

Brave New (and Green) World: Biodiversity Net Gain



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This is a further post on the Environment Act 2021 (“**the Act**”) dealing with the new provisions on biodiversity net gain (“**BNG**”), found in [Part 6](#) of the Act, and the ongoing [consultation](#) on BNG that is being carried out by the Department for Environment, Food & Rural Affairs (“**Defra**”). These provisions are not yet in force. This article is therefore forward-looking, and considers what is on the horizon for environmental law.

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The background to the Act is covered [here](#), and the regulator – the Office for Environmental Protection – [here](#).

Biodiversity Net Gain in the Act

Biodiversity net gain seeks to ensure that development delivers measurable improvements for biodiversity by creating or enhancing habitats in association with development. That could be the creation of new habitats on site (e.g. through green roofs, installation of bat boxes etc), or the purchase of BNG units offsite. It has been the subject of comment on this blog: see [here](#) and [here](#).

BNG is not new. The NPPF states that policies and decisions should provide “*net gains for biodiversity*”; that plans should “*pursue opportunities for securing measurable net gains for biodiversity*”; and the increase in BNG is a “principle” that should be applied when determining planning applications (NPPF, [174(d)], [179(b)], [180(d)]). Local plans themselves may have required biodiversity net gain in some form or another.

What is new is that it is a statutory requirement to provide a 10% increase in BNG for development falling under the town and country planning regime. This is provided as a deemed planning condition inserted into all planning applications (s. 98, Schedule 14, inserting Schedule 7A into the TCPA 1990). It should be noted that (i) the Secretary of State can amend that percentage and (ii) can also exclude certain development from BNG requirements.

Following an [amendment](#) tabled by the Government in June last year, the Act now also applies the requirement for BNG to nationally significant infrastructure projects (“**NSIPs**”). The Act (by s.99 and Schedule 15) achieves this by providing for the publication of “biodiversity gain statements” by the Secretary of State, which will set out biodiversity objectives and describe how particular types of development will deliver BNG of at least 10%. Schedule 15 amends ss.104–105 of the Planning Act 2008, with the effect that the Secretary of State may not grant an application for a development consent order unless satisfied that the BNG objective set out in the relevant biodiversity gain statement is met.

Despite the considerable comment on BNG, it should be borne in mind that the relevant provisions are not yet in force.

The calculation of the BNG is a specialist (and sometimes fiddly) endeavour. It is most often based on a metric that calculates the existing biodiversity units on the site, and then calculates the required units of habitat in order to meet the BNG requirement. The most widely used metric is Natural England’s [biodiversity metric 3.0](#). There is no obligation to use this metric, but it serves as a pragmatic means of assessing BNG (see [Planning Practice Guidance](#), paragraph 22). Each type of habitat is recorded individually, along with its characteristics, and the metric then tells developers how many, and what units, are required. Different losses of biodiversity units on site are weighted accordingly. Mature trees, for example, take longer to replace; and that may be reflected in the units required to achieve the overall BNG gain.

How will BNG be implemented?

The Act sets out the broader framework for BNG and its implementation in the planning system, but leaves much of the finer detail to be addressed through secondary legislation. In January 2022, Defra launched a [consultation](#) – set to close on 5 April 2022 – which has given some more detail on how the Government proposes that the BNG requirement will be applied. The first indication of how BNG will be worked into the planning system in practice came from the government’s [announcement](#), when launching the consultation, of a new £4m funding mechanism to *“help Local Planning Authorities expand ecologist resource and upskill ecologist teams, increasing their capacity to work with developers and communities to provide biodiversity gains”*.

Most of the proposals set out in the consultation relate to development under the Town and Country Planning Act 1990. This is perhaps unsurprising, given the late stage at which the BNG requirement for NSIPs was added to the Act.

Some important points emerge in respect of non-infrastructure development. First, the Government has made clear that the 10% BNG figure is not a cap. Developers may strive to achieve more if they choose, and local planning authorities will not be prevented from imposing higher percentage targets. In doing so, though, they will need to give careful consideration to the feasibility and achievability of any requirements over 10%. This may be a way for authorities in more nature depleted areas to catch up.

Second, the consultation updates the Government’s position on exemptions from the BNG requirement, providing that there is no intention for BNG to be eroded through the creation of exemptions under secondary legislation. Regulations will only exempt certain types of constrained development which do

not result in substantive habitat losses. Indeed, sites that Defra indicated might be exempt from BNG in its [earlier consultations](#) (e.g. brownfield sites) will no longer be exempt from the BNG requirement.

Third, the consultation addresses the interrelationship between the new BNG requirement and statutory protected sites (e.g. Sites of Special Scientific Interest, Special Areas of Conservation, Special Protection Areas and Marine Conservation Zones). The clear position is that these sites will not be exempted from the BNG requirement, but it will operate as an additional burden to existing protections. In other words, achieving BNG will not be a justification for otherwise unacceptable development on statutory protected sites. This is important because, at present, biodiversity metric 3.0 does not take into account impacts on species or recognise the significance of sites, nor does it take into account indirect, cumulative or in-combination effects of development.

Fourth, the consultation addresses some of the practical details about how developers and local planning authorities will deal with BNG in individual planning applications. Developers will be required, for example, to submit “biodiversity gain plans” which explain how their proposals will achieve BNG. Where the 10% requirement cannot be met, developers will have to purchase Government-provided statutory biodiversity credits to make up for any shortfall. In terms of the delivery of BNG, biodiversity will preferably need to be secured for delivery within 12 months of development being commenced. The greater the delay in creating habitats, the lower the number of biodiversity units those habitats will deliver. This will work to prevent developers from seeking to deliver BNG primarily through longer-term habitat creation which may never materialise.

In terms of infrastructure projects, the consultation indicates that the BNG requirement will come into force slightly later. The Government’s intention is to publish biodiversity gain statements by November 2025. Certain types of infrastructure, where BNG is recognised to be less feasible, will be exempt from the 10% gain requirement. In those circumstances, the Government’s preference will be to apply a lower percentage target, rather than to exempt development from BNG altogether.

Comment

BNG is here to stay, and the Act is set to deliver on one of the Government’s key mechanisms for strengthening the sustainable use and management of land, as set out in the [25 Year Environment Plan](#). The consultation has given greater detail on the policy and regulatory measures that the Government envisages will be put in place to deliver BNG in the coming months and years.

Of course, precise form in which the new BNG requirement will actually translate onto the natural environment depends in large part on the metric that is used by developers. Requiring developers to present the habitat implications of proposals by reference to a single number may serve to obscure the more complex and nuanced assessments of the quality and distinctiveness of habitats that lie behind the figures. Natural England’s biodiversity metric 3.0 has already been [criticised](#) by some for undervaluing certain habitats, such as scrubby landscapes that are often features of rewilding projects. It seems likely that, when the statutory requirement for BNG comes into force, the metric itself, and the extent to which it is successful in generating real-world biodiversity improvements, will come under greater scrutiny.

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