

<https://www.freeths.co.uk/2023/02/22/mandatory-biodiversity-net-gain-rules-starting-november-2023-further-information-published-by-the-government-on-21-february-2023/>



Articles Environmental Law 22nd Feb 2023

Mandatory biodiversity net gain rules starting November 2023: Further information published by the Government on 21 February 2023

The Government published on 21 February 2023 its long-awaited response to its January 2022 Mandatory Biodiversity Net Gain (BNG) consultation, together with further guidance on BNG

Our thoughts on this are as follows:

Insufficient detail

The Government's BNG consultation response has been a long time coming and yet still there is great deal of vagueness and references to further guidance and legislation. It is not clear when that further detail will be provided as the Government has not committed to timeframes. This is crucial, as we are rapidly running out of time given that Mandatory biodiversity net gain will start in November 2023.

Examples of promised further materials which we do not have sight of as yet are:

- secondary legislation / regulations on: exemptions; irreplaceable habitat; phased development
- guidance expected on: phased developments; s73 TCPA 1990 applications; timing of required delivery of on-site gains; appropriate off-site biodiversity gains for a particular development; what LPAs and responsible bodies should take into account when creating legal agreements to

secure gain; when LPAs should regard on-site gains as “significant” (meaning that they need legal security for 30+ years); when LPAs should take BNG enforcement action; what should be in a conservation covenant or planning obligation

- no template Biodiversity Net Gain Plan has yet been provided
- consultation on any changes needed to national policy (NPPF) to deal with the interface between Mandatory BNG and policy-driven BNG.

Continued confusion

Confused interface between planning policy BNG requirements / Mandatory BNG requirements of the Environment Act 2021

The interface between how BNG planning policy / guidance and Mandatory biodiversity net gain under the Environment Act 2021 remains unclear. For example Government seems wedded in the new guidance to the approach that:

- (i) on-site gains should be preferred to off-site gains (this is the “mitigation hierarchy”); and
- (ii) off-site gains should be provided locally.

However, these points are not required / prescribed in the Mandatory biodiversity net gain legislation within the Environment Act 2021. There is accordingly presently a gap or lack of clarity between the legislation and the aspirations within the guidance, especially on the preference for on-site gains (the preference for local provision of off-site gains is at least reflected in the mandatory Defra Metric even though not required in legislation).

Unless the Secretary of State enacts regulations to provide clarification on this matter, LPAs may well face difficulties if they seek to follow this guidance when discharging the Act-imposed pre-commencement BNG planning condition. This is because developers may argue that LPA approval should be made in accordance with the *legal requirements of the Act* alone rather than guidance, which is not legally binding. Unless this issue is resolved, there is the potential that this will lead to future litigation or appeals, the latter which is allowed for in regulations that are yet to be enacted. Assuming the Government department has the time and resources available, we would anticipate that regulations are likely to address such matters, but the position is currently unclear.

Enforcement of BNG

There seems to be total reliance on LPAs’ planning enforcement tools to enforce delivery of biodiversity net gain. This is not realistic for all circumstances, despite the increase in funding LPAs will receive for BNG measures announced by Government. Even if LPAs do have the time / funding to carry out this additional enforcement work this can only work for on-site gains and off-site gains where the LPA is responsible for policing the s106 or conservation covenant that will secure delivery of the gain. The key gap is that LPAs cannot enforce against landowners delivering off-site gain where that gain is secured via a conservation covenant with a “responsible body” *other* than the LPA. It is not yet known what

proportion of landowners delivering off-site gain will have that gain secured through non-LPA “responsible bodies”.

The role of Natural England national register for off-site gains

The intended role of Natural England’s national register of off-site gains is also confusing. At one point the guidance makes clear that the Natural England administered register will only record allocations of off-site biodiversity gains and will not act as a marketplace for buying and selling off-site units. This seems like a huge missed opportunity! However elsewhere the guidance says that the register will also have a section which records the existence of habitat banks. Again, the practical use of the register requires urgent clarity as it has big implications for developers (see below under “challenges for developers”).

Lack of clarity for phased development and outline/reserved matters

Based on the new guidance we are no further forward in our understanding of how phased development is to be considered under Mandatory biodiversity net gain. We knew from the consultation in January 2022 that developers would need to provide an overview of BNG at the outline application stage for all stages of the development, but still there is no detail. This is getting very late for developers preparing complex planning applications now.

There are varying legal views over the position of how Mandatory BNG will bite on developments with outline permission granted before November 2023, where the linked reserved matters applications are made after November 2023. Most planning lawyers would take the view that Mandatory BNG would not apply to reserved matters applications in these circumstances, but contrary views do exist. It is disappointing that this point is not addressed in the guidance.

Challenges for developers

The opportunity to create further exemptions from Mandatory biodiversity net gain has not been taken by the Government. There are very few exemptions and none that are likely to be particularly useful to developers, unless the developer is lucky enough to be able to rely on permitted development rights (which is exempt).

A new planning document will be required to accompany all planning applications subject to Mandatory BNG. This is called a BNG Statement. This is separate, and in addition to, the “biodiversity gain plan” required by the Act-imposed pre-commencement BNG condition. Full details of what this must contain are not yet known.

The exact role of the Natural England register needs urgent clarification. *If* the register will only record allocations of off-site gain which have *already been made* to developers, then this will create risk for developers. This is because developers needing off-site units will be forced to enter into allocation agreements with the seller of the units *before* the biodiversity units can be registered in Natural

England's register. Off-site biodiversity units are only of use to a developer once they are registered because only registered units can then be relied upon by the LPA when considering whether the BNG pre-commencement condition for that development can be discharged. *If* the register will only record allocations of off-site gain which have *already been made* to developers then the developers will have to enter the allocation agreement in the mere *hope* that the seller will be able to successfully register the biodiversity units. Entering the allocation agreement will likely incur a deposit payment from the developer to the seller which presumably could be negotiated to be returned if NE registration is not successful. But the greater risk is that if the off-site biodiversity units are then not successfully registered, the developer will be left desperately trying to find some replacement units at the last minute so as to get the pre-commencement BNG condition discharged.

Helpful news for developers

There will be a delayed start of Mandatory biodiversity net gain to April 2024 for small sites. This applies as follows:

- (i) For residential: where the number of dwellings to be provided is between one and nine inclusive on a site having an area of less than one hectare, or where the number of dwellings to be provided is not known, a site area of less than 0.5 hectares.
- (ii) For non-residential: where the floor space to be created is less than 1,000 square metres OR where the site area is less than one hectare.

There will also be no Mandatory BNG for Nationally Significant Infrastructure Projects until November 2025

Mandatory BNG will only apply to s73 T&CPA 1990 applications where original permission is granted after November 2023.

Developers with excess biodiversity units on-site *will* be able to sell them as off-site BUs to other developers, as long as they are registered on the NE register (and for that to happen a s106 or conservation covenant legal agreement must be in place to secure those units for 30+ years).

There is helpful clarity that mitigation and compensation for protected species (likely to be on-site / off-site), and nutrient mitigation (likely to be off-site), can count towards the developer's 10% BNG target as long as 10% of the total post-development biodiversity score is "over and above" what is being provided for protected species / nutrients. Obviously, the legal security requirements for off-site biodiversity units and for "significant" on-site units (management for 30+ years) would still have to be met.

Helpful news for landowners

There is helpful clarity on landowners using land to generate multiple payments (i.e. stack payments). The guidance states that, from a single nature-based intervention (eg a woodland or a wetland), a landowner can (i) sell BUs and (ii) sell nutrient credits, but cannot also sell carbon credits (we understand that any carbon credits from the land would need to result from a different activity).

There is helpful clarity on landowners receiving agri-environment payments / payments for CSR initiatives by private companies / voluntary carbon codes. This means that landowners can also generate money from BUs or nutrient credits on their land as long as the baseline starting point for the BUs / nutrient credits is based on the *completed* enhancements required under the agri-environment / CSR / carbon code payments. In other words, the BUs or nutrient credits would need to be based on enhancements over and above the already-required enhancements.

However, these two points are set out in guidance only. Guidance is not legally binding and there are no effective existing legal constraints on these points and no mention of any such forthcoming constraints. This means it is not clear how Government expects this to be enforced (unless the Natural England registration process exercises relevant checks for those who wish to register off-site BUs?).

There is helpful clarity that landowners can potentially sell more BUs from existing biodiversity gain sites before the 30 year legal commitment period is over. This is possible where the landowner achieves the legally-required habitat creation and enhancements before the end of the existing legal agreement.

Helpful news for LPAs

LPAs will get new funding of £16.71 million to assist them in delivering Mandatory biodiversity net gain.

Challenges for LPAs

The guidance warns that LPAs which offer their own habitat banks cannot direct buyers towards their land in preference over other suppliers to the market, unless there are clear ecological justifications for doing so.

If you have any queries on the topics discussed, please get in touch with Freeths Planning & Environment Group:

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