



# CONSULTATION ON BIODIVERSITY NET GAIN REGULATIONS AND IMPLEMENTATION

## **BPF RESPONSE**

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**PREPARED AND SUBMITTED BY**

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## British Property Federation

1. The British Property Federation (BPF) represents the real estate sector – an industry which contributed more than £116bn to the economy in 2020 and supported more than 2.4 million jobs. We promote the interests of those with a stake in the UK built environment, and our membership comprises a broad range of owners, managers and developers of real estate as well as those who support them. Their investments help drive the UK's economic success; provide essential infrastructure and create great places where people can live, work and relax.
2. We welcome the government's long-term commitment to protecting and enhancing the UK's variety of natural landscapes and habitats outlined in the 25 Year Environment Plan (25YEP). We wholeheartedly support the broader goals and aspirations of the plan and its long-term vision, helping to provide certainty for future projects. This includes the 25YEP commitment to mandate biodiversity net gain (BNG) through the planning process.
3. For Town and Country Planning Act (TCPA) 1990 development, a more standardised approach to biodiversity net gain designed to be simpler and clearer for all relevant stakeholders is clearly of benefit to our environment, industry and society. The BPF does however have a number of comments on the specific proposals outlined that address the balance between achieving best outcomes and ensuring the sustainability and efficiency of the development process for TCPA 1990 development.
4. We would make the following general observations on the proposals set out in the consultation:

- 4.1 **There is a need for consistency across all local authorities in terms of the evidence base that is used to justify the local BNG percentage as part of the relevant local plan adoption process:** We have received feedback from members that at present there are varying approaches across the country with local authorities arriving at different levels of BNG requirements as part of their local plan adoption process. From the development sector's perspective, it is not always entirely clear how a certain local authority has arrived at one BNG figure whilst an adjacent authority has a completely different BNG requirement.

With the mandating of biodiversity net gain through the planning system nationally, it will be important that all local authorities are working off the same methodology so there is a consistent approach as part of the wider local plan adoption process to ensure fairness and transparency for all parties who interact with the development process.

- 4.2 **Greater recognition needed of the difference of delivering BNG on brownfield sites compared with greenfield:** The BPF welcomes government's change of course in terms of not proceeding with a broader brownfield exemption as proposed in the 2019 consultation. However, we are also of the view that the current mechanisms through which local BNG requirements are established need to have greater regard for the significant variations in terms of delivering BNG across brownfield sites. For example, delivering BNG on derelict dockland is a completely different challenge to greenfield development. Conversely, certain other brownfield sites will have greater levels of biodiversity than greenfield due to the variety of habitat and niches that are created.

Section 11 of the Revised NPPF (July 2018) encourages the use of brownfield land for development and directs planning policies to ensure that as much of this land as possible is appropriately used. We would therefore encourage the Government to consider the likely increased cost of developing these sites and the national desire to focus development on previously developed land as a priority. The regeneration of these sites provides a strong economic and social benefit through the redevelopment of previously developed land and indeed provides indirect environmental benefits through doing so.

It should also be noted that developing brownfield sites is typically a costlier exercise than developing greenfield land due to a number of factors including demolition, remediation, and multiple/fragmented land ownership. The viability of such sites may therefore be more sensitive to additional costs associated with their planning and development. These impacts should be considered and where possible, viability evidenced, to ensure that both biodiversity gain and societal growth can be achieved in tandem.

Consideration should also be given to the introduction of a wider very special circumstances test that could help to deliver significant environmental and sustainability benefits and improvements from the development of sites (brownfield and greenfield) that may otherwise lie dormant.

- 4.3 **The implementation of BNG should not undermine the delivery of challenging sites crucial to the Levelling Up Agenda:** As stated above, the delivery of BNG on brownfield land is a different challenge to greenfield however a broader concern is around the extent to which BNG might undermine the delivery of challenging sites (sometimes with negative land values) in locations across the country the government are committed to level up. It should also be noted that significant sums of money are being invested by the government through the various DLUHC funding streams to unlock brownfield development. In this context, we would encourage government to think carefully about the extent to which BNG might undermine the deliverability of these particular sites.
- 4.4 There are tensions in the proposals over the ability for applicants to 'bank' BNG credits (if they overdeliver on a certain scheme) with local authorities' ability to request much higher levels of BNG at application stage. How does this proposal align with the ability of developers to overprovide and retain credits to support future schemes?
- 4.5 In relation to multi-phase development, the emphasis in the consultation document on delivering BNG earlier in the development is a missed opportunity. Requirements for BNG to be 'front-loaded' can result in compromised scheme layouts, impact upon viability, and the delivery of schemes that involve a phased approach to land assembly. It could also result in a sub-optimal approach to environmental and biodiversity benefits. The BPF would suggest a more bespoke approach on a site-by-site basis would be preferable as it may be the case that BNG can be enhanced across all phases with such an approach.

4.6 We have received many concerns over the ability for already under-resourced local planning authorities to deal with added processing requirements as part of the wider application process. We note that this point is recognised by government in the consultation document, and it will be a crucial element of the practical implementation of BNG. We also understand that pilots are already underway to explore how BNG will work in practice with certain local authorities. It will be important that the relevant central government departments are transparent with the information gained from these pilots in terms of sharing any challenges/insights relating to the practical implementation of BNG for local authorities at the earliest opportunity.

4.7 There is a suggestion within the consultation that in the first instance BNG requirements should be delivered on-site. We have also received feedback from our membership that certain local authorities have insisted on on-site delivery of BNG as part of the planning application process.

Whilst we agree that the preference should be towards on-site mitigation, we would like to see more flexibility in the proposals to enable the delivery of BNG off-site where appropriate. In many cases, off-site provision will be preferable as a more strategic approach can be taken to BNG aligned to the strategy of the wider area. The Biodiversity Metric must not place an unacceptable burden on schemes that involve the purchase of units from the BNG register or national credit system and contribute towards biodiversity renewal or recovery schemes situated outside the local area.

5. The rest of our submission responds directly to the questions posed in the DEFRA consultation document and is based primarily on comments provided at a member roundtable in March 2022.

## **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?

6. Yes. Development of a scale or nature that has a negligible or minimal impact on habitats should be exempt from the BNG requirement for both area-based and linear habitat. In assessing the appropriate threshold, it is important to recognise the potential cumulative impact such development may have on habitats.

### Question 2

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

7. Yes. Our view is that house extensions should be afforded an exemption. We understand that in many instances it would be impracticable and unreasonable to require applications relating to house extensions to provide net gain mitigation, and that limited biodiversity benefits would be achieved. House extension applications will most likely relate to developments within residential curtilages where there is little opportunity to provide on-site mitigation and the small scale of development would mean any individual mitigation provided would be minimal and disproportionate in terms of cost.
8. Adding an extra layer of complexity, and cost, for an individual extending their home is unlikely to deliver the desired results. This will create additional requirements and may put further strain on local authority resources with minimal associated gains.

### Question 3

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

9. No. Change of use applications should not be exempted from the biodiversity net gain requirement. Change of use applications are increasingly likely to become a more significant component of development, particularly in urban areas. It is therefore important that consistency is maintained across different types of significant development.

### Question 4

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

10. Yes. This should help to incentivise the creation of biodiversity net gain projects on and off-site, without placing onerous burdens on development that could stifle delivery of biodiversity net gain and other environmental benefits. The proposal could also encourage developers to create enhanced and enriched habitat sites, rather than simply meeting the minimum BNG requirement. Additional BNG units could be used to support future growth via habitat banking and trading of units.
11. Conversely, applying a mandatory net gain requirement to developments for biodiversity creation and enhancements represents a risk of incentivising habitat degradation.

### Question 5

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

12. No. Members fed back that self-builds and custom builds should not be exempt particularly when they form part of a wider development scheme. As stated above, it is important that there is a level playing field across different types of significant development in terms of delivering BNG.
13. Whilst small self-build or custom housebuilding developments may not have a significant impact on biodiversity individually, there is no restriction on the scale of such developments. The cumulative impact of such developments could result in significant harm to biodiversity.

### Question 6

Do you agree with our proposal not to exempt brownfield sites, based on the rationale set out above?

14. Yes. As stated in our opening remarks, the BPF welcomes government's change of approach in terms of not proceeding with a broader brownfield exemption. Recent research has identified that brownfield sites can serve as important habitats for a number of rare species such as black redstarts and bombardier beetles. However, as noted above, our broader point is that there needs to be more recognition in the consultation of the different challenges of delivering BNG on certain brownfield sites as opposed to conventional greenfield sites.
15. In addition, we received further feedback that the brownfield definition as currently drafted is quite unclear and there will perhaps be a need for further guidance on this.

### Question 7

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

16. We have received mixed views on this. There were some concerns over the proposal not to exempt genuinely temporary permissions from the BNG requirement. It should be noted that BPF members when building out larger schemes will very likely be putting in temporary applications (e.g., for a haul road). The concern is around how that temporary permission is accounted for (in terms of BNG) when it comes to submitting the full application further down the line.
17. On the other hand, it is also recognised from within the membership that temporary and time-limited applications can still cause significant damage to environmental habitats and thus we understand why DEFRA have taken the decision not to exempt temporary applications.

### 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?

18. 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?

19. No

#### Question 10

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

20. Yes

## 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?

21. Other. The BPF does support the approach to phased development and development subject to subsequent application, to outline how the entire development will achieve net gain from the outset and prior to the commencement of each phase.
22. However, as set out in our general comments section, our major concern with the proposals in relation to phased development is the presumption towards frontloading BNG requirements earlier in the development process. This misses the opportunity to deliver BNG in a bespoke fashion which will in many cases enhance the overall delivery of BNG across multiple phases. This could also have the adverse effect of dictating a delivery sequence, for example requiring the early delivery of biodiverse areas which cause a viability constraint and has other adverse impacts on build out rates. Noting the mandatory target will have to be met and that processes can be put in place to require the achievement of this to be tracked and forecasted to evidence how the mandatory target will be achieved, it should not be necessary to require early delivery for phased developments.

#### Question 13

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

23. We support the approach that new biodiversity gain plans should only be necessary for S73 proposals that affect the post-development biodiversity value of schemes and should apply the same baseline as the previous development.
24. Regarding variations applications, members also noted there is no exemption where a planning permission is granted pursuant to Section 73 of TCPA after the mandatory requirement comes into effect and where the original permission 'varied' was granted before this and was not subject to the

mandatory BNG condition. The effect of this would be to require the varied proposals to meet the target when the reason for the variation could be entirely unrelated and in respect of a scheme which has not been designed to provide this. This would have the very real potential to cause delivery issues and/or to stifle amendments to schemes which are necessary. It is therefore suggested that regulations are used to address this unforeseen issue.

#### 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?**

25. Yes. BPF members agree that the small sites metric will help reduce the time and costs associated with development of small sites. It will be important that local authorities are adequately resourced to thoroughly consider and examine these types of applications.

#### Question 15

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

26. Yes. However, this should not be limited to small sites, but an extended transition period for all sites to ensure that sufficient tools, procedures, policies and resources are in place to deal with BNG through the planning system without risk of delays and uncertainty over delivery of housing schemes and associated BNG.

27. To provide greater certainty for developers and communities, local authorities should bring forward BNG nature enhancement schemes and associated costs per unit through their development plans. Interim measures could include the ability for developers to purchase statutory biodiversity credits where sufficient BNG units on or off-site could not be achieved.

28. The cost of statutory biodiversity credits must be proportionate and avoid prejudicing development viability and the delivery of wider policy objectives including meeting housing needs of communities and associated investment in regeneration, key infrastructure and levelling up.

#### Question 16

**Are there any additional process simplifications (beyond a small sites metric and a slightly extended transition period) that you feel would be helpful in reducing the burden for developers of small sites?**

29. As set out in our response to question 15, local authorities should be required to establish approved local, sub-regional and regional wildlife enhancement schemes and costs for BNG units within their development plans.



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

### Question 28

- a) Do you agree with the proposed content of the biodiversity gain information and biodiversity gain plan?
  - b) Do you agree with the proposed procedure for the submission and approval of biodiversity gain information and the biodiversity gain plan?
30. In general. However, applications for outline and phased development permission may contain indicative biodiversity gain information based on illustrative or indicative layout and landscape proposals.
31. The final approach must avoid the risk of planning applications such as outline, hybrid or phased applications being refused based on a lack of certainty over biodiversity net gain requirements or delivery where such information is based on indicative proposals. Furthermore, it would be unreasonable to expect developers to secure biodiversity units or credits in advance of securing satisfactory planning permission and necessary land interests.

### Question 29

We will continue to work with external stakeholders and industry on the form and content of the template. Do you agree with the proposed information to be included in a biodiversity gain plan as shown in the draft template?

32. We welcome proposals for a standard approach to biodiversity gain plans. This will provide clarity for developers. We hope it will also encourage a common and consistent approach from planning authorities. In fact, we would like to see this recognised as an explicit intended outcome from standardising biodiversity gain information. We would also like to see measures put in place to monitor consistency across local planning authorities.
33. We note that it remains the Government's intention to continue to allow higher targets to be set by planning authorities after careful consideration has been given "to the feasibility and achievability of any requirements above 10%, which can have significant impacts on the costs of developing a site." Feedback from members suggest that targets of 20% are being set by some planning authorities without a clear explanation or evidence base. We agree that where higher targets are feasible and achievable and do not undermine the viability of the development then we should be ambitious. However, it is important that planning authorities are able to evidence and justify higher targets. In such circumstances, however, developers should be able to count any units created above the 10% baseline requirement as additionality that could then be used to support the delivery of future developments.
34. It is unlikely that sufficient detail on the biodiversity baseline position for each site will be available at the time of reviewing the development plan or certainty over potential changes to biodiversity and

mitigation costs over the plan period. Furthermore, the proposed definition of at least 10% biodiversity net gain means that setting a higher baseline requirement should not be necessary.

35. We welcome the draft template, and the need for flexibility that is recognised in the consultation document. We also welcome the commitment to further consultation and engagement with stakeholders.

### 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?**

36. Yes. It is important to recognise that off-site biodiversity gains will be critical to the success of the overall policy. There will be many instances where 10% or more biodiversity net gain is not possible on-site. As already highlighted, this is particularly the case with brown-field sites.
37. We should also acknowledge that off-site delivery can generate significant environmental and economic benefits. As the consultation paper notes, off-site biodiversity net gain can provide an important source of funding to establish and enhance local wildlife sites and local nature reserves.
38. The BNG metric that is currently under review is heavily weighted towards mitigation in close proximity to the development site. However, this may not be possible or result in the best solution for nature.
39. We recommend that this is reviewed to ensure that policy and guidance encourages off-site contributions towards the enhancement of identified priority habitats and strategic nature recovery strategies. Consideration must also be given to the wider environmental benefits of each scheme. This would also help to reduce potential challenges and delays where local planning authorities might seek local biodiversity gain when in some instances regional or national gain would be better for biodiversity and potentially more cost effective.
40. We welcome the commitment to publish further guidance to support decision-making. We are already hearing reports from members of inconsistency in approaches from planning authorities on what constitutes appropriate off-site biodiversity gains for a given development.

### 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?**

41. Government could provide an evidence base demonstrating the value that can be created by maintaining for longer periods.

### Question 32

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

42. Yes. In particular, we support the proposal to allow developers who exceed the requirements for biodiversity net gain on a given development to use or sell the excess biodiversity units as off-site gains for another development.

### 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?

43. Yes.

### Question 34

Do you agree with the proposed scope of the UK Government's role in facilitating the market, as set out above?

44. We support proposals for the supply of biodiversity units.

45. In particular, and as noted above, we welcome proposals to allow developers who exceed the requirements for biodiversity net gain on a given development to use or sell the excess biodiversity units as off-site gains for another development. We should reward and incentivise developers to go above and beyond statutory requirements and targets. This would be supported by BPF members.

### Question 35

Are the proposals outlined here sufficient to enable and encourage habitat banking?

### Question 36

Do you agree with our proposal that to be eligible to supply biodiversity units for mandatory biodiversity net gain, habitat must be created or enhanced on or after a specified date, proposed to be 30 January 2020?

### 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?

46. We support the proposals for habitat banking.

47. We agree that a defined starting point should be set, and the requirement that habitat must have been created or enhanced on or after 30 January 2020 seems reasonable. There needs to be a mechanism to ensure biodiversity units are not double counted.

#### Question 38

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

#### 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?

48. We welcome the commitment to work with stakeholders to design the register. This should include all key stakeholder groups, including those who will be using the register and those making applications.

49. We agree that registration should be online. The process should be simple, user-friendly, fast and secure. The commitment to determine an application within 28 days seems reasonable.

#### Question 40

Do you agree that this list of information requirements will be sufficient to demonstrate that a biodiversity gain site is legitimate and meets the eligibility criteria?

#### Question 41

Do you agree that the UK Government should require a habitat management plan, or outline plan, for habitat enhancement to be included on the register?

50. We would like Government to consult further on this. We welcome the commitment to publish guidance on the process of registration, including what information should be provided and when, during the transition period. We would suggest that this is published in draft to enable further consultation with stakeholders before a final decision is made.

#### Question 42

Do you agree that the UK Government should allow the register operator to:

- a) set a fee for registration in line with the principle of cost recovery?
- b) impose financial penalties for provision of false or misleading information?

51. We would like to see more detail on this. We are not opposed to a small fee in principle, but this needs to be reasonable and proportionate.
52. There should also be further consultation on the detail of any possible financial penalties imposed for the provision of false or misleading information. Any penalty regime should be flexible enough to take account of the fact this will be a new process for many businesses and to recognise that there will always be genuine errors, made in good faith.

#### 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?

53. We agree that there should be an appeals process and welcome the commitment to continue consultation on this with potential users of the system.

#### Question 44

Do you agree with our proposals for additionality with respect to:

- a) measures delivered within development sites?
- b) protected species and off-site impacts to protected sites?
- c) on-site impacts on protected sites, and any associated mitigation and compensation
- d) achievement of River Basin Management Plan Objectives?
- e) the strengthened NERC Act duty on public authorities?

54. We are supportive of the proposal to allow mitigation and compensation measures for protected species to be counted towards up to 90% of biodiversity net gain requirement.
55. We recommend further consideration is given to allowing 100% of biodiversity net gain requirement and the creation of additionality units on sites such as SANG land to incentivise developers to optimise the creation and enhancement of biodiversity locally. The environmental benefits of such an approach could outweigh the purchase of off-site biodiversity units or credits to achieve the required level of net gain.

#### 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?

#### Question 46

Do you agree that the enhancement of habitats, including designated features, within statutory protected sites should be allowed in the coastal, intertidal and marine environment as defined above?

56. We would agree that these sites should be eligible for enhancement through biodiversity net gain.

#### 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?

57. The approach outlined in the consultation document seems sensible. We agree the approach should be evaluated after a couple of years.

#### Question 48

Are these proposals for statutory biodiversity credits sufficient to:

- a) Ensure, when supported by suitable guidance, that they are only used by developers as a last resort
- b) Mitigate the market risk associated with the sale of statutory biodiversity credits by the UK Government?

#### Question 49

Do you think there are any alternatives to our preferred approach to credit sales, such as those outlined above, which could be more effective at supporting the market while also providing a last resort option for developers?

#### Question 50

Do the principles for how we will set, and review credit price cover the relevant considerations?

58. We support proposals for the sale of statutory biodiversity credits where developers can demonstrate they cannot deliver their net gain requirements on-site, off-site or through the purchase of biodiversity units on the market. Some members have raised concerns that within a couple of years there may be a real shortfall of off-site provision available. We agree that further guidance will be needed.

59. We also agree that the credit mechanism and credit price need to be kept under regular review. We understand the intention that the credit price will deliberately be uncompetitive with the biodiversity unit market. It should not however be set at a level that is punitive or makes significant numbers of developments unviable.

60. We welcome the intention that credit sales will be online, and the commitment that the sales platform will be user-friendly and secure.

#### Question 51

Do you agree with the proposed principles for credit investment?

61. We agree with the proposed approach. All the revenue raised from credit sales should be ring-fenced for investment in habitat creation and enhancement in line with local and national priorities.
62. Transparency will be critical to maintain trust and confidence in how revenues are invested. We welcome the commitment to publish an annual review of credit investment.

#### Question 52

Do the above project-level management, monitoring, enforcement, and reporting proposals seem sufficient, achievable, and not overly burdensome on practitioners, developers, or planning authorities?

#### Question 53

Do you think earned recognition has potential to help focus enforcement and scrutiny of biodiversity net gain assessments, reporting and monitoring?

63. We do have concerns about the capability and capacity of planning authorities to deliver on the new requirements, and welcome the recognition of this in the consultation document. We would like to hear more from Government on how planning authorities will be supported and resourced to ensure the new arrangements are a success.

#### Question 54

Do the above proposals for policy-level reporting, evaluation and enforcement seem sufficient and achievable?

#### Question 55

Considering the data requirements set out above and in greater detail in Annex C:

- a) is there any additional data that you think should be included in the Biodiversity Reports?  
b) is there any data included here that should not be required as part of the Biodiversity Reports?

64. We agree that the policy needs to be monitored and evaluated. This should be an open process, involving all key stakeholders including developers.
65. We also agree with the requirement for local authorities and planning authorities to publish Biodiversity Reports every five years. The reports should include data that allows for a direct comparison of performance between authorities.