



# Defra Consultation on Biodiversity Net Gain Regulations and Implementation, March 2022

Response from CPRE, the countryside charity

## Introduction

CPRE, the countryside charity, welcomes the opportunity to respond to this consultation. Our response has been prepared through an internal consultation between the CPRE national charity and our network of local groups. We have drawn on detailed comments from CPRE groups in Gloucestershire, Hertfordshire, Kent, and Norfolk. As a result, our comments are grounded in the reality of local experiences of how biodiversity net gain (BNG) is emerging as an issue in decision-making.

## CPRE's Headline Comments

In principle, BNG is a sound and welcome step forward in planning for nature: the principle that development should leave nature measurably better is a huge leap forward. However, there are also many concerns arising in practice. Recent academic research suggests that use of BNG so far is not delivering the intended outcomes: analysis of six early adopter councils found “a 34% reduction in the area of non-urban habitats, generally compensated by commitments to deliver smaller areas of higher-quality habitats years later in the development project cycle”<sup>1</sup>. In other words, quantitative loss now compensated by the promise of qualitative gains well into the future. This is not in the spirit of BNG as a concept for increasing the quantum of natural assets. We recommend that the findings of this research are properly analysed and the proposed implementation measures reviewed accordingly.

We are also very concerned that BNG requirements produce a perverse incentive to landowners and developers to deliberately degrade or hold down the ecological status of their land, so as to reduce the BNG measures needed to secure planning permission.

Clearly, these are unplanned consequences of a mechanism that is well-intentioned in concept. But we are very concerned that the reality of BNG in implementation will be a far cry from what it promises to offer in principle.

It is also important to recognise the BNG alone cannot tackle our crisis in ecology. At the very least, we recommend that there should also be a statutory duty placed on public bodies to deliver nature recovery, and this should mandate local authorities (individually or, preferably, jointly) to implement Local Nature Recovery Strategies and Nature Recovery Networks. LNRs can have multiple benefits,

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<sup>1</sup> [The Society for Conservation Biology \(wiley.com\)](https://www.societyforconservationbiology.com)



such as alleviating flood risk and absorbing carbon dioxide emissions. NRNs have the potential to improve connectivity for wildlife between designated sites for nature and the wider countryside. This would also provide ecological resilience to climate change.

Whilst the consultation is wide-ranging and detailed, CPRE recommends that many of the potential risks and concerns associated with BNG implementation could be addressed through four simple and straightforward principles:

- gain measures should always be proportionate to the loss, so the size of development or its brownfield/greenfield status are immaterial – if there is impact, then BNG is needed;
- there should be complete parity between regular planning applications (T&CP Act 1990) and Nationally Significant Infrastructure Project (NSIP) regimes – it would be perverse for larger schemes to have lower BNG requirements;
- all beneficiary land for BNG should be on BNG registers, and we would recommend mandating Local Nature Recovery Strategies (LNRS) through a statutory ‘duty to deliver nature recovery’, such that all BNG measures can be shown to contribute to a strategic approach to nature recovery;
- trading in the market for biodiversity units must not be a substitute or easy option compared to local BNG measures, and the risks arising from this could be much reduced by mandating that traded BNG units must be deployed on a LNRS site locally or elsewhere.

These four principles would obviate the need for most of the suggested exceptions and exemptions which are currently under consideration in the consultation.

## Answers to the consultation questions

### Part 1: Scope of BNG for Town & Country Planning Act 1990

#### Q1 Minimum size thresholds

- a) No. We don't agree with a minimum size threshold. Each development should be considered in its own right, as very small developments could have an ecological impact depending on their type and location.
- b) No. What matters is the location, connectivity and functionality of the linear asset, not its length. Linear habitats are some of the most important features in our landscape and are hugely valuable for biodiversity. Each linear habitat must be assessed on its individual merits.

#### Q2 Householder applications

No. If they were to be exempt, then this could result in garden grabbing by developers and a way of developing that bypasses BNG. Some gardens or other land within the curtilage of dwellinghouses are



very biodiverse and extremely large, but also vulnerable to individual owners' behaviour which is hard to enforce. To align with NPPF policies for gardens there is a need to ensure BNG considerations are factored into applications for developing on garden land. They may be on or near a designated area or other sensitive area, in conservation zone or have veteran trees on site. Therefore, householders should not be exempt.

### Q3 Change of Use

No. Change of use to residential brings residential impacts and paraphernalia, which could in some cases have locally significant ecological impact. Currently an isolated, derelict old barn in the middle of a green field can be subject to change of use under permitted development. These old structures are often vital for bats, barn owls etc and therefore should be legible for mitigation and a net gain.

### Q4 Creation of biodiversity gain sites

No. Each site should be assessed for its existing biodiversity, to avoid the risk of destroying one ecological asset to create another. Each site must be and needs to be assessed to see what exists on the site initially before any net gain can be assessed. A baseline must be set. Furthermore, without assessment there is a risk of a net loss, and one habitat is being destroyed, effectively, for another. The site earmarked for BNG should itself come under scrutiny to protect existing habitats and therefore be subject to BNG.

### Q5 Custom/self-build

No. If self-build / custom-build plots are included within a wider development, would those plots be exempted and, if so, how would landowners/developers be prevented from exploiting this to reduce the calculation? If biodiversity needs protecting and enhancing it should not matter if the development falls under self-build or not. Some large developers bring forward self-build site and may switch between conventional and self-build once planning has been accepted and visa versa, so it is important that biodiversity protection covers every eventuality in order to be robust. Some self-build sites are huge and consist of hundreds of dwellings.

### Q6 Brownfield

We agree: not exempt, because some brownfield sites can be priority habitats. Specifically:

- If the red-line boundary of a site encompasses non-hardstanding areas and if, for example, ecological impacts may arise from roadways, drainage, flood management or constructional requirements of a development, then this must class as part of the development even if the new buildings themselves would be on hardstandings.
- Some species/habitats rely on buildings – eg bats, barn owls.
- An exemption for buildings and hardstandings would be meaningless: Ecological Impact Assessments, bat surveys etc will show if there's an impact: if the impact is zero, then so is the BNG requirement. So it should still be assessed.



Furthermore, many brownfield sites are priority habitats, and it would be a travesty if BNG was not applied in these instances.

Conversely, in areas of intensively farmed agricultural land, the vast majority of biodiversity assets will be at the margins, along hedgerows, woodland belts and watercourses. There is therefore a risk that low ecological harm to the site will result in lower BNG requirements for greenfield sites than for brownfield, and this could potentially lead to higher greenfield land take.

#### Q7 Temporary development

We agree: not exempt. Many temporary developments could have long-term ecological impacts, and there is also a risk of developers gaming the definition of 'temporary' in order to reduce their obligations. Indeed we have already seen the definition of temporary stretched to 40 years in some solar farm applications.

#### Q8 Exceptions to Permitted Development

We agree: not exempt.

#### Q9 Any other exemptions?

No.

#### Q10 Designated sites

We agree: not exempt. Statutory designated sites for nature conservation should be subject to BNG. These sites should receive complete protection from development if we are serious about reducing the decline in biodiversity. In a Nature Recovery Strategy, one would expect designated sites to be nodes from which ecological assets and functions could spread to adjacent and nearby nature recovery sites. This is one of the reasons why requiring BNG measures to contribute to a mandatory strategy/network for nature recovery is so important.

#### Q11 Irreplaceable habitats

- a) No, we disagree with the approach, because it creates a loophole in which the BNG requirement arising from damaging an irreplaceable habitat could be lower than that for a replaceable one. The onus should be on the developer to provide BNG **as well as** not impacting irreplaceable habitat – it is important to ensure that developing on irreplaceable habitat is seen as the worst outcome, and therefore the least attractive option for the developer. In any case, the notion that developing on an irreplaceable habitat is possible without causing negative impacts is entirely counter-intuitive.



- b) to e) Yes. It's correct that irreplaceable habitats should be protected anyway, and not developed; and clearly Defra intends this to be the case, so the loophole needs to be closed. Also, the definition of irreplaceable habitat in the NPPF (Annex 2 Glossary), repeated in the glossary to the Defra paper, should be revised to include species-rich lowland grassland (which has declined in area by 97% since 1945) and certain types of lowland heath.

Further, there is an opportunity for creating space and opportunity for irreplaceable habitats to expand and recolonise adjacent land. Essentially the objective should be to increase the extent of the habitat, so the BNG site would become an extension site. Again, this would fall within the scope of a Local Nature Recovery Strategy.

#### Q12 Phased development

We agree that a BNG plan should be agreed prior to each phase, and we would welcome the frontloading of BNG into earlier phases. However, there is a more general problem with sites being divided into smaller ones in order to fall within thresholds, eg for Environmental Impact Assessment. We therefore suggest that where there are adjacent/contiguous sites/sites a joined-up BNG assessment should be made first, to ensure that the BNG opportunity is maximised and the cumulative effects of multiple developments are properly considered.

The granting of outline consent establishes that an acceptable reserved matters application is capable of coming forward, so a BNG condition at outline would have to be sufficiently robust to deal with changes to design, layout, drainage etc that might be put forward at reserved matters. In practice this seems likely to result in one of two outcomes:

- reducing the developable area of a site, and/or increasing the red-line boundary area of a site, to allow for more retention of trees, hedges etc and a bigger SUDS/open space provision without altering the design of the development itself to better integrate nature;
- a tendency to default to trading BNG units on the market and thereby produce limited on-site or nearby benefits.

#### Q13 Variations to permissions, including minerals permissions

No. A variation to an existing permission should be in context of current policy, not what the policy was at the time of the original permission. A variation should therefore come with a BNG condition if it otherwise meets the criteria.

Also, considering the propensity for former quarries to become significant ecological assets, it is crucial that minerals permissions are not able to bypass the BNG requirements.

#### Q14 Small sites

No. A separate treatment of small sites opens up a risk of developers using piecemeal development with a less demanding BNG requirement.



#### Q15 Transitional periods

No. Biodiversity may be deteriorating during the transitional period, and this may be equally true of smaller and larger sites. A longer period for smaller sites also creates an incentive for developers to divide up larger sites into smaller ones, so the net outcome will be potentially harmful. In any case, many developers are already routinely using BNG to carry weight in their favour in the planning balance, and to conform with existing policy expectations; so it's unclear why transitional periods are needed.

#### Q16 Reducing the burden for small sites

No. The burden should be proportionate to the biodiversity impact, not to the size of the development.

### Part 2: Nationally Significant Infrastructure Projects

#### Q17 Exemptions

No. It's very unclear what is meant by 'targeted exemptions'. In any case, why should bigger schemes pursued through NSIP have a lower BNG target than smaller schemes pursued under TCP1990? That is perverse: the BNG requirement should be proportionate to the impact of the development, irrespective of its size or the consenting regime.

#### Q18 to 20 Effective date for BNG on NSIP schemes

No. CPRE has argued that NSIP schemes which have been accepted for examination but not yet examined should be required to demonstrate their contribution to the net-zero 2050 target for greenhouse gas emissions. We consider the same principle should apply to BNG: big projects with long timescales need to start contributing to positive outcomes immediately, and setting a long lead-in time simply creates an incentive for schemes to be hurried through before the requirement takes effect.

#### Q21 Using existing landholdings as BNG sites

No. All sites need to be on the BNG register, otherwise the system is not monitorable. Developers should bring their landholdings forward to be added to the register.

#### Q22 Biodiversity Gain Plans

Yes. Parity between NSIP and regular planning is essential to the system operating fairly and transparently.

#### Q23 Enhancement areas within development boundaries

No. This seems to point to a case-by-case approach for NSIPs with large development boundaries; but surely an on-site environmental mitigation area would be factored into the mitigation hierarchy before



BNG is calculated. Mitigation is not a BNG. It is a replacement for habitats destroyed and therefore should not be used as part of the BNG enhancement.

If the developer has control of the BNG site then this may be advantageous in ensuring implementation, but the proposed approach implies that a 'damage this part, enhance that part' approach within a development boundary could be put forward before BNG is calculated, and it is difficult to see how this differs from the conventional mitigation hierarchy.

#### Q24 Anything else?

Often years before an NSIP application is submitted, the biodiversity on site has begun to be cleared by developers in an effort to destroy what is there and to realise an easier and greater BNG gain. How will this be prevented?

#### Q25 Maintenance period

No. A fixed time period is not appropriate. Maintenance should be for at least the life of the project including post-development restoration, as with minerals permissions. Conversely, maintenance conditions which rely on the developer continuing to take responsibility for a long period after the project should be given limited weight in assessing the acceptability of schemes, because they may prove unimplementable.

#### Q26 CPO powers

Yes. A site being acquired by CPO must also be measured in the metric. We would wish CPO to be a last resort: an NSIP scheme should contribute to the biodiversity of the area, and the BNG opportunities of the area should be set out in a Local Nature Recovery Strategy; so the expectation should be for NSIP schemes to contribute to the LNRS.

#### Q27

Yes. This guidance is likely to be highly complicated because the intertidal relations and food webs are delicately balanced. If a site is an SPA and a SSSI, how can BNG be obtained or mitigated for? Surely the site then becomes an irreplaceable habitat.

### Part 3: Implementation

#### Q28

No. It is crucial to prevent the site from being cleared prior to the baseline habitat being set? If the site is not designated it is not in the developer's interest to find the site of high ecological value. The core biodiversity gain information should include a desk top study from the local biological records centre and other relevant conservation bodies such as the BTO and the area for any desk top study should extend to at least 30m outside of the red line boundary of the site. The pre-development biodiversity



value is what is at risk of being destroyed and also at risk of being degraded/cleared prior to any planning application.

Q29

Yes.

Q30

Yes. We would suggest the following provisos for the use of off-site diversity units in specified locations:

- They should ideally be within the same local planning authority area.
- They should form part of a Local Nature Recovery Strategy (LNRS) area established by the responsible authority for the locality.
- It would be better to wait until an appropriate site becomes available (within a reasonable time frame, perhaps 5 years) than see off-site gains located far away from the development site. This should help to reduce creeping habitat and species loss from a locality.
- The market in off-site units must be regulated to ensure that prices do not become unaffordable in the local area: this is a danger where large-scale biodiversity losses are occurring due to development.

Q31

For on-site measures, the Government should make BNG mandatory for the life of the development and by securing a suitable bond to administer the management of the 'registered' site. For off-site measures, the best way to ensure long-term protection would be to require all off-site gains to be within LNRS areas, which should be given the same protection as SSSIs. Further enhancement of protection could be secured by transferring ownership to public or voluntary bodies.

Design of retained and 'gain' biodiversity areas on-site should acknowledge the need for long-term management. Small areas will be vulnerable to loss and damage. Biodiversity is likely to be higher in larger areas of similar habitat type than in the equivalent area separated into small areas, and in areas of mixed habitat with plenty of transition and edge habitats. This should inform site design as well as making transfer of such sites into protective ownership easier. With support, voluntary community management of such sites can be very successful, and creates buy-in for long-term protection and enhancement.

General comment on the market for biodiversity units

Whilst it is difficult to fit these comments to the consultation questions, there is a need to raise concerns that the BNG 'market' risks disconnecting the type and location of the gains from the type and location of the losses, especially if this becomes an easy option for developers.



Our suggested solution is that land can only be added to the BNG register if it meets the objectives of the Local Nature Recovery Strategy (LNRS) – and that by definition local authorities must therefore have an LNRS in order to implement BNG in their area. Developers must then demonstrate that non-trading options (ie doing it locally first) have been properly pursued but, having done so, traded BNG contributions could only benefit LNRS-compatible outcomes in other places (as opposed to buying up random land parcels elsewhere).

Q32

No. The proposed market for biodiversity units is problematic, and could lead, unless strict criteria are adopted as set out in respect of Q30, to loss of biodiversity and public access to nature in a locality. In our view selling of excess on-site biodiversity units must only be to provide gains for another site within the same LPA area.

Q33

Yes.

Q34

Yes.

Q35: No. Habitat banking should take place only within LNRS areas for the use of developments in the same LPA area. If the site is to be utilised for BNG then the whole site should be legally protected and for longer than the proposed 30 year minimum.

Q36

Yes.

Q37

Yes. We suggest one year in principle, but as previously stated it would be better to have a longer period – perhaps up to 5 years - if this enabled more units to be retained locally.

Q38, Q39 and Q40

The criteria and information seem appropriate but the timing is not. The register operator should satisfy itself that the details of the site are correct and appropriate by site survey. Habitat must be assessed at certain times of the year, preferably involving several visits, depending on the habitat type and availability of historic records. This is essential to ensure that the proposed habitat creation and enhancement will not damage or destroy existing ecological value and that the maximum potential of the site is being utilised by the proposals.

Q41: Yes.

Q42: Yes to both, but the register operator must also confirm that it has satisfied itself that the information is correct and the plans are appropriate by site survey.



Q43: Yes, although caution is needed to avoid loopholes for developers to use as a delay tactic.

#### General Comment on Additionality

We would like to make a point about BNG and benefits in the planning balance. Currently, BNG is a material consideration and its provision is interpreted as a benefit that can be given weight in the balance. When BNG is mandatory, it becomes a legal requirement, not a material consideration. The implication in the consultation is that measures which would already be required by other regulations, eg SUDS, do not count towards BNG and therefore BNG must provide something that wouldn't otherwise be provided. This seems sound in principle, but in practice we need to see integration of SUDS, street trees, hedgerows etc into a sort of 'integrated nature scheme' for a development – otherwise the outcomes may be disjointed – so how is the additionality demonstrated?

#### Q44 a,b,c,d.

No. Mitigation is not a BNG and should be ring fenced. Furthermore, onsite measures delivered to comply with statutory obligations or policy, such as green infrastructure, sustainable drainage or nutrient mitigation are not uplifts in biodiversity. They are mitigation measures, so either preventing harm or replacing what is to be lost and not a net gain. Likewise, adequate mitigation and compensation are just that, not biodiversity gains. None of the bullet points under 'Proposals' can be described as biodiversity gains, they are all either compensation, mitigation or preventative measures. Biodiversity gain should be an enhancement of nature, added value to what is already there on top of what is to be replaced or protected.

#### Q44e.

Yes.

#### Q45 Enhancement on protected sites

Don't know. It makes sense that existing sites with ecological value should be able to benefit from BNG measures, but the proposals seem to complicate what seems like a simple principle. For example, is there a clearer way to enable BNG measures on a candidate Local Wildlife Site that could help it to become designated?

By including non-statutory sites such as local nature reserves within LNRS areas, they can benefit from off-site diversity units. As in Q44, using BNG provisions to make up for deficiencies in the management of protected sites and species lets landowners, who should be achieving the biodiversity standards required by Natural England and legislation, avoid their obligations.

#### Q46

Other. No statutory designated site should be included. We should be looking to protect a much wider area. What could be included is land surrounding or adjacent to a statutory site. This would not only protect what is already there but enhance and widen the area and help to link up nature.



Q47

Other. In principal we agree, but only if the other environment services complement and enhance adding value to the BNG.

Q48a

No. If Biodiversity credits are able to be purchased in advance, how would you know that they were purchased as a last resort and not simply purchased as an easier option? By purchasing in advance, how would the developers know how many credits to buy or how many they need?

Q48b

Other. The market risk should be identified so that you know exactly what it is you are mitigating against. What is the market risk?

Q49

No comment.

Q50

No. Land values vary across England and moreover within local authority areas, and this might also result in biodiversity being distanced from communities who would then have reduced access to nature.

Q51

Other. Yes, in principle. A direct traceable link would be required.

Q52

No, not sufficient. To evaluate how BNG is being delivered overall, would require credits to be directly linked to projects, yet under Q51 it is suggested that there would be no traceable link between individual development that has purchased credits and specific sites.

Q53

Yes. Accountability and transparency is essential to ensuring BNG is delivered in practice. The public must be able to scrutinise and see tangible results.

Q54

Yes, but not sufficient. The cost of burden is likely to be considerable for LAs, not only to implement and monitor these sites but also the reporting which will undoubtedly use up valuable resources. This is why a bond from the developer, who would have moved on and seemingly has no on-going responsibility, is necessary.

Q55a.

Yes. How will developers be prevented from clearing a site prior to obtaining baseline data?