HOW WILL BIODIVERSITY NET GAIN BE ACHIEVED?

The Environment Act (2021), at Part 6 and schedule 14 amends the Town and Country Planning Act 1990 (at new Schedule 7A) to make it a condition of planning permission in England that the objective of biodiversity gain is met. This objective states that the biodiversity value attributable to a development exceeds the pre-development biodiversity value by a given percentage - currently set at 10%.

#### 3.1 Increasing biodiversity value

Biodiversity value is determined using Defra's Biodiversity Metric 3.0 (see Part 4 for more details on the metric). The metric gives a standard value (in Biodiversity Units) for any area of land, based on the extent and condition of the wildlife habitat on the land.

The biodiversity value includes the cumulative biodiversity value of the following: the post-development biodiversity value of the development site; any new wildlife habitat created off-site; and any biodiversity credits purchased.

The pre-development value is taken from the time of a planning application, or the date planning permission is granted if there is no application.

*It is important for members to note that if any activity carried out since January 2020 on land put forward for development has lowered the biodiversity value of the land, then the biodiversity value prior to these activities is used as the baseline (Environment Bill, Schedule 14, paragraph 6). This was included in the legislation to prevent people from intentionally lowering the biodiversity of land that they intended to use for development later so as to lower their net gain obligations.*

The post-development biodiversity value is made up of any combination of the following:

1. The value of the development site after development has taken place (which could be higher or lower). It also includes future commitments to increase the biodiversity value of the development site, this must be delivered through either:
  - a. a condition subject to which the planning permission is granted,
  - b. a planning obligation, or
  - c. a conservation covenant,
2. Biodiversity gain outside the development site (off-site) which means habitat where:
  - a. the enhancement is required to be carried out under a conservation covenant or planning obligation, and
  - b. the enhancement is recorded in the biodiversity gain site register (see section 3.4 below)
3. Biodiversity credits, which can either be bought on the open market or purchased directly from the Government.

All of these habitats (on-site, off-site or delivered using credits) must be maintained for 30 years as a minimum.

### 3.2 Biodiversity gain plan

Any application for planning permission must include a “Biodiversity Gain Plan”, setting out how BNG will be achieved. The Plan must include the following:

- How the development will minimise impact on biodiversity.
- the pre-development biodiversity value of the on-site habitat.
- the post-development biodiversity value of the on-site habitat.
- any registered off-site biodiversity gain allocated to the development and the biodiversity value of that gain in relation to the development.
- any biodiversity credits purchased for the development.

The planning Authority must then approve the Biodiversity Gain Plan, being satisfied that the relevant biodiversity values are accurate, that any off-site habitat is accurate and that any credits have in fact been purchased.

The CLA would advise members producing a Biodiversity Gain Plan to use the services of a suitably qualified ecologist to ensure it is robust and accurate.

### 3.3 Avoiding perverse outcomes

One of the criticisms of any type of environmental off-setting system, including BNG, is that it could represent a “licence to trash”. Without checks, developers can essentially pay to destroy rare or important wildlife habitats and to replace them with new ones elsewhere. *In extremis*, this could see densely populated areas like South East England under severe development pressure while money flows to more remote rural Northern England to create or improve habitats there. This would be socially and politically unacceptable for numerous reasons, including that those negatively impacted by development would not see the benefits of the offsets.

There are three main ways to avoid this happening: the use of the Mitigation Hierarchy in development decisions; an exemption for statutory designated wildlife sites and irreplaceable habitats; and a geographical weighting within the Biodiversity Metric.

First, developers are expected to follow **the Mitigation Hierarchy** as a way to ensure habitat is not destroyed during a development except as a last resort. The Mitigation Hierarchy states that development should follow these steps:

- **Avoid** environmental damage in the first place, for example by choosing right site location.
- **Minimise** adverse effects from development, for example through development design that has minimal impact.
- **Compensate** for any residual damage caused to biodiversity.

The Biodiversity Gain Plan (see above) will aim to satisfy planning authorities that the Mitigation Hierarchy has been followed and that compensatory habitat is not being used except where this is unavoidable.

Second, BNG does not apply to **statutory designated sites and irreplaceable habitats**<sup>1</sup>. Development on protected sites is already subject to its own regime and BNG will not replace this, though it could be applied on top of any existing requirements. Irreplaceable wildlife habitats are excluded for obvious reasons. This includes habitat that cannot be recreated elsewhere within a reasonable timeframe, such as ancient woodland or active peatland.

Finally, the Defra Metric has a **geographical weighting** which encourages compensatory habitat to be created as close to the development site as possible. This is partly to ensure that those who lose out from the removal of habitat see the benefit of the offset. Sites within the local authority boundary are preferred.

For the new system to function and to achieve its environmental objective, it is important that biodiversity gain is meaningful and is actually delivered. Local and central government departments are under pressure to deliver results. Biodiversity Gain Plans that lack integrity, for example putting in easy to deliver habitats that do not actually improve biodiversity, or that are not delivered in practice, are likely to be found out during the 30-year period for which they are in place. Brokers and agents offering “off the shelf” biodiversity credits, based on a standardised land management package, need to be scrutinised carefully. If a land manager signs up to deliver biodiversity credits that are not reliable, there is a chance they could be held liable for this, if not in law then in the court of public opinion, which could lead to reputational issues.

### 3.4 Biodiversity gain site register

A biodiversity gain site refers to an area of land that has been dedicated to achieving BNG, either under a conservation covenant or a planning obligation, for at least a 30-year period. The register will be a national record (publicly visible) of all these sites. This aims to help ensure that the commitments within a Biodiversity Gain Plan are delivered, and to avoid land being double counted as net gain for more than one development.

Further government regulations will set out exactly who can register land on the site register; the information required to do so and the process to be followed. The site register is likely to include the location of the land; the development to which it is allocated; the work to be carried out (and by who); and the biodiversity value that the land will achieve as a result.

### 3.5 Statutory biodiversity credits

Where it is not possible to achieve the required biodiversity gain through avoiding damage; on-site habitat creation or restoration; or off-site habitat creation or restoration, it is possible to purchase statutory biodiversity credits to achieve the gain.

Note that this is not the same as purchasing a biodiversity credit on the open market, which will in effect be the same as delivering off-site habitat. It is assumed that if a private operator offers credits to developers, these will be registered on the site register in the same ways as if the developer dealt directly with the off-site habitat creation.

<sup>1</sup> *Statutory designates sites include Sites of Special Scientific Interest (SSSIs), Special Areas of Conservation (SAC), Special Protection Area (SPA), National Nature Reserve (NNR), National Parks (NP) and Areas of Outstanding Natural Beauty (AONB)*

*Irreplaceable habitats include those that would take a very long time to re-create, such as ancient woodland or peat bogs.*

The introduction of statutory credits instead allows developers to purchase biodiversity credits directly from the Government. This is designed as a last resort where there is no viable alternative and to avoid the creation of bottleneck in the development system due to a lack of registered sites available when BNG is introduced as mandatory.

Whether in the statutory system or open market, biodiversity credits are likely to be supplied through the use of habitat banks. Habitat banks start with a baseline assessment of biodiversity value and then implement management to increase the value by creating new habitats or restoring existing ones. Approved credits can be generated from the project and then sold either privately or via the Government scheme. With funding provided up-front, either from the Government or a broker, work can begin on the new habitat bank before credits are required, generating a pipeline to sell on to developers as needed.

### **3.6 Local Nature Recovery Strategies**

The Environment Act brings in a requirement for the preparation of Local Nature Recovery Strategies (LNRS) across England. These will map areas of biodiversity importance and opportunity and present a list of priorities for the recovery of nature in the local area.

Likely to be developed at the County level, and led by Local Authorities, these Strategies will be used to target where in a local area BNG is delivered. The Defra Metric gives a 15% uplift score to new habitat created in areas identified as a priority in LNRSs. This will make it advantageous for developers to secure biodiversity units in priority areas.

Local Nature Recovery Strategies will also be used to target funding within the new Environmental Land Management (ELM) schemes and will be referenced in planning decisions (though it is not yet clear what the mechanism for this will be).

The CLA is pushing for strong engagement with local land managers in the preparation of these strategies. We encourage members, especially those who may wish to deliver BNG on their land, to engage in the development of LNRS and refer to the published strategies when available.

## **4. THE DEFRA BIODIVERSITY METRIC**

As will be clear from the summary of how BNG works in section 3, much depends on the ability to assign a biodiversity value to a piece of land, whether this is land put forward for development; post-development sites; or sites outside the development boundary that are used for compensatory habitat.

The legislation mandates the use of the Defra Biodiversity Metric, which has been developed and tested since 2012. The Metric is now on version 3.1, with several revisions and improvements in recent years. As the metric is evolving it will be important to ensure that developers check to ensure they are using the most up-to-date metric. The metric can be found on the Natural England website here:

<http://publications.naturalengland.org.uk/publication/6049804846366720>

The metric works by assessing the type, extent, and condition of wildlife habitats, using habitats as a proxy for biodiversity. This means that rather than attempting to measure the species or ecosystem services on a site, habitats, which are easier to assess and more stable are used.

The metric allows comparison between different habitat types using “biodiversity units”. An area of habitat is given a value in units, based on its extent, condition and rarity or importance. The metric has a built-in weighting, with higher values given to rarer habitats and those in good condition. This means that 1 hectare of broadleaved woodland (a high-value habitat), is worth the same number of units as 6 hectares of cereal crops (a lower-value habitat) in similar condition.

The benefit of this approach is that it aims to combine some degree of flexibility, with some in-built checks and balances to ensure the system is not gamed and biodiversity continues to improve overall. You do not always have to replace habitats like-for-like, which may be hard to do, but you do have to deliver something of the same biodiversity value.

Using the Defra Metric does require a degree of ecological expertise, to accurately record the type and condition of habitats on a site. For this reason, both developers and landowners would be advised to seek expert ecological advice when using the metric to deliver BNG.

## 5. BIODIVERSITY NET GAIN AND THE PLANNING SYSTEM

For those CLA members expecting to put land forward for development or undertake development on their own land, it is important to be aware of the implications of BNG for achieving planning permission. Once the BNG regulations are in force, planning authorities will be unable to grant planning permission for new development unless mechanisms to secure a minimum 10 per cent biodiversity gain can be demonstrated. As set out above, a Biodiversity Gain Plan will be required to be submitted with a planning application and it is likely that developers will require the services of a suitably qualified ecologist to prepare the Plan in advance of submission of the planning application.

### 5.1 National Planning Policy Framework

The National Planning Policy Framework sets out the Government’s planning policies for England and how they should be applied. It provides a framework within which locally prepared plans for housing and other development can be produced.

Planning law requires that applications for planning permission be determined in accordance with the local/development plan, unless material considerations indicate otherwise. The NPPF must be taken into account in preparing the local/development plan and is a material consideration in planning decisions.

Following publication of the 25-year Environment Plan, the NPPF was updated to include policies specific to delivering BNG. The most recent version of the NPPF (July 2021)<sup>2</sup> includes national planning policies for delivering BNG in Chapter 15 *Conserving and enhancing the natural environment* as follows:

<sup>2</sup> Link to National Planning Policy Framework

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1005759/NPPF\\_July\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf)

*174. Planning policies and decisions should contribute to and enhance the natural and local environment by:....*

*d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures.*

and

*179. To protect and enhance biodiversity and geodiversity, plans should:*

*b) promote the conservation, restoration and enhancement of priority habitats, ecological networks and the protection and recovery of priority species; and identify and pursue opportunities for securing measurable net gains for biodiversity.*

N.B. The NPPF will be further updated by the Government as planning reforms are introduced. It is strongly suggested that developers should always ensure that they have taken into account the contents of the version of the NPPF currently in force.

BNG policies will feature in local/development plans and planning applications will be judged against them. This will require all developers to take BNG into account in their planning applications in the form of a net gain plan. If not, then they run the risk of an outright refusal or delay in decision-making.

## 5.2 Small site biodiversity net gain plan

Natural England has produced draft guidance for the Small Sites Metric (SSM), a simplified version of the Defra Metric for use on smaller development sites. The small sites metric can only be used when both of the following criteria are met:

1. The development is either:
  - a. A residential development: where the number of dwellings to be provided is between one and nine inclusive on a site which has an area of less than one hectare, or
  - b. Where the number of dwellings to be provided is not known, there is a site area of less than 0.5 hectare, or
  - c. For all other development types where the site area is less than 0.5 hectare or 5000 square metres.
2. There is no priority habitat, within the development area, (excluding hedgerows and arable margins).

The small sites metric can only be used to assess biodiversity **inside** the development area. Any habitat creation or enhancement **outside** the development site area must be assessed using the Biodiversity Metric 3.0.

If the above criteria are met, the small sites metric can be used. If this is not the case i.e., because:

- the site is larger than the size threshold set out above; or
- there is a priority habitat present, excluding hedgerows and arable margins; or
- the development includes the assessment of off-site habitat enhancement or creation

then the site should be scored using the Biodiversity Metric 3.0 and will require the services of a suitably qualified ecologist.

The Small Sites Metric refers to **Priority habitats**. These are a range of semi-natural habitat types that have been identified as being the most threatened and requiring conservation action. The list of priority habitats can be found on the Joint Nature Conservancy Council (JNCC) website<sup>3</sup>.

It will be important to ensure that developers are taking into account the most up-to-date Small Sites Metric guidance which will be available on the Natural England website<sup>4</sup>.

### 5.3 Permitted Development and Biodiversity Net Gain

The Environment Act provides that all development undertaken under permitted development rights<sup>5</sup> will be excluded from the mandatory BNG requirements.

## 6. IMPLICATIONS FOR LANDOWNERS OFFERING BIODIVERSITY UNITS

For those members who are not directly involved in development, there are opportunities to help deliver the biodiversity gain on their land. The CLA believes that this could represent a significant income stream for some members, who are prepared to commit to the 30-year agreement length required by legislation.

The general guidance on entering environmental markets (*GN17-20 Guidance for identifying and entering new environmental markets*<sup>6</sup>) offers general advice for any member considering entering into contracts to sell environmental goods or services from their land.

### 6.1 Delivering compensatory habitat outside the development site

For members who own or manage land near to where development takes place, there is an opportunity to help deliver some of the compensatory habitat that developers need to demonstrate.

### 6.2 Using a habitat bank or broker

One way to take part in BNG is via a broker or habitat bank. A broker can help match landowners to developers who require BNG to be delivered.

A habitat bank works by creating wildlife habitat in advance, which is then used to generate credits to sell to developers as and when needed. The advantage is that this does not rely on waiting for a developer to need the credits before work can begin on the ground. So long as the site is registered on the net gain register, to indicate that it is being created and managed for use as BNG, rather than for any other reason, credits can then be sold.

### 6.3 Delivering statutory biodiversity credits

<sup>3</sup> For a list of priority habitats see the JNCC website <https://jncc.gov.uk/our-work/uk-bap-priority-habitats/>

<sup>4</sup> <http://publications.naturalengland.org.uk/publication/6047259574927360>

<sup>5</sup> Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended)

<sup>6</sup> <https://www.cla.org.uk/advice/gn17-20-guidance-identifying-and-entering-new-environmental-markets/>

The Government has committed to providing a certain number of credits for developers to purchase to avoid a lack of credits being a barrier to development. These statutory credits will be from land management projects endorsed by Natural England with improvements to the biodiversity value of the site recorded. This allows the generation of credits which can be sold at a set price.

#### **6.4 Tax Implications of delivering net gain**

Currently, inheritance tax agricultural property relief (APR) applies to agricultural property if it is used for 'agricultural purposes'. Taking land out of agricultural production to use for environmental purposes, including as a source of biodiversity units for net gain, could mean it will no longer qualify for APR.

The guidance and approach from Government on the tax treatment of income from BNG is also unclear. The CLA is in active dialogue with the Government to ensure the tax treatment and implications of BNG are as clear as possible and do not prevent beneficial environmental activity.

We advise that members seek advice from the CLA Tax Department or other specialist advisers if they have questions or concerns about this issue.

#### **6.4 Stacking and bundling with other incomes sources**

There is no reason that land used to deliver BNG cannot also receive other sources of income. Some agricultural activity, for example sensitive livestock grazing, may be able to continue. In addition, it may be possible to combine different income sources for other environmental benefits produced on the land. This could mean that while certain biodiversity outcomes are paid for through BNG, other agreements, whether through the new Environmental Land Management schemes, carbon credits or nitrogen or phosphate credits could be combined on the same land.

When attempting to "stack" different outcomes and payments on the land, or to "bundle" them into a single payment covering multiple outcomes, it is important to ensure that any contracts do not contradict each other and that there is no double funding (where the same environmental action is paid for twice). Members should carefully consider the terms of any two environmental agreements that apply to their land. This is best achieved by narrowly defining what is being paid for by each party, for example making clear that if a woodland is being created to deliver BNG, that the carbon credits are available for the land manager to sell elsewhere.

#### **6.5 What happens at the end of the BNG time period for a site?**

The Environment Act states that a BNG site must be in place for a minimum of 30 years. This length of duration will have implications for the appetite among landowners for putting land forward for BNG sites.

A further consideration is what will happen to the land at the end of this period. While in theory the agreement will end and the land can revert to a previous use or status, there are reasons to think the reality may be different in practice. Firstly, the introduction of Local Nature Recovery Strategies, which will be used to identify priorities for BNG, mean that sites where environmental improvement has taken place may be identified as priorities in these strategies. In some situations, there may also be pressure to designate BNG sites if they become

particularly important for wildlife. Land with a high biodiversity value may be precluded from future development, so members should consider it as akin to a permanent change.

An alternative to returning land to fully commercial use is to sign it over to a new BNG agreement. A new baseline could be taken, measuring the biodiversity value of the site following 30 years of management, and a plan put in place for how to deliver yet more biodiversity value on the land. This option would maintain the environmental value of the land while also allowing a further income stream for on-going management.

## 7. LEGAL MECHANISMS FOR DELIVERING BIODIVERSITY NET GAIN

Different legal mechanisms may be used to deliver and maintain BNG for a period of 30 years after the development is completed. These include the use of planning conditions or planning obligations or a mixture of the two, and/or Conservation Covenants. Planning conditions will be imposed, and planning obligations negotiated with the aim of securing compensatory habitat creation to prevent biodiversity loss.

### 7.1 Planning – Town and Country Planning Act 1990 (as amended)

The Environment Act 2021 Schedule 14 *Biodiversity gain as a condition of planning permission* updates the Town and Country Planning Act 1990 (the 1990 Act) with the introduction of new Section 90A which inserts Schedule 7A *Biodiversity Gain in England* into the 1990 Act.

**7.1.1 Planning condition** – Applicants must provide details of proposed biodiversity enhancements and net gains, informed by expert advice, with planning applications. The planning authority may attach planning conditions to the planning permission to ensure that biodiversity enhancements are implemented. As far as development management is concerned, one of the principal provisions in the Environment Act 2021 relates to a condition which will be attached to the grant of most planning permissions as a matter of law, that ensures that biodiversity enhancements are implemented. This statutory condition will provide that the development in question cannot be commenced unless a 'biodiversity gain plan' is submitted to and approved by the planning authority.

**7.1.2 Planning obligation** - If a developer is unable to locate and secure an appropriate site on which an approved BNG scheme can be created this will often necessitate a financial payment to the planning authority, or an agreement to find an offsite location, via a planning obligation. This planning obligation will be secured through a section 106 agreement. A section 106 agreement is a type of planning obligation authorised by section 106 of the 1990 Act. A section 106 agreement is a legal agreement in the form of a deed between the planning authority and the owner of the land, who is normally the applicant/developer. It's the applicant's responsibility to comply with the contents of the section 106 agreement when they are due and to ensure they are made on time. Planning obligations run with the land to which they relate. Any outstanding obligations will be transferred with the land if it is sold. Planning obligations are enforceable by the planning authority either by applying for an injunction from the courts, or by entering the subject land, carrying out the work and recovering the costs incurred in doing so. Any outstanding planning obligations are legally enforceable against the owner of the land. This applies to successors in title of the land to which the obligation relates.

### 7.2 Conservation covenants

If a developer is unable to deliver approved BNG scheme on the development site, an offsite location will need to find, and the net gain secured with a binding contract. The Environment Act introduces Conservation Covenants as a new legal tool. These are voluntary, but legally binding, agreements between a landowner and a designated 'responsible body' such as a conservation charity, public body or a not-for-profit body to conserve the natural or heritage features of the land.

Conservation covenants can contain positive or restrictive obligations to fulfil conservation objectives. The parties can negotiate the terms, including the duration, of a conservation covenant to suit their circumstances. Generally, a conservation covenant will bind subsequent landowners and therefore have the potential to deliver long lasting conservation benefits.

Conservation covenants can be enforced through the courts if either body fails to comply with the terms of the agreement.

Members should take legal advice before entering a conservation covenant. They should consider especially the monitoring and enforcement of the agreement, including who pays for monitoring costs over the 30-year period.

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