

Legislation brings biodiversity net gain regime a step closer

Suzie Horne 07 December 2023



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The legislative framework for biodiversity net gain (BNG) is finally being introduced, in six statutory instruments which will become law when BNG goes live in January 2024.

This includes outlining the legal basis for calculating biodiversity value for BNG.

In a change from the process originally set out, developers will be able to submit a biodiversity gain plan (BGP) to the local planning authority (LPA) once planning permission is granted.

See also: [Biodiversity net gain legal issues for farmers](#)

Following this, the LPA has eight weeks to approve or refuse the plan in writing. If accepted, this will discharge the mandatory BNG condition.

A draft BGP template also sets out further requirements and how the process will work:

- The BGP and the LPA's decision on it must be published on the LPA's local register
- LPAs will be able to ask developers to direct efforts towards off-site mitigation that has been identified as within an ecological network with locally important species
- The landowners of off-site habitat banks will agree habitat management and monitoring plans with the LPA or responsible body, with no need for the developer to be involved
- BNG sites will need to be registered on the Natural England register before being included in a BGP.

The publication of the statutory instruments is welcome but raises many further procedural questions, says broker Hugh Townsend, of Townsend Chartered Surveyors.

These include how much influence a biodiversity unit buyer's LPA will have on deciding what works are suitable on an off-site mitigation.

There are also questions about the interaction between LPAs when off-site mitigation is being provided outside the LPA in which the planning consent was granted.

BNG register

The Biodiversity Gain Site Register Regulations 2023 allow for a publicly accessible biodiversity gain site register of off-site BNG commitments. This will be operated by Natural England.

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These regulations set the eligibility criteria for land to be registered.

Also published are the Biodiversity Gain Requirements (Irreplaceable Habitat) Regulations 2023, listing habitats considered irreplaceable for BNG calculation.

The regular 10% uplift requirement is not applied for these habitats, where bespoke compensation is to be agreed between the developer and the LPA.

What is BNG?

BNG is an obligation on developers to leave their sites in a measurably better state than before the development took place. They must raise the biodiversity count by 10% through on-site or off-site measures.

It applies to most development in England under the Town and Country Planning Act (TCPA) from January 2024, to small sites from April next year and to Nationally Significant Infrastructure projects from October 2025.

The latest government announcement includes the requirement that developers must produce a minimum of 10% of their net gain onsite before looking elsewhere.

There is a market for landowners to create and sell biodiversity units, which will be subject to 30-year agreements.

Open market prices for biodiversity units are estimated by broker Townsend Chartered surveyors at £15,000 to £90,000 a unit before VAT and fees.

BNG information and guidance is available at gov.uk/government/collections/biodiversity-net-gain

Approach will vary with LPA

Landowners considering offering off-site BNG units to developers should keep an eye on what their LPA's approach is, as these vary both in terms of what they will prioritise in BNG policy and in their preparedness for the regime, says consultant Anthony Weston of CLM.

"Different guidance and experience is emerging from LPAs around the country, and we're waiting to see how LPAs incorporate the BNG legislation and implement it," he says.

"It will be worth some landowners promoting their land for BNG in relation to local nature recovery strategies (LNRS). Some local authorities have started to call for BNG sites in the way they do development site allocations."

However, most local authorities are behind the curve on developing and progressing their LNRS, says Anthony.

Mitigation units provided off-site and within an LPA's LNRS can qualify for a 15% bonus on top of units produced by the habitat gain.

Also, some development sites within an LNRS will have a 15% higher biodiversity value and so require more units than they otherwise would.

This applies only when producing specific relevant habitats, making it important to understand the LNRS of both the development site and off-site.

In some LPAs, older biodiversity opportunity area documents are being revisited, and these may be of interest to landowners.

Government fund for nutrient mitigation

Chancellor Jeremy Hunt's autumn statement included a £110m fund to deliver high-quality nutrient-mitigation schemes over the next two years.

This is expected to help the voluntary nutrient mitigation market as well as LPAs looking to develop their own mitigation projects.

Nutrient neutrality (NN) is a planning requirement in more than 70 catchments, requiring any development to demonstrate that it is nutrient neutral in terms of phosphate and nitrogen production.

This is leading to a market in nutrient credits which can be created on farmland.

"This Local Nutrient Mitigation Fund allows LPAs to set up 'offsetting schemes' via costed expressions of interest for projects or strategies delivering mitigation," says broker Hugh Townsend.

"Whether this would involve an LPA buying land and completing their own works and producing credits, or setting up a process for landowners to supply credits from their own projects directly to developers, remains to be seen," he says.

"It seems in the wording that there is potential for both types as long as mitigation to unlock housing development is the outcome.

"The former would provide direct competition to an open market, while the latter may encourage it."

Natural England (NE) is creating statutory nutrient mitigation credits, currently on land owned by wildlife trusts and other non-governmental organisations.

Marketing of these has begun only in the Tees catchment area but this is expected to be extended to others, including Stodmarsh in Kent, the Wensum catchment area in Norfolk, and the Norfolk Broads wider area.

However, NE is also considering buying from private landowners, says Hugh.





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“Effectively NE’s scheme is/will be in competition with those selling in these markets.

“This suggests that those in these catchment areas, which might be affected in due course, should consider pushing on now with any sales before this competition arrives.

“There is clear demand in the relevant catchment areas and more vendors are now waking up to the idea that the market for these units will be continuing “as is” for the time being.

“Furthermore, maybe well past the next general election, there could be further threats to this market with more attempts to introduce policy changes.”

It is possible to use the same land for NN mitigation and BNG.

Nutrient neutrality

Landowners offering nutrient credits must tie up land for 80 to 130 years in legal agreements which run with the land, so that when it is sold, gifted or inherited, the obligation to provide the mitigation continues.

Open market prices for nitrogen credits currently range from £3,000 to £4,000/unit (equating to about £18,000/ha to £206,000/ha), according to broker Townsend Chartered Surveyors.

Phosphate mitigation units are valued at £50,000 to £65,000/unit (from £2,000 to £169,000/ha).