

The No- Nonsense Guide to Biodiversity Net Gain

Jonathan Easton & Constanze Bell



After a busy day of remote-working and home-schooling, the kids are in bed and you have 10 minutes to spare. What do you really need to know about BNG?

Jonathan Easton & Constanze Bell present the no-nonsense guide to BNG; ideal when there is a glass of wine waiting and you have limited time and energy.

What is BNG?

Development that adopts a biodiversity net gain ('BNG') approach seeks to make its impact on the environment positive, delivering improvements through habitat creation or enhancement after avoiding or mitigating harm. BNG under the Environment Bill 2019-20 means delivering more or better habitats for biodiversity and demonstrating this measurable gain through use of the Defra biodiversity metric.

Why is BNG such a 'hot topic'?

The Environment Bill 2019-20 makes provision regarding specific environmental policy areas including biodiversity and has been described as a 'landmark' piece of legislation.

Why this Bill now?

A large proportion of existing environmental law and policy in the UK derives from the EU, with its implementation largely monitored and enforced by EU institutions such as the European Commission. In this context, the Environment Bill 2019-20 is concerned with securing environmental protection and restoration through of domestic legislation.

Kings Chambers

T: 0345 034 3444

E: clerks@kingschambers.com

Manchester

36 Young Street,
Manchester, M3 3FT

DX: 718188 MCH 3

Leeds

5 Park Square,
Leeds, LS1 2NE

DX: 713113 LEEDS PARK SQ

Birmingham

Embassy House, 60 Church Street,
Birmingham, B3 2DJ

DX: 13023 BIRMINGHAM

What is the timeframe for the Bill to achieve Royal Assent?

The Environment Bill 2019-20 was announced in the Queen's Speech in December 2019. It passed its second reading without division on 26 February 2020. The Bill was being considered by a Public Bill Committee but due to current circumstances the sittings of the Committee have been suspended until further notice. The Committee is now scheduled to report by Thursday 25 June 2020. Royal Assent is anticipated in late 2020 and a two-year transition period is envisaged.

How does the Bill approach BNG?

Part 6 of the Bill provides for the creation of a new measurable BNG requirement, in England, of 10% for developers through the planning system. Gains will be mandatory and maintained for at least 30 years. They will be measured using a biodiversity metric that has been developed by Defra.

Schedule 14 of the Bill adds Schedule 7A to Town and Country Planning Act 1990 to create a "general condition on planning permission in England in relation to biodiversity gain". This will require a developer to have submitted, and had approved, a "biodiversity gain plan" in order to obtain planning permission. The plan will have to identify the developer's proposals to minimise impact on habitats, the pre and post development biodiversity value, and any offsite biodiversity credits and gains.

Schedule 14 prescribes the contents of the plan, conditions for approving the plan and that the biodiversity gain objective of 10% must be met. The Schedule also makes it a legal requirement to use the Defra Biodiversity Metric to calculate biodiversity values and gain.

Part 6 of the Bill also changes the duty on relevant authorities from "conserving" biodiversity to "conserving and enhancing" biodiversity and requires the creation of Local Nature Recovery Strategies to cover the whole of England.

Are there any exemptions to the net gain requirement?

There are currently no broad exemptions from the net gain requirement, other than permitted developments and household extensions.

What has been left to the regulations?

A significant amount of the detail will be left to secondary legislation. For example, the Secretary of State will have a number of powers to make regulations including to amend the 10% objective and to amend the type of developments which will be required to deliver net gain. The Secretary of State may make regulations concerning the procedure for approving a biodiversity gain plan, factors to be taken into account when determining whether to approve a plan and appeals regarding refusals to approve a plan. Further, the Secretary of State may make regulations concerning the form of a biodiversity gain plan, how to submit and who may submit a plan, and further matters to be addressed in such a plan.

There is a power for the Secretary of State to make regulations creating: a biodiversity gain site register accessible to the public (see c.91, part 6, Env Bill 2020); and ‘biodiversity credits’ (c.92, part 6, Env Bill 2020).

The Secretary of State will have powers under Schedule 14, for the purpose of the gain requirement, to define what is meant by “irreplaceable habitats”, and to exclude them or amend how the legislation applies to them, using a negative procedure.

There is a power for the Secretary of State to make regulations making certain specified public authorities (in addition to local planning authorities) publish biodiversity reports. These regulations may require biodiversity reports to include specified quantitative data relating to biodiversity in any area of land in which the authority exercises any functions (in England).

How is BNG calculated?

The biodiversity gain objective is met if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage of 10% (see Part 1, Schedule 14). The biodiversity value is the total of the post-development biodiversity value; the biodiversity value of any registered offsite biodiversity gain allocated to the development, and the biodiversity value of any biodiversity credits purchased for the development.

The biodiversity value is the value calculated in accordance with the Defra Biodiversity Metric.

The pre-development biodiversity value is the biodiversity value when planning permission is granted (on application or on appeal). Note however that the person submitting the biodiversity gain plan and the LPA can agree an earlier date.

The post-development biodiversity value of the onsite habitat is the projected value of the onsite habitat as at the time the development is completed. Planning authorities can only accept this value if the gain will be maintained for at least 30 years through one of three options: a planning condition, a planning obligation or a conservation covenant.

What happens if a site where BNG has already been required is developed again?

If a site where a biodiversity gain has already been required is to be developed again any further gain must be measured from the final intended metric value. This is regardless of whether it has already been delivered or not.

Could a developer/ landowner try and play the system by ‘running down’ the value of their land?

If a person carries out activities on land without planning permission (or another sort of permission specified by way of regulations) after 30 January 2020 and as a consequence of those activities the pre-development biodiversity value of a site decreases then the pre-development biodiversity value is taken to be the biodiversity value before those activities were carried on (see sched. 14, Part 1 “*Pre-development biodiversity value*”). The key question is therefore whether the activities that decreased the biodiversity value were permitted.

What are BNG credits?

A credit purchased from the Secretary of State for the purposes of meeting the BNG objective imposed on a planning permission. A credit can be bought by a person entitled to carry out the development of any land. Note that the Bill grants the Secretary of State a power to make arrangements to introduce BNG credits so the detail of this system, if introduced, will come forward by way of secondary legislation. The arrangements introduced may include the detail of applications to purchase credits; the price of a credit; proof of purchase; and reimbursement for credits relating to development which was not carried out.

The Bill provides that the Secretary of State, when determining the amount payable under the arrangements for credits, must have regard to the need to determine an amount which does not discourage the registration of land in the biodiversity gain sites register.

How will money raised by way of BNG credits be used?

The Bill provides that payments received for credits can only be used in three ways (see c.92(6), part 6, Env Bill 2020): carrying out works, or securing the carrying out of works, for the purpose of habitat enhancement; or, purchasing interests in land in England with a view to carrying out works, or securing the carrying out of works for habitat enhancement; or, operating or administering the BNG credit arrangements.

What will happen at the local plan stage and what will happen at the application stage?

A transition period of two years is anticipated and it likely that secondary legislation and/or national policy will set out transitional provisions in relation to local plans/ applications that fall between the old regime and the new BNG requirements under the Bill.

At both the plan making and decision taking stage it is likely that the question of BNG deliverability will be a factor in determining whether a site is “achievable with a realistic prospect that housing will be delivered on the site within five years”. Where sites are intended to count towards the 5-year housing supply, the evidence regarding BNG at the plan-making stage should therefore be sufficient to demonstrate a realistic prospect of delivery with the detail left to a later stage. This distinction will likely be elucidated in updates to PPG/ NPPF. It should be noted that some councils are already requiring a BNG calculation, usually relying on the DEFRA 2.0 Metric and seeking a 10% BNG score as a target.

A point of broader importance is what this means for the local plan process, in particular housing trajectories. It is likely that this new focus on BNG will raise additional issues in terms of supply and development viability.

Jonathan Easton & Constanze Bell

21 May 2020