

Biodiversity Net Gain update

Throughout 2023 preparation for the introduction of mandatory Biodiversity Net Gain (BNG) has continued within the government, land management and development sectors. It was due to become mandatory in November 2023 but a delay until January 2024 has been announced.

This briefing note outlines the basic information of this year's updates, details what information is still awaited, and answers frequently asked questions. For more background information on BNG please see our previous [briefing note](#).

- In **February**, Defra announced updates to its BNG policy position following a 12-week consultation process launched in January 2022. Alongside a summary of consultation responses, it updated its general guidance on BNG, including how to sell biodiversity units to developers as well as clarifying the stacking of BNG and compatibility with agri-environment scheme payments.
- In **March** Biodiversity Metric 4.0 was launched, updating version 3.1 published in April of 2022. Defra anticipates that version 4.0 will become the statutory version. Changes largely focused on improving user experience and streamlining the guidance. Alongside it, the small sites metric was published, which is a simplified version of 4.0.
- In **May** guidance for developers was released, which clarified the issues of additionality relating to BNG. Creating or enhancing habitats to comply with statutory obligations, or as part of a river basin management plan can count towards the 10% BNG requirement, provided they are registered.
- In **June**, the Local Nature Recovery Strategy areas were published, allowing development projects which create, enhance or recover habitats, and are mapped in the strategies to get a higher biodiversity value in the metric than they would in other locations.
- In **July** Defra invited applications from local authorities, public bodies, charities and other organisations to become 'responsible bodies' - the counterparty with a landowner to a conservation covenant (a mechanism to secure BNG land management long-term). To be eligible for the role the organisation must have a conservation focus. The first responsible bodies are expected to be designated later in 2023.
- In **August** Defra released the statutory biodiversity credit prices, these credits are available as a last resort for developers if they are unable to use on-site or off-site units to meet their BNG obligation. The use of this option is disincentivised relative to the private biodiversity unit market as the developer would have to buy two credits for every one unit that they need to offset. Indicative prices vary between £42,000 per credit for habitats such as cropland, heathland and shrub, through to £125,000 for lowland mixed deciduous woodland and £650,000 for lakes. VAT would be charged in addition.
- Also in **August**, Defra and Natural England updated their advice regarding stacking environmental payments, with advice on combining biodiversity units with nutrient credits, agri-environment schemes and carbon.
- In **September** Defra announced that the rollout of mandatory BNG would be delayed until January 2024, with all remaining guidance and regulations to be released by the end of November 2023. To formally enact BNG, ministers would need to lay a statutory instrument before parliament, which is in recess until mid-October. There is not enough time to complete the secondary legislation and give the industry sufficient notice of the final arrangements before the intended November 2023 launch date.

While the guidance released to date is extensive, some issues still require addressing for the market to function and grow:

- 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. A consultation was run by the Treasury on this topic from March to June 2023, but so far there have been no outcomes.

- It is not clear what happens to the site after the 30-year 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 at their own cost? 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 Local Planning Authorities (LPAs) act on guidance alone, and insist on on-site uplifts, particularly if LPAs differ in their decisions.
- The identity of the responsible bodies is awaited. They were due to be designated 12 weeks after their application so we expect the first designations to be in mid to late October.

Frequently asked questions:

Who will be exempt from BNG?

Exemptions from the BNG requirement are 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 to create BNG units.

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 householder 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 happens after 30 years?

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

There has been concern about what happens to the land after the BNG contract period, given this could weigh heavily in landowners' decision-making about whether they develop biodiversity gain projects. Defra's consultation response in February stated 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 carefully consider site selection and valuation impacts when designing BNG projects and assessing unit pricing. 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 temporarily with the intention to phase their availability out once the market has matured. 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. Like statutory biodiversity credits, biodiversity unit sales will also be subject to VAT.

Staged sales will be permitted to allow further biodiversity enhancement of a BNG project site 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 effectively puts a ceiling of 10% biodiversity net gain on all development, limiting the amount of biodiversity enhancement that the policy creates overall. On the other hand, it provides a potential reward for enhancing a development's on-site greenspace provision. There is not a straightforward answer here, in practice it could prove to be a purely theoretical issue, Defra is proposing to continue monitoring the situation.

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 in February confirmed 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 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 of why the loss of an irreplaceable habitat could not be avoided.

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 before the commencement of each phase.

What is happening with small sites?

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 is available for developments which meet size and 'absence of priority habitat' criteria.

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 mainstream 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 been raised that NSIPs could compulsorily acquire land to deliver their BNG requirement. This will not be restricted, although Defra has said that there will be guidance on reasonable alternatives before compulsory purchase. Given the large areas potentially involved, this remains a concern for landowners near any future NSIPs, but provided the market for biodiversity units is sufficient this approach should not be necessary.

How will BNG be treated for inheritance tax purposes?

The outstanding tax implications remain an issue for many landowners, principally due to the concern that their BNG project may not qualify for the same taxation reliefs as agricultural land. A consultation was run by the Treasury on this topic from March to June 2023, but so far no outcome has been announced.

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 growth 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. If creating BNG units does affect relief eligibility, landowners would be likely to take this into account in the pricing of their units.

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 biodiversity unit 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 depending 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.

In addition to a commercial agreement between the landowner and developer for the credit sale, a legal agreement involving the LPA is required to secure the delivery and enforcement of the habitat enhancement proposals. This document will be required for the registration process. It could either take the form of a planning obligation (section 106) with the developer and the LPA, or a conservation covenant which would also involve a responsible body. Habitat management and monitoring plans will need to be agreed upon with the LPA or responsible body and included on the register. Natural England will be able to charge a fee, which is anticipated to be between £100 and £1,000 per site.

Can land managers stack and bundle BNG units?

Land managers can sell both biodiversity units and nutrient neutrality 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 currently up to 125 years for nutrient neutrality credits. 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.

Land within environmental schemes 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 '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 to create biodiversity units for sale in the BNG market.

The issue of additionality comes into play regarding the stacking of carbon credits with biodiversity units. 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.

Contacts



Andrew Teanby
Associate Director
ateanby@savills.com
+44 (0) 7835 445 458



Kelly Hewson-Fisher
Head of Rural Research
kelly.hewsonfisher@savills.com
+44 (0) 7977 539 956

This report is for general informative purposes only. It may not be published, reproduced or quoted in part or in whole, nor may it be used as a basis for any contract, prospectus, agreement or other document without prior consent. Whilst every effort has been made to ensure its accuracy, Savills accepts no liability whatsoever for any direct or consequential loss arising from its use. The content is strictly copyright and reproduction of the whole or part of it in any form is prohibited without written permission from Savills Research.