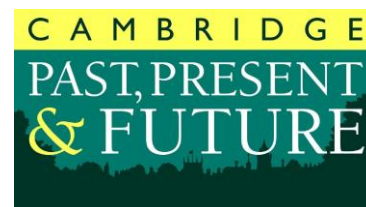


Consultation on Biodiversity Net Gain Regulations and Implementation  
Consultation Coordinator, Defra



By email to:

[Consultation.coordinator@defra.gov.uk](mailto:Consultation.coordinator@defra.gov.uk)

Cambridge Past, Present & Future  
Wandlebury Country Park  
Cambridge CB22 3AE

Phone 01223 - 243830  
[planning@cambridgeppf.org](mailto:planning@cambridgeppf.org)  
[www.cambridgeppf.org](http://www.cambridgeppf.org)

30/03/2022

Dear Consultation Coordinator, Defra

## **Response to Consultation on Biodiversity Net Gain Regulations and Implementation January 2022**

Cambridge Past, Present & Future is one of the leading partners in the Cambridge Nature Network, a local nature recovery project. The Cambridge Nature Network is one of the Nature Recovery Projects being funded by Natural England and is exploring how Biodiversity Net Gain might be able to help deliver local nature recovery strategies. Through this piloting work we have gained an insight into some of the practicalities of creating BNG Units and of habitat banking. This includes on land that is owned by our charity. It is in this context that we respond to section 3 of the consultation.

Cambridge Past, Present & Future is also a civic society for the Cambridge area and we spend a significant amount of our resources trying to influence the local planning system in order to protect local natural heritage. We engage with developers and scrutinize and respond to planning applications. It in this context that we respond to sections 1 and 2 of the consultation.

---

We do not require our response to remain confidential.

## **1. General Comments on Introduction to the Consultation**

### **Approach to BNG in the UK and Marine Environment**

The text indicates that there is an inconsistent approach across the UK (see pages 10 and 11). It is critically important that that there is a joined-up approach and BNG is secured across all important UK habitats.

Page 10: *Our proposals apply to development in England only; where the legislation means that the requirement would apply to development, or components of projects, outside of England we intend to exempt these through regulations.*

Page 11 Re marine environment says: *The requirements for biodiversity net gain will apply to development projects, or components of projects, as far as the low-water mark, including the intertidal zone. Projects, or components of projects, in the marine environment beyond the intertidal zone are not included within the scope of the mandatory requirements for biodiversity net gain.*

### **Application of BNG and exempted developments**

Exemptions (Page 20)

The following approach is supported; *Any exemption from mandatory biodiversity net gain would not prevent planning authorities requiring biodiversity gains to be delivered by exempted developments in line with local or nationally set planning policy.*

## Mandatory 10% BNG requirement

Page 12 Mentions 10% requirement; *The mandatory requirement is to achieve at least a 10% biodiversity net gain increase from the pre-development biodiversity value.*

The mandatory requirement as set out on page 12 (with similar statements on page 15 and 59) is welcomed. However, policy needs to go further to address the scale of biodiversity loss and Local Authorities should be encouraged to do more - e.g. Cambridgeshire authorities are seeking 20%. We are pleased that the table at Figure 2 at least recognises that local policy may require a higher percentage. It should be remembered that the outcomes from habitat creation can be varied with a variance of reality from theory, on average of -10% to +10%. So, it is still possible that a BNG Plan which aims for +10% actually delivers 0%. Therefore, aiming for more than 10% BNG increases the probability that a genuine gain of around 10% will be achieved.

The need for biodiversity gain plans to include pre-development biodiversity value; there are instances where sites have been cleared before planning applications are submitted with the view to reducing the baseline biodiversity value of a site. The local planning authorities must be able to take the pre-existing value of the site into account. See our response to question 23.

## Mitigation Hierarchy

Page 14: Fig 2 table contains some good points here, e.g., adherence to the mitigation hierarchy. It is very important that there is a clear distinction between **mitigation** of adverse effects, further **enhancement** of biodiversity and **compensation** for any unavoidable loss. This is not mere semantics as the distinction, for example between mitigation and compensation, is of critical importance when assessing and justifying damage to top tier nature conservation sites e.g., SPAs and SACs.

Page 17: Figure 3 is helpful in clarifying a bit more about the distinction between mitigation, enhancement and compensation. However, it would still be helpful to emphasise the differences.

## NSIPs percentage gain

We propose that for the type of big projects that fall within the scope of NSIPs that the mandatory percentage should be a minimum of 20%.

## Part 1 Defining the scope of the biodiversity net gain requirement for Town and Country Planning Act 1990 development

**Question 1: Do you agree with our proposal to exempt development which falls below a de minimis threshold from the biodiversity net gain requirement? a) for area-based habitat; b) for linear habitat (hedgerows, lines of trees, and watercourses)**

Yes (subject to comment below)

We understand the approach here, but care is needed. As the consultation states, there are areas of land (e.g. hard standing) where the impact on habitat loss is minimal. However, we have concerns with the other proposed exemptions. For example, it also states that: *Exempt development proposals which result in negligible impacts or minimal impacts to low or medium distinctiveness habitats*<sup>17</sup>

The supporting footnote 17 goes on to indicate that:

*Habitat types are defined and assigned distinctiveness scores in biodiversity metric 3. In general terms, low distinctiveness habitats tend to include habitats such as agriculturally productive land and amenity grassland. Medium distinctiveness habitats include those which are of moderate biodiversity value such as some types of scrub and grassland.*

Low distinctiveness habitats can still hold significant wildlife interest and we can foresee considerable argument where a developer will argue that impacts on say, Skylarks on arable land, are negligible or minimal and thus exempt.

So in terms of question 1, whilst we agree that there may be de minimis impacts, the bar for this should be set as low as possible and there must be a requirement for proper assessment to be carried out to ensure that any existing ecological interests on areas of low or medium distinctiveness are not being harmed and thus requiring remediation and enhancement. With that in mind, we are unsure as to what specific area threshold (or length of hedgerow) would be appropriate for de minimise requirements.

**Question 2: Do you agree with our proposal to exempt householder applications from the biodiversity net gain requirement?**

Yes, agree that householder applications should be exempt.

**Question 3: Do you agree with our proposal to exempt change of use applications from the biodiversity net gain requirement?**

No, subject to comments below.

Material changes of use that require planning permission by their nature have the potential to impact on the wider environment. A key purpose of BNG as stated in the consultation is to ensure that wildlife is left in a better state after a development. Whilst a change of use may not result in a direct physical loss of habitat, it could have an indirect effect on an existing wildlife interest through, say intensified activity. For example, there might be a collection of agricultural buildings, the use of which was changed to attract more visitors. If the buildings were in a sensitive area for biodiversity there might thus be an impact from the increased use.

**Are there change of use applications that could have a significant impact on biodiversity and how these might be defined?**

Defining and making practical rules for every eventuality would be difficult, if not impossible. So, what is probably needed is a general clause that indicates that the Local Planning Authority will have the discretion to include a change of use application for BNG if it deems that it will have an impact on existing wildlife interests. Any accompanying advice to developers should stress the importance of pre-application consultation with the Local Planning Authority if it is likely that an existing wildlife interest is likely to be affected.

**Question 4: Do you think developments which are undertaken exclusively for mandatory biodiversity gains should be exempt from the mandatory net gain requirement?**

Yes.

However the consultation also refers to the application of this exemption to other 'environmental mitigation' - this is a loose term and further clarification would help.

**Question 5: Do you think self-builds and custom housebuilding developments should be exempt from the mandatory net gain requirement?**

No

It seems to assume that all self/custom build is inherently benign which is a broad assumption - this might not be the case.

**Question 6: Do you agree with our proposal not to exempt brownfield sites?**

Yes

Many brownfield sites are of high ecological value and therefore they should not be exempt.

**Question 7: Do you agree with our proposal not to exempt temporary applications from the biodiversity net gain requirement?**

Yes

**Question 8: Do you agree with our proposal not to exempt developments which would be permitted development but are not on account of their location in conservation areas, such as in areas of outstanding natural beauty or national parks?**

Yes.

**Question 9: Are there any further development types which have not been considered above or in the previous net gain consultation, but which should be exempt from the biodiversity net gain requirement or be subject to a modified requirement?**

Do not Know.

How will BNG apply to e.g., Transport and Work Act applications or will this be dealt with be separate amending legislation?

**Question 10: Do you agree with our proposal not to exempt development within statutory designated sites for nature conservation from the biodiversity gain requirement?**

Yes.

Strongly support.

**Question 11 (a-e): Do you agree with the stated proposals for development (or component parts of a development) on irreplaceable habitats**

Yes

It is proposed that this is subject to separate specific compensatory requirements and therefore not subject to quantitative BNG. This is logical and we do not disagree with the specific propositions set out in Question 11 (a-e). However, there are still a couple of important points to bear in mind. First, it proposed that further guidance will be developed that will detail what are considered to be irreplaceable habitats and much will depend on what is included in that - an initial list of examples include obvious ones such as ancient woodland. Second, irreplaceable habit is by definition irreplaceable, so devising effective compensation for it will be very difficult. In addition, there are many types of important habitat, for example intertidal areas, that are extremely difficult to replicate. Thus, whilst we don't have a problem with the proposed approach set out in Question 11, we think it is very important that any future guidance stresses how difficult habitat replacement is in some cases and emphasises the overall thrust of the mitigation hierarchy that compensation is very much a last resort.

## **Part 2: Applying the biodiversity gain objective to different types of development**

**Question 12: Do you agree with our proposed approach that applications for outline planning permission or permissions which have the effect of permitting development in phases should be subject to a condition which requires approval of a biodiversity gain plan prior to commencement of each phase?**

Yes

**Question 13: Do you agree with the proposals for how phased development, variation applications and minerals permissions would be treated?**

Yes

We don't have a problem with the overall approach to the application of phased development to BNG subject to a minor comment re old permissions given below. It is stated on Page 35 that:

*We also know that Reviews of Old Minerals Permissions (ROMPs) typically result in the amendment of planning conditions and attaching modern conditions to old planning permissions. As a new permission is not being granted, we do not generally consider it reasonable to attach the mandatory biodiversity gain requirement to old permissions during these reviews.*

Whilst we appreciate that this may reflect a legal reality with respect to fairness, should not at least the guidance encourage mineral operators to try and provide further environmental improvements e.g. updated more favourable restoration plans?

**Question 14: Do you agree that a small sites metric might help to reduce any time and cost burdens introduced by the biodiversity gain condition?**

Yes.

**Question 15: Do you think a slightly extended transition period for small sites beyond the general 2- year period would be appropriate and helpful?**

No.

We think that this should be implemented as soon as possible so do not agree with the proposition. Biodiversity is under threat now and the sooner this starts to be countered through the use of mechanisms like BNG the better.

**Question 17: Are any targeted exemptions (other than that for irreplaceable habitat), reduced biodiversity net gain objectives, or other modified requirements necessary for the application of the biodiversity net gain requirement to NSIPs?**

No

This requires further clarification as the case for targeted exemptions does not detail what the exemptions (or circumstances) for lack of BNG may be. As regards to projects that may be started before requirement for BNG came into force, the comment in respect of ROMPs above also applies.

**Question 19: Do you consider that the November 2025 is an appropriate date from which NSIPs accepted for examination will be subject to the biodiversity net gain requirement? No**

No

BNG should apply to NSIPs as soon as possible and not be further delayed.

**Question 20: Do you agree that a project's acceptance for examination is a suitable threshold upon which to set transition arrangements?**

Yes.

**Question 21: Would you be supportive of an approach which facilitates delivery of biodiversity net gain using existing landholdings by requiring a lighter-touch registration process, whilst maintaining transparency?**

Yes

It is good to see emphasis here that mitigation hierarchy would continue to apply. This would need to be tracked and transparent. We agree with the proposal in Question 21 that this could work because it eases the process by which BNG is secured.

**Question 22: Do you consider that this broad 'biodiversity gain plan' approach would work in relation to NSIPs?**

Yes

**Question 23: Should there be a distinction made for NSIPs between on-site habitats (which are subject to the biodiversity net gain percentage) and those habitats within the development boundary which are included solely for environmental mitigation (which could be treated as off-site enhancement areas without their own gain objective)?**

Yes

By following the application of the mitigation hierarchy, there should be a clear distinction between mitigation, compensation and enhancement (ie BNG). The first two seem to be a necessary part of the planning process to address and remediate impacts of a particular development and enhancement the extra measures to improve the state of biodiversity, ie leave it in a better state than before a development commenced.

It is noted that there is also a statement in this section regarding the pre-development value of a site to be taken into account but as footnote 34 reiterates, only since January 2020. However, whilst this is restated on Page 52 the footnote to that also says:

*The planning authority may require that an earlier baseline is applied where activity, other than that permitted by a planning permission (for example an earlier development), has reduced the on-site biodiversity value since this date. We do not currently intend to exercise the powers to specify other types of consent which would remove degradation activity from consideration. This is intended to remove any incentive for pre-assessment habitat removal.*

This is important because we consider that it was never the intention of the Act to prevent previous deliberate destruction to escape being considered as a material planning consideration.

**Question 24: Is there any NSIP-specific information that the Examining Authority, or the relevant Secretary of State, would need to see in a biodiversity gain plan to determine the adequacy of an applicant's plans to deliver net gain (beyond that sought in the draft biodiversity gain plan template at Annex B)?**

No

**Question 25: Do you think that 30 years is an appropriate minimum duration for securing off-site biodiversity gains allocated to NSIPs?**

No. Longer periods may be required

We have previously taken the view that permanent damage requires permanent recompense, ie in perpetuity provisions. BNG may appear different in that it is an additional enhancement rather than say, mitigation or compensation for actual or likely damage to an existing interest. However, given the perilous state of UK biodiversity and the objective to leave nature better off than before (which should be a permanent objective), we think there should be a longer period of maintenance. Ideally all biodiversity enhancements should be maintained in perpetuity through whatever mechanisms may be available. It is helpful that the consultation goes on to say at page 59 that:

*The Environment Act states that biodiversity gain sites (off site) must be maintained for at least 30 years after the completion of the works to create or enhance the habitat. We will encourage and enable developers and landowners to secure sites for a longer period (or in perpetuity) where possible through policy and guidance.*

**Question 26: Are further powers or other measures needed to enable, or manage the impacts of, compulsory acquisition for net gain?**

Yes, as a last resort (see additional comments below)

We are wary of the use of CPO powers for BNG. Our experience of CPO is that it should be used as a last resort as it can be protracted, difficult and very controversial if contested. It has been necessary in extreme cases in the past - for example the CPO inquiry into the compensation package for the Cardiff Bay Barrage. This however, was in order to redress the loss of an entire intertidal area of an internationally important site. Whilst laudable that the use of CPO is being considered for BNG it should only be as a last resort.

**Question 27: Is any guidance or other support required to ensure that schemes which straddle onshore and offshore regimes are able to deliver biodiversity net gain effectively?**

Yes

Providing BNG in marine areas, even down to the low water mark, is technically challenging. So further guidance on the particular difficulties of doing this will be helpful. We would expect such guidance to indicate (e.g.) the different consenting regimes between offshore and onshore areas, appropriate sources of information and help and information on the special challenges for delivering BNG in the marine environment - for example the creating of new intertidal areas through managed realignment.

### **Part 3. How the mandatory biodiversity net gain requirement will work for Town and Country Planning Act 1990 development.**

**Question 30: Do you agree that further guidance is needed to support decision-making about what constitutes appropriate off-site biodiversity gains for a given development?**

Yes, we agree.

Such guidance should reiterate key principles, eg the mitigation hierarchy and that net gain should be additional. It would also be useful to set out key ecological generic objectives for enhancement - eg resilience and location. It is important that the right habitat is created in the right location.

**Question 31: How should the UK Government encourage or enable developers and landowners to secure biodiversity gain sites for longer than the minimum 30-year period?**

In relation to private landowners, the government would need to mandate it. In relation to BNG sites that are managed by the public and voluntary sector, the issue is who pays for the ongoing habitat management after 30 years (this would also be relevant for private landowners)?

One option is for the developer to pay for the ongoing habitat management. To achieve this financially it would be necessary for the developer to provide an endowment that is tied to the BNG credit. The endowment would need to be sufficient to generate an annual financial return that is equal to the annual cost of maintaining the habitat. Ultimately, this would mean that the overall cost of the BNG credit would need to be increased in order to include a contribution towards an endowment. Some habitats are much more expensive than others to maintain over the long term, woodland being much cheaper than meadows for example.

Another option is for the public sector to pay for the ongoing habitat management through environmental land management schemes. In other words, a guarantee that BNG sites would be granted funding and that the level of funding would be commensurate with the ongoing costs. This approach is likely to be difficult to apply to onsite BNG (eg housing estates).

Another option is for the credits to be sold a second (or third time), ie selling the BNG uplift that would occur between Year 30 and Year 60. For habitats that take a long time to reach good biodiversity levels (such as woodland or chalk grassland) there is likely to be BNG uplift, however whether this generates sufficient credits to generate the income needed to cover costs or opportunity losses is open to question.

The ongoing costs could be reduced by reducing the monitoring and reporting requirements.

One of the main concerns of landowners for periods of over 30 years will be the ability for them to make changes to the land. No one can know what the world will be like in over 30 years' time and what new opportunities or difficulties may exist, so legally tying their land to one use for very long periods is likely to be a significant disincentive. This includes environmental NGOs who may find that visitor pressure has grown to such an extent that they need to increase public access on the BNG land, or they may feel the need to provide visitor facilities on it, such as paths, picnic benches, seats or a wildlife watching hide. If doing so contravenes the legal agreement established for the BNG then this will make it difficult or expensive to do the things that they feel are in the best interest of their site (and which may also be the best things for public benefit). In order to remove this disincentive, there would need to be flexibility built into any agreements for the period after 30 years, such that it would make it easy to make small changes to the land and avoid expensive legal costs in doing so.

**Question 32: Do you agree with our proposals for who can supply biodiversity units and the circumstances in which they may do so?**

Page 58 - it is stated that (emphasis added):

*Any landowners or managers will be able to create or enhance habitat for the purpose of selling biodiversity units, provided that they are able to meet the requirements of the policy, including additionality and register eligibility requirements, **and demonstrate no significant adverse impacts on protected and priority habitats.***

It may appear pedantic but the tests for any proposal that could affect international sites (clearly a protected habitat) is set out in the Habitats Regulations Assessment. The relevant steps identified in the appropriate guidance are:

1. [Screening](#) - to check if the proposal is likely to have a significant effect on the site's conservation objectives. If not, you do not need to go through the appropriate assessment or derogation stages.
2. [Appropriate assessment](#) - to assess the likely significant effects of the proposal in more detail and identify ways to avoid or minimise any effects.
3. [Derogation](#) - to consider if proposals that would have an adverse effect on a European site qualify for an exemption.

Thus, adverse effects are not qualified by significance as applied above.

**Question 33: Do you agree that developers which are able to exceed the biodiversity gain objective for a given development should be allowed to use or sell the excess biodiversity units as off-site gains for another development, provided there is genuine additionality?**

In principle yes, providing that such credits are subject to the same criteria. However, we are concerned that this could lead to gaming of the system, which results in lower BNG overall. On many development sites there are areas that cannot be built on, for example due to the presence of utility services, the risk of flooding or proximity to transport infrastructure. These areas are typically planned to be used for green infrastructure or ecological enhancement as there is no other viable use for them (ie they would happen regardless of BNG). If these areas were to result in a surplus BNG which was then sold, there would not be genuine additionality – but it would be hard to prove this (the developer would claim otherwise). This could lead to dispute. It is essential that the guidance makes clear what is “genuine additionality” in order to discourage gaming of the system.

**Question 35: Are the proposals outlined here sufficient to enable and encourage habitat banking?**

Don't know. It is not clear what is meant by “the associated parcel of land within the habitat bank would need to be secured by a legal agreement and registered”. It would be impractical to assign an exact area of land to each credit. A habitat bank might include one area of new habitat that is 50 acres in size and worth 50 BNG credits. It would be practical to say that 20 credits have been attributed to the 50 acres but it would be impractical to try and map which of the 20 acres applies to the 20 credits purchased. It is also likely the BNG benefit would vary across a 50-acre site (due to underlying geology, aspect, etc.) and so the credits would be created for the parcel as a whole (ie 50 acres = 50 credits), not each individual BNG credit within the parcel.

**Question 37: Should there be a time limit on how long biodiversity units can be banked before they are allocated to a development? What would you consider to be an appropriate time limit?**

No. As long as the baseline has been recorded it should not matter. For two reasons:

I). Landowners are taking a risk that they create habitat and then they are unable to sell it (for example if there is oversupply in the market). If there is a time limit then this risk is increased, this is likely to discourage or act a disincentive to habitat banking.

II). Many habitats take a long time to develop and a mature bank is likely to achieve more guaranteed results.

In reality, the landowner will want a return on the investment they have made and therefore there is little incentive for them not to sell. So we would imagine that “hoarding” of credits would be rare. If you are concerned about landowners driving up prices by not making credits available, then the market would ordinarily intervene with new entrants taking advantage of the discrepancy between supply and demand.

**Question 38: Do you agree that the eligibility criteria for adding sites to the biodiversity gain site register are sufficient?**



No.

P64 “- to be suitably managed to meet the required enhancement” should be revised to “to be capable of being suitably managed”. This is to avoid a situation where the habitat that is proposed to be created is not suitable for the location.

We would like to see an additional bullet point that says that the enhancement “is the right habitat in the right location”. This is to avoid habitats being created in the wrong location, which may be contrary to wider conservation efforts in that location.

**Question 39: Do you agree that the register operator should determine an application within a maximum of 28 days unless otherwise agreed between both parties?**

No. Due to the pressures that local planning authorities are under. 28 days could mean 20 working days, which could overlap with the relevant officers’ annual leave, meaning they may only have 10 working days. There should not be a great deal of urgency over this issue because the registration would take place after granting of planning permission. This would give a developer plenty of time and therefore it would be the developer’s fault if they left this to the last minute. We do agree that there should be a time limit, but we believe that 28 working days would be more workable.

**Question 42 a). Do you agree that the UK Government should allow the register operator to set a fee for registration in line with the principle of cost recovery?**

Yes, however consideration needs to be made for habitat banks. There would seem to be no benefit in having to register the same parcel of land several times. There should either be one fee, or subsequent fees at a reduced rate to reflect that less work would be required.

It is important that you indicate the likely fee as soon as possible (ideally now) so that landowners creating habitat banks can factor this into their costs and discussions with developers.

**Question 43: Do you agree with our proposal to allow applicants to appeal a decision by the register operator where the applicant believes that the registration criteria have not been appropriately applied?**

Yes.

**Question 44: Do you agree with our proposals for additionality with respect to a) measures delivered within development sites?**

Yes, providing that these are subject to the same BNG requirements as off-site BNG.

**Question 45: Do you think that A) the non-designated features or areas of statutory protected sites and/or B) local wildlife sites and local nature reserves, should be eligible for enhancement through biodiversity net gain?**

Yes, both A and B should be eligible. However, some additional safeguards will be required, including the requirement that Natural England has to agree to the site/credits being registered.

I) We share your concern that “such a nuanced approach might introduce additional complexity or be difficult to deliver, monitor and enforce in practice.” This would require Natural England approval.

II) Our experience of trialling BNG is that it is much harder to generate sufficient credits where the land already has a mid-level biodiversity value (which will be the case on most protected sites). BNG works best when applied to land that has low baseline value. This means that on protected sites the creation of BNG credits is only likely to be considered when work is planned anyway and BNG credits help towards the costs of the work. This of course brings into question whether such credits are “genuine additionality”, however we believe that this is best considered on a case-case basis by the registering authority and the local Natural England team rather than a blanket exclusion from registering for BNG.

**Question 47: Do you agree with our proposed approach to combining payments for biodiversity units with other payments for environmental services from the same parcel of land?**

Yes

I trust that you will take our comments into consideration.

Yours sincerely

A handwritten signature in black ink that reads "James Littlewood". The signature is written in a cursive style with a horizontal line under the first letter of the first name.

James Littlewood

Chief Executive