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To:

Biodiversity Net Gain consultation

Defra

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**Consultation on Biodiversity Net Gain Regulations and Implementation**

This response is submitted on behalf of ADEPT by David Dale, Policy Officer, email address [daviddale2401@gmail.com](mailto:daviddale2401@gmail.com) mobile 07772 513812. It is not confidential.

ADEPT is a professional membership association representing Place Directors from county, unitary and combined authorities, along with Local Enterprise Partnerships (LEPs), sub-national transport boards and corporate partners drawn from key service sectors throughout England.

**General comments**

We welcome the opportunity to comment on these proposals, and we value our ongoing informal discussions with Defra officials on this and other matters relating to the local delivery of the ambitions of the 25 Year Environment Plan and the requirements of the Environment Act 2021. We strongly support the ambitions of the Plan and in particular the principle of mandatory Biodiversity Net Gain (BNG) under the Act. The great loss of biodiversity and wildlife over the last 50 years or so has not been halted by the planning system, and has arguably been hastened by it. Mandatory BNG is an important step towards halting and reversing that loss.

Our main concern relates to the resources and capacity of Local Planning Authorities (LPAs) to deliver the additional burdens on the planning system. LPAs have been under huge financial and staffing pressures in recent years. They face skills shortages in key areas including ecology: many councils no longer have in-house ecological expertise, and where they do, it is often too little. It is vital that Defra continues to work with the local government sector to make a full assessment of the resourcing requirements of BNG and to make sure that these are fully funded.

These requirements are long-term: it is not just a matter of applying the BNG metric in the determination of planning applications but also the ongoing monitoring, reporting and enforcement needed to ensure BNG is implemented successfully. This requires sustained investment in the training and development of the professional staff, and in the ability of councils to attract and retain them. It requires a proactive approach from Defra and DLUHC to producing guidance and standard documentation that will support the consistent roll-out of BNG nation-wide and give clarity to developers about what is required of them.

More generally, it also requires alignment of key government policies so that BNG is joined up with other requirements and policies, for example Local Nature Recovery Strategies (LNRS), environmental targets and the Levelling Up agenda. LNRS should have formal weight in the planning system so that development applications can be considered not just in relation to site-specific habitat creation and improvement, but to the strategic nature protection and recovery needs of the wider area.

BNG regulations and guidance must ensure that developers cannot use the presumed cost of habitat enhancements as a viability argument to reduce other benefits such as community infrastructure and affordable housing. Some developers are already using nature-friendly housing as a positive feature in selling their homes.

We are concerned about the proposed exclusion of on-site BNG enhancements from the public register that will cover off-site enhancements. There will be less transparency and accountability if this remains.

We are aware that some councils will look to use their own estates to develop nature improvement projects that can be funded through off-site BNG credits (habitat banking). We believe that the purchase of credits should only be available as a last resort once a developer can demonstrate that all other options have been explored and are unachievable. Where this is the case, the credits should be made available for use locally for projects that align with the LNRS. There should be a mechanism to ensure that councils have the time and opportunity to develop local projects in the early years of mandatory BNG, and that the credits do not get diverted elsewhere.

**Consultation questions**

**Part 1: defining the scope of the biodiversity net gain requirement for Town and Country Planning Act 1990 development Proposals**

**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: Yes – 5m2 threshold.

b) for linear habitat: Yes – 5m threshold.

The thresholds should be low in order to minimise the potential loss or degradation of habitat. Even a small site can have important habitat that should be protected and improved. However, the system needs flexibility and proportionality in order that the additional workload is manageable, and so that planners and ecologists can focus on those applications with the greatest impact and importance.

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

No. Some homes have important areas of habitat that would be lost if buildings are enlarged or converted, although many do not. Anything that exceeds the de minimis thresholds should be included. Again, flexibility and proportionality are key so that Local Planning Authorities (LPAs) can, where it is important for nature and wildlife, enforce mandatory BNG for small and householder applications, without requiring detailed work for those where that is not the case.

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

No. Need to distinguish between proposed change of use of buildings and of land. Change of use for a single building is less likely to impact on biodiversity than an application for a larger open site which may have important habitat that would be lost. LPAs should have the power to determine whether an exemption should apply in each case.

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

Yes, only for BNG.

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

No. Anything that exceeds the de minimis thresholds should be included.

**Question 6 Do you agree with our proposal not to exempt brownfield sites, based on the rationale set out above?**

Yes. Brownfield sites should be included for the reasons given.

**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?**

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?**

Yes. BNG is explicitly in addition to existing policy and legal requirements.

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

a) The exclusion of such development from the quantitative mandatory biodiversity gain objective?

Yes. It makes no sense to talk of BNG for irreplaceable habitats. The important point is that the requirements of the National Planning Policy Framework (NPPF) that development resulting in the loss or deterioration of irreplaceable habitats should be refused (unless there are wholly exceptional reasons and a suitable compensation strategy exists) is applied effectively and enforced robustly for all types of development, including national/major infrastructure projects.

b) The inclusion of a requirement to submit a version of a biodiversity gain plan for development (or component parts of a development) on irreplaceable habitats to increase proposal transparency?

Yes. This would essentially be a statement of biodiversity net loss, but again the important point is that such applications should be refused unless there are wholly exceptional circumstances.

c) Where there are no negative impacts to irreplaceable habitat, to allow use of the biodiversity metric to calculate the value of enhancements of irreplaceable habitat? [

Yes.

d) To use the powers in biodiversity net gain legislation to set out a definition of irreplaceable habitat, which would be supported by guidance on interpretation?

Yes.

e) The provision of guidance on what constitutes irreplaceable habitat to support the formation of bespoke compensation agreements?

Yes, as a last resort. The application should be refused in all but the most exceptional circumstances.

**Part 2: Applying the biodiversity gain objective to different types of development Phased development and development subject to subsequent applications**

**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. There should be a requirement to frontload BNG onto the early phases of development, for the reasons set out. Planning approval for subsequent phases should be conditional on the full implementation of BNG in the early phases.

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

Yes.

**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. However, it will be important to ensure that developers are not allowed to divide sites into smaller areas in order to fall beneath the threshold at which the full metric applies.

**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. For clarity, it would be best to have a single transition period and commencement date. The additional resources and capacity that LPAs will need to do this must be assessed and fully funded.

**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?**

Do not know.

**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. It is right that BNG should apply to NSIPs, with no additional exemptions.

**Question 18 Do you agree that the above approach is appropriate for setting out the biodiversity net gain requirement for NSIPs?**

Yes. There should be a single policy statement covering all types of NSIPs, there should be early consultation on this.

**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. We do not consider it necessary to delay the implementation of mandatory BNG to NSIPs for two years after implementation by LPAs.

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

No comment.

**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?**

No comment.

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

No comment.

**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)?**

No comment.

**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 comment.

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

No. Habitats should be secured and maintained by the landowner for the whole life of the development that has been consented. The same should apply to LPA consents.

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

No comment.

**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?**

No comment.

**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?**

Yes. It must be clear to developers what the BNG requirements mean for them, what information they must submit with their planning application, and how they will implement the plan. The plan should be clear about when and how its actions will be delivered, and how this will be monitored and reported to the LPA. The LPA should set out what enforcement action will be taken in the event that the BNG plan is not implemented in full.

**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?**

Yes, but it needs more detail on the specific actions planned to protect/enhance/create habitats and timescales for these.

**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, clear guidance is needed in order to avoid differences of opinion between developers and LPAs. We agree that the guidance and the metric should encourage early and on-site BNG wherever possible. Developers must demonstrate that they have adequately considered the on-site and local off-site options before looking further afield. We agree that the metric should incentivise any off-site BNG to be as early and as local as possible.

**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?**

There should be clear policy and guidance on how to continue to protect created/improved habitats once the minimum period has expired.

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

No, not entirely. The market should be regulated in a way that incentivises developers and suppliers to buy and sell their units as locally as possible. While LPAs should not be able to require a developer to purchase credits from a particular supplier/landowner, they must be able to require the purchase of credits in locations and for activities that align with the Local Nature Recovery Strategy (LNRS). This will be an important tool in the delivery of the LNRS.

**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?**

Yes, in principle for sale, but again the market should be regulated in order to incentivise early and local use of the ‘excess’ units, in line with the LNRS. Developers should not be able to use their own ‘excess’ units on other sites of their own, this would undermine the principle of on-site BNG as the top priority.

**Question 34 Do you agree with the proposed scope of the UK Government’s role in facilitating the market, as set out above?**

No, not entirely. It is not clear who will regulate the market – set rules and guidance, provide support and oversight, and intervene to correct any conflicts of interest or market failure. It is important that this further work is undertaken urgently if the market is to be operational by November 2023.

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

No, not entirely, further detail is needed. There should be a requirement for habitats to be protected and improved in line with priorities set out in Local Nature Recovery Strategies. A simple before and after metric is not sufficient here as sites will vary in importance for nature recovery and improved biodiversity.

**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?**

The scheme should encourage the creation and improvement of additional habitats that might not have happened otherwise. The date suggested is too old, it would be preferable to use either the date that the Environment Act was passed (November 2021), or the date that the secondary legislation is published.

**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?**

Not sure, a simple cut-off date does not seem appropriate, although a sliding scale might work so that their value starts to decrease over time. The aim should be to maximise the creation and improvement of habitat, the rules around habitat banking should support not hinder this.

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

No. There should also be a minimum threshold for level of enhancements made, and checks to ensure that there are no rights or charges over the land that would impact on the delivery of BNG.

**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?**

Yes, once the applicant has provided all the information needed to make a determinaton.

**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?**

Yes. This does include a statement of the level of enhancements made, although no minimum threshold is set. The list should be tested in practice and updated accordingly.

**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?**

Yes, this is essential.

**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?**

Yes overall, although the level of the fee for individual applicants should also reflect the value of the biodiversity credits being created, that is, a small project should pay less than a large project.

**b) impose financial penalties for provision of false or misleading information?**

Yes.

**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?**

Not sure. BNG is intended to be in addition to existing legal and policy requirements, so in principle only those additional enhancements that are not required for other reasons should count. This answer also applies to questions 44b-44e. However, measures for sustainable drainage and green infrastructure may require a significant proportion of land within a site, and this would make it less practical to deliver BNG on the ret of the site. In such cases, sustainable drainage and green infrastructure measures should count towards BNG if the metric can demonstrate habitat improvements over and above the minimum required for the measures.

**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. The principle set out above – that only those enhancements not required for other reasons – should apply.

**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?**

Yes, as above.

**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, as above – the BNG payments must be for distinct and additional enhancements. There should be clear guidance to ensure transparency and so that the BNG enhancements can be monitored and enforced by the LPA

**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? [Yes / No (please explain why not) / Other (please tell us more) / Do not know] b) Mitigate the market risk associated with the sale of statutory biodiversity credits by the UK Government?**

Other – not sure. There are two important principles here: that the purchase of credits is only available as a last resort once a developer can demonstrate that all other options have been explored and are unachievable; and that the credits are made available for use locally for projects that align with the LNRS. There should be a mechanism to ensure that councils have the time and opportunity to develop local projects in the early years of mandatory BNG, and that the credits do not get diverted elsewhere.

**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?**

As above.

**Question 50 Do the principles for how we will set, and review credit price cover the relevant considerations?**

As above.

**Question 51 Do you agree with the proposed principles for credit investment?**

As above.

**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?**

No, further detail I needed here. It is important that there should be independent monitoring of the BNG that was specified as part of the planning consent, it should not be left to developers and landowners to ‘mark their own homework’. On the other hand monitoring, reporting and enforcement would be a significant additional burden for LPAs – even if there were capacity to do this it would require funding by Government or by fees on a cost recovery basis.

**Question 53 Do you think earned recognition has potential to help focus enforcement and scrutiny of biodiversity net gain assessments, reporting and monitoring?**

Yes, in principle, but further details are needed here.

**Question 54 Do the above proposals for policy-level reporting, evaluation and enforcement seem sufficient and achievable?**

No, maybe achievable but not sufficient. There should also be some external professional and academic scrutiny of the degree of success of the BNG policy, law and implementation. There could be a role for the Office of Environmental Protection in assessing the effectiveness of the law and advising on how to strengthen it where necessary.

**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?**

Yes, LPAs should explain how BNG enhancements across their area have contributed to the delivery of the LNRS. Project monitoring and biodiversity reports should also be used to inform the public about the success or otherwise of BNG enhancements by significant landowners and developers that play a key role in enhancing biodiversity across the local area, and this information should be used as a relevant matter in determining future applications (for example, where a developer has consistently failed to deliver BNG enhancements to agreed standards and timescales, this should be take into account when determining any future applications by that developer).