

The Environment Bill (2020) – biodiversity net gain



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Timeline: Bill and supporting policy

- Latest version of the Bill introduced in HoC on 20.1.20 (a comparison version is available at <https://publications.parliament.uk/pa/bills/cbill/58-01/0009/Enviro%20Compare.pdf>)
- See also
 - Explanatory Notes to the Bill
<https://publications.parliament.uk/pa/bills/cbill/58-01/0009/en/20009en.pdf>
 - Environment Bill Policy Statement 30.1.20
<https://www.gov.uk/government/publications/environment-bill-2020/30-january-2020-environment-bill-2020-policy-statement>
 - Environmental Governance Factsheet (parts 6 and 7 - Nature and conservation covenants) 10.3.20
<https://www.gov.uk/government/publications/environment-bill-2020/10-march-2020-nature-and-conservation-covenants-parts-6-and-7>

Timeline (2)

- Draft Environment (Principles and Governance) Bill 19.12.18, to comply with s.16 of the European Union (Withdrawal) Act 2018 followed by consultation
- Government consultation *Net gain, Consultation proposals* (December 2018)
https://consult.defra.gov.uk/land-use/net-gain/supporting_documents/netgainconsultationdocument.pdf
- Government *Summary of responses and Government Response* (2019)
- Full Environment Bill first published before 2019 General Election
- New version of the Bill published after the General Election
- Parliamentary scrutiny
 - Second reading
 - Committee hearings began but suspended following lockdown
 - Now proposed to be completed by 29 September 2020
- 2020 policy statements relating to the Bill

Current position

- Current policy has to approach BNG (absent development plan policies to the contrary) in terms of mitigation following established principles. See e.g. NPPF 2019 §§170, 174, 175 and PPG *Natural environment* §§18-24.
- The “have regard” duty in s. 40 of the Natural Environment and Rural Communities Act 2006 is only a weak duty
- Government *Net Gain* consultation 2018 –
 - “This system works well to avoid the most severe impacts on biodiversity and protect the best sites for wildlife, but less well to manage the gradual erosion of lower value habitats. Cumulatively, even ‘insignificant’ losses of habitat at a development scale add up to significant rates of biodiversity loss overall. The approach also leaves much to be agreed in relatively subjective and discretionary ways – while this offers some flexibility, it can also result in uncertainty and costs for both developers and LPAs. Current practice enables some enhancement but without reliable measurement there is no way of understanding how much this benefits the environment and people.
 - In practice, a variety of approaches are employed by the 353 local authorities in England ...”

Objectives

- *“Nature is in decline, much of England’s wildlife is deteriorating, and many ecosystems are degraded. The UK has a number of international and legislative commitments to take urgent and effective action to halt the loss of nature or biodiversity.”* Explanatory Notes, para. 44.
- The Bill seeks to improve biodiversity in several respects of which BNG is only one (though perhaps the one attracting the greatest attention) –
 - a strengthened biodiversity duty on public authorities, strengthening s. 40 of Natural Environment and Rural Communities Act 2006
 - Local Nature Recovery Strategies (LNRSs)
 - targeted measures to protect existing trees
 - conservation covenants
 - a 10% biodiversity net gain requirement on new development

Transition to BNG

- *Summary of responses and Government Response* p. 15 –
 - **“Transition**
 - There was strong support for a notice period and clear deadlines. Support for a transition period longer than a year was balanced by concern that too protracted a transition may pose risks to effective implementation and biodiversity outcomes. **Government will make provision in the Environment Bill to set a transition period of two years [footnote: 2 years from the Bill receiving royal assent].** It will work with stakeholders on the specifics of transition, including accounting for sites with outline planning permission, and will provide clear and timely guidance to support those involved understand what will be required of them and when.”
 - That transitional period can only start to run when the bill becomes law. The Parliamentary process has been delayed further with the public bill committee not now completing its work until 29 September 2020.

Bill proposals: BNG mechanism

- The Bill sets out the proposed mechanism for BNG in Part 6 and Schedule 13
- Not yet clear as to how this will integrate with proposals in Planning White Paper
- This will introduced new provisions into the TCPA 1990 primarily by subjecting all permissions (with certain exclusions) to a mandatory condition. This will overcome current issues regarding what is needed for mitigation etc.
- Cl. 90 provides
 - “Schedule 14 makes provision for biodiversity gain to be a condition of planning permission in England.”
- Cl. 91 confers power on the SoS to introduced regulations for a publicly accessible biodiversity gain site register for obligations enduring for 30 years + embodied in planning obligations or conservation covenants and where the enhancement is made available to be allocated in accordance with the terms of the covenant or obligation to one or more developments for which planning permission is granted.

Bill proposals: proposed Schedule 7A TCPA 1990

- Schedule 14 para. 1 introduces a new Schedule 7A into the TCPA
 - “90A Biodiversity gain in England
Schedule 7A (biodiversity gain in England) has effect.””
- Sched 7A para. 1 -
 - “1 (1) This Schedule makes provision for grants of planning permission in England to be subject to a condition to secure that the biodiversity gain objective is met.
 - (2) Paragraphs 2 to 12 have effect for the purposes of this Schedule”
- Sched 7A para.13 -
- “The condition is that the development may not be begun unless—
 - (a) a biodiversity gain plan has been submitted to the planning authority (see paragraph 14), and
 - (b) the planning authority has approved the plan (see paragraph 15).”

Proposed Schedule 7A TCPA

- “*Biodiversity gain objective*”
- 2(1) The biodiversity gain objective is met in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage.
- (2) The biodiversity value attributable to the development is the total of—
 - (a) the **post-development biodiversity value** of the onsite habitat,
 - (b) the biodiversity value, in relation to the development, of any **registered offsite biodiversity gain allocated to the development**, and
 - (c) the **biodiversity value of any biodiversity credits** purchased for the development.
- Paras. 2(3) and (4) set the relevant percentage at 10% subject to variation by SoS
- Paras. 3 and 4 provide for references to the biodiversity value of any habitat or habitat enhancement are to its value as calculated in accordance with the **biodiversity metric** which is a document to be published by the SoS (subject to consultation) and may be revised from time to time for the purposes of measuring the value of habitat or habitat enhancement

Proposed Schedule 7A TCPA

- §§5-7 “**Pre-development biodiversity value**” which in general is the biodiversity value of the onsite habitat on the “relevant date”. The relevant date (subject to agreement to the contrary) is -
 - (a) in a case in which planning permission is granted on application, the date of the application, and
 - (b) in any other case, the date on which the planning permission is granted
- NB anti-avoidance provisions
 - Where activities are carried out without permission or of a kind specified by the SoS, which leads to the value being “lower on the relevant date than it would otherwise have been ”the value is taken to be prior to the commencement of those activities
 - Where the land on which permission is granted is land ”registered in the biodiversity gain site register its pre-development pre-development biodiversity value should be taken to be the *enhanced* value of the registered site, regardless of whether or not the registered biodiversity enhancement has in fact been delivered successfully.

Proposed Schedule 7A TCPA

- §§8-9 “**Post-development biodiversity value**” projected value of habitats on the development site since needed by LPA to determine whether proposal satisfies the BNG objective. Government expects it to be determined by applying the metric to the developer’s plan for the site as detailed in the BGP. Significant increases in onsite value only to be considered if secured through a suitable mechanism and will be maintained for at least 30 years after completion of development.
- §§10 “**Registered offsite biodiversity gains**” – cl. 91
- §11 “**Biodiversity credits**” – cl. 92 – SoS may make “arrangements” (see cl. 92(3)) under which a person entitled to carry out the development of any land may purchase a credit from the SoS for the purpose of meeting the biodiversity gain. A credit is to be regarded as having such value as is determined under the “arrangements” (which must be published). SoS to have regard to the need to determine an amount which does not discourage the registration of land in the biodiversity gain sites register
- §12 general definitions for Sched. 7A - references to the grant of planning permission include the deemed grant of planning permission

Biodiversity gain: exclusions and modifications

- Para. 17 **excludes** development where permission is granted by development order or planning permission is granted s. 293A (urgent Crown development), or development of such other description as the SoS specifies in regulations.
- SoS may **modify** the application of BNG to “Irreplaceable habitat” by regulations under para. 18 but is to be defined in regulations, may confer powers/requirements on Natural England and “must make provision requiring, in relation to any such development, the making of arrangements for the purpose of minimising the adverse effect of the development on the biodiversity of the onsite habitat”. Likely to include SPAs, SACs, SSSIs and Ramsar Sites. See para. 1575 of the Explanatory Notes and Government Response of July 2019 at p. 6.
- Also power to **modify/exclude** by regulations
 - Para. 19 allows **modification** for outline permissions where reserved matters made be phased or “any kind of planning permission” where the grant is subject to conditions “having that effect” - “that effect” appears to refer back to phasing (see Explanatory Notes at para. 1576)
 - Para. 20 allows **modification or exclusion** where permission is granted under s. 73A (development already carried out) or s. 102 (discontinuance)

Biodiversity gain: the applicable metric

- Already subject to consultation – Biodiversity Metric 2.0 (Dec 2019)
- Final version intended to be published in December 2020
- <http://publications.naturalengland.org.uk/publication/5850908674228224>
- Natural England -
 - Consultation response 7.8.20. Many points made and changes proposed.
 - “We have now published a summary consultation response following the end of the beta Biodiversity Metric 2.0 consultation period. This summary consultation response can be downloaded below. We will publish full details of all the changes made to the final version of the Metric compared to this beta test version when we publish the final version of the Metric.”

Biodiversity gain: reserved matters approvals?

- Government Response noted (p. 78):
 - “There was no clear consensus on whether reserved matters applications should be included in net gain requirements, with some suggesting that they should be exempted to ensure a smoother transition.”
- Bill refers to “planning permission” – whether outline, detailed or deemed
- Expl Notes emphasis on “all planning permissions” §§820, 1555, 1567, “a development approved by planning permission” at §1568
- Case law distinguishes applications for permission from RMAs -
 - ***R v Bradford-on-Avon UDC, Ex p Boulton*** [1964] 1 WLR 1136, 1147–1148
 - ***Castlebay Ltd v Asquith Properties Ltd*** [2006] 2 P & CR 22
- RMAs for permissions granted before the BNG provisions come into effect? Quite apart from the fact that RMAs do not appear to be covered in the Bill, appears to run contrary to the transitional assurance given by Government
- No need to include RMAs since the condition will be imposed by operation of law for all outline permissions granted after Part 6 comes into effect. Contrast s. 73 applications.

Biodiversity gain: reserved matters approvals?

- NB in the Government Response (2019) “Impact on developers” (p. 14) made commitments regarding engagement and practical guidance:
 - “However, government acknowledges the need for **clarity, consistency and simplicity** and good guidance to help developers design net gain into their processes in the early stages of development. Government commits to:
 - continue to engage with the industry to address concerns, identify and address risks and communicate opportunities offered by net gain
 - publish practical guidance which **makes it clear to developers what will be required and when**, and how requirements interact with other environmental considerations including district-level licensing.”
- The Bill process of course has yet to conclude.

Thank you for listening

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