

Biodiversity Net Gain update



In February 2023 Defra announced updates to its Biodiversity Net Gain (BNG) policy position following a 12 week consultation process launched in January 2022. Alongside a summary of consultation responses, it has updated its general guidance on BNG, including how to sell biodiversity units to developers as well as clarification on the stacking of BNG and environmental payments on land. The guidance is thorough and clear, and provides much needed clarity ahead of the November 2023 start date for BNG, albeit some issues are still left unanswered.

This briefing note focuses on the changes announced; for more background information on BNG please see our previous [briefing note](#). The key points covered in this briefing note are:

- The introduction of new exemptions including a *de minimis* area and for householder applications
- A delay on mandatory BNG for small sites until April 2024 and Nationally Significant Infrastructure Projects (NSIPs) until November 2025
- Confirmation that for phased development, a new biodiversity gain plan is required ahead of each phase of the development
- Confirmation that developers generating gains on-site will be able to sell any additional gains (above their own 10% requirement) as off-site units for other developments
- Clarification that mandatory BNG will only apply to Section 73 variation applications where the original permission was granted after November 2023
- Stacking is permissible for nutrient credits alongside biodiversity units
- Biodiversity units can be created from land creating carbon credits if there is additional enhancement to the existing obligations.

Who will be exempt from BNG?

Exemptions to the BNG requirement were already in place for permitted development (PD) and urgent Crown development as well as for temporary impacts that can be restored within two years. Further exemptions will be created for:

- Developments impacting an area under 25m² or five metres for linear habitats such as hedges
- Householder applications
- Biodiversity gain sites where the land is being enhanced for the purposes of BNG.

Additionally, it is proposed small scale self-build and custom housebuilding will be exempted, although further clarification on what this means is needed. The application of a *de minimis* threshold alongside housebuilder applications will avoid the need for smaller scale projects to undertake mandatory biodiversity net gain (such as the erection of a garden building, greenhouse or shed which do not fall under PD rights). However, Defra clarifies planning policy can still require proportionate on-site enhancements where possible.

What protections are there for irreplaceable habitats?

The National Planning Policy Framework (NPPF) sets out strict protections for irreplaceable habitats, but there was previously concern that irreplaceable habitat protections could be weakened by the introduction of BNG, allowing for an offset of something that could not be compensated for. The consultation response confirms further legislation will clarify the definition of irreplaceable habitats and provide a list of habitat types which are considered irreplaceable. The list of habitats is awaited, but the existing NPPF gives examples of ancient woodland, ancient and veteran trees, blanket bog, limestone pavement, sand dunes, salt marsh and lowland fen; as such these are expected to be included as a minimum.

Instead of a 10% increase for these irreplaceable habitats, the Local Planning Authority (LPA) needs to be satisfied that any compensation plan meets relevant policy, and that decisions are made in line with the NPPF. A separate plan will need to be submitted for any development on irreplaceable habitats, to ensure clarity on what is being offset. Statutory BNG credits cannot be used as compensation for irreplaceable losses, and a summary is required for why the loss of an irreplaceable habitat could not be avoided.

Respondents suggested certain species should be included within irreplaceable habitats, rather than just the habitat class. The clarifications listed regarding irreplaceable habitats should ease concerns that BNG cannot supersede existing protections for these areas.

How will phased developments meet BNG targets?

Development which is permitted in phases will require additional BNG information for each phase. Approval of a biodiversity gain plan is needed prior to the commencement of each phase. Further guidance is expected to come out on this to clarify the details. There remains the question of timings of on-site delivery of biodiversity gains which will need to be answered ahead of the November launch.

What is happening with the small sites metric?

To allow a longer period for developers and LPAs to adapt, BNG for small sites will not be mandatory until April 2024. For residential developments, small sites are defined as developments between 1 - 9 dwellings, on a site of less than one hectare, or any site less than 0.5 hectares. For non-residential, small sites are defined as a floor space of less than 1,000m², or a site of less than one hectare. A separate small sites metric (a simplified version of the Biodiversity Metric 3.1) will be available for developments meeting size and 'absence of priority habitat' criteria.

Further simplifications for smaller sites are being considered and explored, but not yet guaranteed. These include improved mapping of habitats and online training on metrics alongside the use of gardens for biodiversity gains. The time extension is to give LPAs longer to adapt to the new requirements.

Will BNG apply to Nationally Significant Infrastructure Projects (NSIPs)?

NSIPs will not be exempt from BNG and will broadly follow the same process as the Town and Country Planning Act approach. Given the scale of these projects, a two year transition period has been announced, with mandatory BNG being applicable for NSIPs from November 2025.

Concerns have previously been raised that developers could compulsorily acquire land in order to deliver BNG on NSIPs. This will not be restricted, although Defra has outlined that there will be guidance on reasonable alternatives before compulsory purchase. This remains an issue and a concern for landowners nearby any future NSIPs, but provided the market for biodiversity units is sufficient then it should not be necessary to go down this route.

What happens after the 30 year period?

Defra has clarified that the 30 year period is the minimum duration for BNG units, and this will not be reviewed before 2026. After the 30 year period, Defra suggests maintaining or further enhancing the site, by taking a new baseline and re-entering it into the BNG market.

There have been concerns about what happens to the land after the BNG period, given this could weigh heavily in landowners' decisions making with regards to whether they offer land for biodiversity gains. Defra's consultation response confirms it "would hope that very few biodiversity gain sites are taken out of conservation management entirely at the end of their agreements". This suggests that landowners should still carefully consider site selection when looking at BNG delivery options, as later reversion may be impeded. It is hoped the government chooses to incentivise retention, for example through tax incentives, rather than make it a necessity later down the line.

Who can sell BNG units?

Anyone who can meet additionality and eligibility requirements can sell units. The government has distanced itself from the market, and confirmed it will not develop a centralised trading platform. Natural England will sell statutory biodiversity credits but only on a temporary basis with the intention to phase their availability out once the market has matured. The statutory biodiversity credit price will be published six months in advance of mandatory BNG, so it is expected around May, however this price will be intentionally uncompetitive relative to the private biodiversity unit market.

It is expected that the buyer, seller and any other parties draw up their own terms and legal agreements, with unit prices to be determined by negotiation. Defra has produced guidance on selling biodiversity units as a land manager; this says the parties are free to choose whether payment is a lump sum, staged payments or payment by results.

A national market is provided for, with sellers able to sell anywhere, provided the distance between the development and the off-site habitat is properly accounted for in the development's biodiversity metric calculation. LPAs cannot direct buyers towards their own BNG offset sites in preference to other suppliers in the market. Developers that exceed their biodiversity gain objective on-site can then sell any additional units they create as off-site units for another development. However, this will only be permitted if the excess gain is registered, and there is genuine additionality for the excess units sold, i.e. the development went above and beyond what was required on-site. Biodiversity unit sales will be subject to VAT.

Staged sales will be permitted to allow further enhancement before the end of the existing agreement if the planned enhancement has already been achieved. Verification would be required from the initial period, and then any new

enhancements would need updated legal agreements that cover the remaining time on the original agreement, plus 30 years.

It has been identified that allowing developers to sell any extra units may put an artificial ceiling of 10% biodiversity net gain on all developments, and if this were not allowed to happen, we may see higher increases in biodiversity. On the other hand, it provides a potential reward for putting more effort into your on-site development, which is beneficial. There is not a straightforward answer here, and Defra is proposing to continue monitoring the situation, which is likely the best outcome.

How will BNG be treated for inheritance tax purposes?

The outstanding tax implications remain an issue for many landowners, with no confirmation as to whether areas designated for BNG can qualify for the same taxation reliefs as agricultural land. Reportedly, work is underway to provide guidance on the tax implications for habitat creation or enhancement. One solution would be to amend Section 124C of the Inheritance Tax Act 1984, which is currently rather redundant, but does specify certain habitat schemes that should be treated as agricultural land. If BNG was added to the list of enactments, then it would solve the problem fairly neatly, clarifying that the land would still benefit from Agricultural Property Relief and therefore helping unlock the development of this market. In the absence of any clarifying amendments, eligibility for the relief would depend upon whether the land is still considered agricultural property and in agricultural use. This judgement could potentially vary from site to site depending upon the habitat types and management activities undertaken.

What about existing habitat banks?

Habitats created after 30 January 2020 will be eligible for registration and sale of units. Any enhancements before this date are not eligible, and will need to be re-baselined to allow for sales.

There will not be a time limit on how long units can be banked before they are allocated. The habitat bank can effectively be split dependent on how many are needed for each development, with separate 30 year agreements for separate developers.

How will the biodiversity gain site register work?

Natural England will function as the operator of the biodiversity gain site register, to record allocations of off-site units and make the information publicly available, but it will not act as a marketplace. Six weeks is expected to be the timeframe for application determination. On-site gains do not need to be registered, as it is hoped this information can be lifted from planning applications.

Landowners will need to sign a legal agreement before registration to put obligations on them to assure the habitat enhancement proposals are achievable and delivered. This could either take the form of a planning obligation (section 106) with an LPA or a conservation covenant with a responsible body. Habitat management and monitoring plans will need to be agreed with the LPA or responsible body and included on the register. Natural England will be able to charge a fee, with it anticipated to be between £100 and £1,000 per site.

Can landowners stack and bundle BNG units?

Land managers can sell both biodiversity units and nutrient credits from the same intervention, such as the creation of a wetland or woodland. It is worth considering differing timeframes, as it is a minimum of 30 years for BNG but up to 125 years for nutrient neutrality. If continuing to maintain the area after the original 30 years, a new baseline would need to be taken, and then new BNG units can be sold with a new 30 year agreement.

Environmental grants, such as Environmental Land Management, can also be uplifted to provide BNG, provided it is clear what the original grant funding is for. For example, if you created a modified grassland for a grant payment, you could then take a baseline from this and improve the habitat condition beyond the requirements of the grant in order to create biodiversity units for sale into the BNG market.

Regarding the stacking of carbon credits with biodiversity units, the issue of additionality comes into play. You can sell both from the same land, but not from the same action of enhancement. For example, it would be possible to plant a woodland for carbon credit sales under the Woodland Carbon Code, and then uplift that existing habitat for biodiversity units, provided it does not impact the carbon value and that the woodland is already established when the biodiversity baseline is taken.

Conclusion

Whilst the update provides clarity on many issues, there are still some unanswered questions, which need to be clarified as we move towards the mandatory BNG start date of November 2023.

- The outstanding tax implications for land designated for BNG will remain a sticking point for many landowners, and need to be clarified as soon as possible
- It is not clear what happens to the site after the 30 years contractual period has passed. Will the government incentivise retention of the new habitat through ongoing management payments, or will the landowner be required by regulation to sustain the created habitat? This could influence whether landowners choose to enter into a section 106 agreement or conservation covenant.
- A framework is needed for when it is acceptable to buy off-site units. Currently the guidance still suggests that on-site is preferred but there is not much more detail than this. There may be litigation issues if LPAs act on guidance alone, and insist on on-site uplifts.
- Secondary legislation is needed to define and introduce additional exemptions, irreplaceable habitats and phased development, it is not clear as to when this will be available.

We will await these details in due course, alongside the expected Biodiversity Metric 4.0 later in 2023, which is expected to be the version in force when mandatory BNG launches.

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