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Winter 2024



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## Biodiversity Net Gain



39 Essex Chambers  
#39Events





# What is Biodiversity and Why Does it Matter?



# Definitions

- Article 2 of the Convention on Biological Diversity defines “biological diversity” as:
  - “[T]he variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.”
- 25 Year Environment Plan (page 58):
  - “Biological diversity, or ‘Biodiversity’, is simply the variety of life on Earth – the variety of ecosystems or habitats, of species and of the genetic diversity they contain. We value wildlife in its own right but biodiversity also underpins much of the economic and social benefit we gain from nature.”

# Background to Statutory BNG

- Planning Policy (PPS9, NPPF etc)
- Biodiversity Offsetting
- 25 Year Environment Plan:
  - Policy for embedding an “environmental net gain” principle for development
  - Commitment to consult on mandatory “biodiversity net gain”
- The 2018-2019 consultation
- The Environment Act 2023

# Commencement of Statutory BNG

- Commencement of BNG:
  - Town and Country Planning Act 1990 development: 12 February 2024 (and 2 April 2024 for non-major developments)
  - Planning Act 2008 development: Due late November 2025

# Primary Legislation

- Main provisions:
  - Environment Act 2021 ss 98-101 and Schedules 14 and 15
  - Town and Country Planning Act 1990 s 90A and Schedule 7A
  - Levelling-up and Regeneration Act 2023, s 135
  - Planning Act 2008 amendments to ss 103-105 and new Schedule 2A



# Secondary Legislation

- The Environment Act 2021 (Commencement No. 7) Regulations 2023
- The Environment Act 2021 (Commencement No. 8 and Transitional Provisions) Regulations 2024
- The Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024
- The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024
- The Biodiversity Gain Site Register Regulations 2024
- The Biodiversity Gain Requirements (Exemptions) Regulations 2024
- The Biodiversity Gain Requirements (Irreplaceable Habitat) Regulations 2024

# Policy and Guidance

- The Government's Biodiversity Net Gain Collection:
  - Collection of 26 (and counting) separate pieces of guidance from Defra, Natural England, and the Department for Levelling Up, Housing and Communities
  - Includes lengthy Planning Practice Guidance on BNG
- British Standard BS 8683:2021
- Planning Advisory Service suite of resources on BNG for local authorities



# BNG for TCPA 1990 development (1)

- Scope
- Transitional Provisions
- Exceptions and Exemptions

## BNG for TCPA 1990 development (2)

- The Biodiversity Gain Objective
- The Statutory Biodiversity Metric
- Calculating the Pre- and Post-Development Biodiversity Value of the Site
- Registered Offsite Biodiversity Gains
- Biodiversity Credits
- The Submission and Determination of Planning Applications and the Statutory BNG Condition
- The Biodiversity Gain Plan

# BNG for TCPA 1990 development (3)

- Modifications for irreplaceable habitats
- Modifications for phased development
- Modifications for section 73 applications
- Minerals
- Monitoring and enforcement
- Plan-making and BNG

# BNG for NSIPs

- Due to come into force late November 2025
- Amendments to ss 103-105 of the PA 2008 and new Schedule 2A
- Appears Government is envisaging that BNG for NSIPs will operate in a broadly similar way to the regime for TCPA 1990 development, but still a work in progress.

# Marine Net Gain

- Legislation governing BNG currently limited to development on land and intertidal locations.
- Once the new Schedule 2A to the PA 2008 is in force, the Secretary of State will have power (under paragraph 11 of that Schedule) by regulations to apply the Schedule, with or without modifications, to PA 2008 development in the English marine region.
- 2022 ‘Consultation on the Principles of Marine Net Gain’ and 9 December 2023 Government Response.



# Environmental Net Gain

- The policy in the 25 Year Environment Plan
- 2023 Government Response to MNG consultation definition of Environmental Net Gain:
  - “Improving all aspects of environmental quality through a scheme or project. Achieving environmental net gain means achieving biodiversity net gain first, and going further to achieve net increases in the capacity of affected natural capital to deliver ecosystem services”

# Case Law on BNG

- *NRS Saredon Aggregates Ltd v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2795 (Admin):
  - Inspector’s Appeal Decision dated 5 May 2023.
  - Inspector dismissed an appeal for minerals development in which BNG of nearly 40% was secured. In so doing, he had afforded “only moderate weight” to the BNG on the basis that “some of the biodiversity net gain that would be achieved is required to meet national policy and future legislative requirements in order to mitigate the environmental impact of the development”.
  - Eyre J found that to be an error of law, since the statutory regime for BNG had not, at the time of the Inspector’s decision, commenced and would not operate retrospectively.

# Concluding Thoughts

- New regime
- Level of effectiveness will only be ascertainable in the long run
- Is 10% the right level?
- Is 30 years the right timescale?
- What will be the level of burden of the regime?
- How will the regime change over time?

# Key Links

- BNG Collection: <https://www.gov.uk/government/collections/biodiversity-net-gain>
- 2018-19 consultation: <https://consult.defra.gov.uk/land-use/net-gain/> and Government response: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/819823/net-gain-consult-sum-resp.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819823/net-gain-consult-sum-resp.pdf)
- 2022 regulations and implementation consultation: <https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-biodiversity-net-gain-regulations/> and Government response: <https://www.gov.uk/government/consultations/consultation-on-biodiversity-net-gain-regulations-and-implementation/outcome/government-response-and-summary-of-responses>
- 2023 metric consultation and Government response: [https://consult.defra.gov.uk/defra-net-gain-consultation-team/technicalconsultation\\_biodiversitymetric/](https://consult.defra.gov.uk/defra-net-gain-consultation-team/technicalconsultation_biodiversitymetric/)
- MNG consultation: <https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-the-principles-of-marine-net-gain/> and Government response: <https://www.gov.uk/government/consultations/consultation-on-the-principles-of-marine-net-gain/outcome/government-response>
- NRS Saredon Aggregates Ltd v Secretary of State for Levelling Up, Housing and Communities [2023] EWHC 2795 (Admin): <https://www.bailii.org/ew/cases/EWHC/Admin/2023/2795.html>