

## Biodiversity Net Gain consultation: 8 questions you need to answer

You have until 5 April 2022 to tell DEFRA what you think about how biodiversity net gain will work in practice: [Consultation on Biodiversity Net Gain Regulations and Implementation - Defra - Citizen Space](#).

We are delighted that **Sophus zu Ermgassen**, lead author of the first academic evaluation of the potential outcomes of Net Gain, and **Jo Treweek**, one of the original architects of the Metric, have analysed the consultation questions and identified several that are likely to play a pivotal role in the outcomes of the policy.

Based on evidence from the scientific literature and experience of compensation systems outside the UK, they have come up with some guidance (set out below) on the responses to key consultation questions – the ones they believe have the potential to make a real difference in improving the ecological outcomes of Net Gain.

BNG has the potential to be a significant improvement on the existing way that biodiversity is treated in the planning system. However, there are a number of areas where BNG risks falling short, and in the worst-case scenario, it could legitimise further biodiversity loss. In our view it now is a major opportunity to address these fundamental issues and change the course of BNG by providing as many unified responses to the BNG consultation as possible pushing for changes that will improve the ecological outcomes of the policy.

### Only have two minutes spare?

Please ping an email to [netgainconsultation@defra.gov.uk](mailto:netgainconsultation@defra.gov.uk) (copying in your MP):

*“Dear DEFRA team. The biggest issue with BNG is the lack of resourcing for monitoring and enforcement of the promised biodiversity gains at the local authority level. Leaving developers’ gains unmonitored could result in a worst-case scenario of legitimising further biodiversity loss. It is imperative that significant funding is allocated, from developers or government, to pay for BNG training, recruitment of specialists, and most importantly enforcement and monitoring.*

*On no account should developers be allowed to choose their own ecological consultants – consultants should be allocated from a central body to break the potential conflicts of interest between developers and the consultants reporting on the ecological value of sites.*

*The two principles of avoiding harm and additionality must be absolutely central to the roll-out of BNG and must be given greater emphasis.”*

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 11.** *Do you agree with the stated proposals for development (or component parts of a development) on irreplaceable habitats, specifically: a) The exclusion of such development from the quantitative mandatory biodiversity gain objective? [Yes / No (please explain why not) / Do not know] b) The inclusion of a requirement to submit a version of a biodiversity gain plan for development (or component parts of a development) on irreplaceable habitats to increase proposal transparency? [Yes / No (please explain why not) / Do not know] c) Where there are no negative impacts to irreplaceable habitat, to allow use of the biodiversity metric to calculate the value of enhancements of irreplaceable habitat? [Yes / No (please explain why not) / Do not know] d) To use the powers in biodiversity net gain legislation to set out a definition of irreplaceable habitat, which would be supported by guidance on interpretation? [Yes / No (please explain why not) / Do not know] e) The provision of guidance on what constitutes irreplaceable habitat to support the formation of bespoke compensation agreements? [Yes / No (please explain why not) / Do not know]*

### Advice on response

There is, and should be, a presumption against development affecting irreplaceable habitat (IR) whether directly *or indirectly*. IR represents “critical natural capital” that cannot be replaced or substituted. Our response relates to part e) of the consultation questions.

The adequacy of the proposals relating to how IR is treated with BNG rests heavily on certain key factors:

- 1) how IR is defined (understood to be included in proposed further work by Defra/ Natural England);
- 2) how IR is delineated spatially;
- 3) the risk of losing land with potential to consolidate IR
- 4) robustness of the process for ensuring an appropriate level of emphasis on the avoidance step of the MH.

Very clear guidance on these aspects is needed to underpin proposed exclusions for general BNG provision.

- 1) It is important that some very high distinctiveness habitats, especially those known to support rare/ threatened/ declining species, for which there are no generally accepted or evidenced restoration techniques available, should be included in the definition of IR. We agree that clear identification of such habitats is necessary and also think that any development affecting them should go through a more rigorous approach within the planning system to ensure a good outcome for the species relying on these remnants of habitat within the landscape.

## Biodiversity Net Gain consultation: 8 questions you need to answer

2) Best practice international standards would specify that IR should be delineated to include all areas needed to sustain it, (land that is necessary to sustain ecological processes, perform buffering functions etc) and it would be unusual to “crop out” small intervening areas of land regardless of whether they are considered to be of “current high value” because of their likely functional role in supporting fragmented IR.

3) It is important to exclude the possibility that development might be approved on areas intermixed with IR that are considered to be “degraded” without a full analysis of their potential for recovery with appropriate input. It would not be appropriate to lose land with potential to enhance the resilience of IR within the landscape (consolidating existing IR and allowing its species populations to colonise adjacent restored habitat etc). There should be a presumption against development on any land associated with an opportunity to make IR more resilient in future even if it doesn’t currently support good habitat.

4) The rules and procedures for demonstrating sufficient emphasis on the avoidance step of the MH are unclear. We suggest it is appropriate to treat IR as Critical Habitat in the context of international performance standards and the EU Habitats Directive. There should be a strong presumption in favour of the avoidance step of the Mitigation Hierarchy and the criteria that will be used to allow any derogation should be specified. In accordance with international good practice, proponents should be required to demonstrate that there was no alternative in the region [planning area] to develop without affecting IR.

Any compensatory action for impacts to IR should undergo rigorous independent review.

**Question 33.** *Do you agree that developers which are able to exceed the biodiversity gain objective for a given development should be allowed to use or sell the excess biodiversity units as off-site gains for another development, provided there is genuine additionality? [Yes / No (please explain why not) / Other (please tell us more) / Do not know]*

### Advice on response

The major problem with this proposal is that it assumes that the biodiversity units promised by developers on-site will be delivered in reality, and therefore that any surplus they report can be sold to others as offsets. However, if the governance is not in place to guarantee that on-site units are delivered in reality, then this proposal risks incentivising developers to overestimate the number of units they will deliver in-site, so that they can claim to have met all of their biodiversity liability on-site and can therefore allocate a specific section of their on-site gains as surplus units that they can register on the Net Gain register and sell to other developers.

## Biodiversity Net Gain consultation: 8 questions you need to answer

There is very strong reason to believe that the biodiversity units promised by developers on-site will be significantly higher than those that are actually delivered. [An academic study](#) (pre-Net Gain) which surveyed developments where habitat enhancements were promised at the application stage found that most of these did not meet the ecological criteria promised by the developers years later. There may be many reasons for this, but a key one is that many of the ecological management companies which are charged with maintaining the aesthetic value of housing developments have little expertise in ecological management. Additionally, there may be many residents who prefer having open areas managed for amenity purposes rather than biodiverse habitats, and this risks them taking action and moving away from the habitats that were promised when the development received planning permission (which might have been decades ago).

Local authorities do not as of yet have the resources to monitor on-site habitats (only [20% of local authorities](#) have any in-house ecological expertise). Furthermore, even if the habitats were monitored and it was found that a habitat that a developer had promised would be in a high condition is actually in a low condition, local authorities are explicitly advised not to take enforcement actions against violations of planning conditions unless the violation represents a '[serious harm to a local public amenity](#)'. It is very likely that the failure to deliver on-site habitats that were promised when a development was approved many years ago will fail to meet this threshold, leaving these on-site gains in essence unenforceable. The problem, therefore, is that in the absence of proper monitoring and genuine enforcement (including potential financial penalties for non-compliance) we risk creating a whole ecosystem of 'shadow units' - units that developers have claimed they will deliver on-site in their net gain assessments, and then sold on to others, but in reality these units are not monitored or adequately enforced so they may never actually materialise. Until the on-site governance issues are resolved, we must not allow developers to sell their on-site units to other developers. In the absence of monitoring and enforcement, this could seriously undermine the biodiversity benefits of BNG.

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 34.** Do you agree with the proposed scope of the UK Government's role in facilitating the market, as set out above? [Yes / No (please explain why not) / Other (please tell us more) / Do not know]

### Advice on response

The proposal suggests the government will not set up a trading platform for the exchange of credits, or record the prices of transactions between buyers and sellers. This goes against the lessons from international examples, which suggest a transparent trading platform in which prices are publicly available is essential. Transparency is key for ensuring that net gains are delivered and that the outcomes of the policy can be robustly monitored and evaluated by third parties. It is essential that the prices and transactions between buyers and sellers are not negotiated in secret, but are recorded in a transparent public database. In other offset systems, like New South Wales in Australia, journalists have been able to uncover [insider trading](#) and exploitation of the offset system because of the transparency of the offset market and the trades and trade prices taking place within it - it is absolutely essential that the maximum transparency is achieved to detect outcomes like this and to enable third parties to hold the system to account.

**Question 40.** Do you agree that this list of information requirements will be sufficient to demonstrate that a biodiversity gain site is legitimate and meets the eligibility criteria? [Yes / No (please explain which additional information should be included or which existing information should be excluded, and your reasons for this) / Other (please tell us more) / Do not know]

### Advice on response

The consultation says the applicant themselves should provide "a statement that the applicant has checked whether the baseline habitat has deteriorated significantly since 30 January 2020" - but this is not strong enough. We recommend that local authorities or the national government actually visit past Google Earth imagery for the site, to ensure it looks roughly the same at the time of application as it did a few years ago, rather than just taking the word of the project proponent. We need to put measures in place to stop landowners pre-emptively damaging or reducing the quality of their land to reduce their baseline so that they can generate the maximum possible uplift, which has been recognised as a [key perverse incentive](#) of biodiversity compensation systems in the academic literature - this requires third-party oversight. When constructing the Durrell Institute of Conservation and Ecology's '[BNG database](#)', the team of biodiversity officers from the partnered local authorities did in fact come across cases of pre-emptive clearing associated with planning applications using past satellite imagery for the site.

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 45.** *Do you think that A) the non-designated features or areas of statutory protected sites and/or B) local wildlife sites and local nature reserves, should be eligible for enhancement through biodiversity net gain? [Yes, both A and B should be eligible / No, only A (non-designated features or areas of statutory protected sites) should be eligible / No, only B (local wildlife sites and local nature reserves) should be eligible / No, neither should be eligible / Other (please tell us more) / Do not know]*

### Advice on response

In the academic literature on biodiversity compensation systems, many are concerned with the concept of ‘cost-shifting’ – where governments use the funds of offsetting to meet biodiversity targets that they would be legally obliged to deliver anyway. The concern here is that biodiversity compensation measures in this case deliver outcomes that are not additional, because the government parasitises funding that should go to compensating for the impact of a development and uses it to deliver an objective it is legally obliged to deliver anyway. Such dynamics have been observed in several ecological compensation policies around the world.

However, we recognise that some of the most valuable wildlife sites in the country are local wildlife sites, and these can sometimes represent the areas that can with additional investment deliver the best outcomes for nature.

To ensure that money invested in local wildlife sites is truly additional, it should be necessary to pass certain additionality tests, such as the managers of the sites demonstrating that the reason they are unable to deliver ‘favourable’ condition for the site is because of a defined funding shortfall.

The other component that is essential, and [proposed in the academic literature](#), is that government track its spending on conservation separately from the spending on conservation that is attributable to funding derived from Biodiversity Net Gain. In short, separate accounts are needed – the ‘core statutory funding’ account should track how much is being spent on improving nature which is not compensating for a loss elsewhere, and the ‘compensation’ account should track how much is being earned and spent to compensate for losses. We propose this alteration is made as early as possible, and should be reported in the JNCC’s biodiversity indicators which report the annual spending on conservation by both the government, and environmental NGOs. The reason for this is for third parties to be able to identify if there is any evidence that the government is reducing its spending in nature conservation in tandem with increased private sector funding for conservation – which would render the ‘benefits’ of net gain unadditional, thereby undermining its ecological outcomes.

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 44.** *Do you agree with our proposed approach to combining payments for biodiversity units with other payments for environmental services from the same parcel of land? [Yes / No (please explain why not) / Other (please tell us more) / Do not know*

### Advice on response

[A review of stacking and bundling](#) implemented in biodiversity compensation schemes around the world has found that bundling is by far the most common arrangement, because the experience of systems which have allowed stacking is that the benefits are very rarely additional. We therefore do not agree with the approach in this consultation to allow the stacking of biodiversity and other environmental services (i.e. the credits should not be able to be sold independently to different buyers). However, the more scientifically robust approach is bundling, where it should be permitted for a single buyer to purchase the full suite of biodiversity units and ecosystem service credits generated by a site as a single 'bundle'. We would support this arrangement.

The major problem with stacking is that it is rare, and very challenging to conclusively prove, that the benefits of environmental credits are additional. If, for example, we allow the purchase of carbon credits from a site where a high-carbon habitat was being created anyway under biodiversity net gain to generate biodiversity credits, then those carbon credits have not sequestered additional carbon, and the polluter who purchases the credits has not compensated for the emissions it has caused.

There is likely to be pressure for landowners to allow stacking of environmental credits, because it potentially increases the number of potential revenue streams. But this should be resisted on environmental grounds, because environmental credits which are not additional are actively damaging – polluters can register them as 'offsets' even though the damage they have done has not been compensated for.

Additionally, we have already spoken to several property developers who already see lucrative opportunities from creating habitat banks based on the value of the biodiversity credits alone – allowing them to generate further revenues from selling environmental credits from the same land would deliver no or very small additional environmental improvements. Put simply, stacking risks making landholders richer with no or little ecological benefit.

We suggest that the government proceed without permitting stacking for now. If it turns out that there is a chronic undersupply of biodiversity units in the market, and it is clear that landholders need further incentives to adopt conservation management on their land, then stacking could be considered in future. But it is risky, and should not be the default approach implemented at the start of the policy.

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 52.** *Do the above project-level management, monitoring, enforcement, and reporting proposals seem sufficient, achievable, and not overly burdensome on practitioners, developers, or planning authorities? [Yes / No, not sufficient / No, overly burdensome or not achievable / No (please explain why not and suggest how could they be improved) / Do not know]*

### Advice on response

A [recent evaluation](#) of the outcomes of Biodiversity Net Gain in six early-adopter councils found that the vast majority of biodiversity units being delivered under BNG are coming from promises of high quality on-site habitats. However, if these promises do not materialise in reality, then many developments will essentially be overestimating the biodiversity units they will be delivering on-site, reducing the biodiversity liability they actually need to bear and pay for. This also risks reducing the demand for off-site units, by artificially reducing the number of units needed. For the whole BNG system, it is absolutely essential that these on-site biodiversity promises are delivered in reality. However, the governance arrangements are simply not there to ensure that this will be the case. Local authorities do not as of yet have the resources to monitor on-site habitats (only 20% of local authorities have any in-house ecological expertise). Furthermore, even if the habitats were monitored and it was found that a habitat that a developer had promised would be in a high condition is actually in a low condition, local authorities are explicitly advised not to take enforcement actions against violations of planning conditions unless the violation represents a '[serious harm to a local public amenity](#)'. The problem, therefore, is that in the absence of proper monitoring and genuine enforcement (including potential financial penalties for non-compliance) we risk creating a whole bunch of 'shadow units' - units that developers have claimed they will deliver in their net gain assessments, but actually deliver no biodiversity gains. In the absence of monitoring and enforcement, this could destroy the biodiversity benefits of BNG.

It is essential that the government clarifies what kind of enforcement mechanisms are open for local authorities, as the official government guidance as it currently stands encourages LPAs not to take enforcement action. They should review the existing enforcement mechanisms, and if no appropriate mechanisms are identified, work on creating new mechanisms that are better suited to the context of ensuring biodiversity gains are delivered. LPAs also need to be sufficiently resourced to actually be able to take enforcement action. Additionally, it is necessary to not have a system that relies on developer self-reporting of the biodiversity outcomes alone - it is essential that LPAs or central government have sufficient capacity to monitor at least some of the outcomes promised by developers on-site, such as random spot checks by trained ecologists to check if the developers' promises and reporting reflects the reality of the ecological conditions on-site.

## Biodiversity Net Gain consultation: 8 questions you need to answer

**Question 54:** *Do the above proposals for policy-level reporting, evaluation and enforcement seem sufficient and achievable? [Yes / Yes, but not sufficient / Yes, but not achievable / No (if not, how could they be improved?) / Do not know*

### Advice on response

At the policy level, it is essential that Net Gain delivers outcomes that are additional – i.e. it generates conservation gains that would not have happened anyway in the absence of Net Gain. One of the major risks to this is cost-shifting – where governments use the funds of offsetting to meet biodiversity targets that they would be legally obliged to deliver anyway. For example, [research demonstrates](#) that the UK government’s real spending on nature conservation has fallen by around 40% from 2008-2018. If net gain generates revenues that are spent on nature conservation, but instead of complementing the government’s core conservation spending, the government uses these as a justification for reducing its own spending, then Net Gain has had no additionality overall.

The key solution is for government to track its spending on conservation separately from the spending on conservation that is attributable to funding derived from Biodiversity Net Gain. In short, separate accounts are needed – the ‘core statutory funding’ account should track how much is being spent on improving nature which is not compensating for a loss elsewhere, and the ‘compensation’ account should track how much is being earned and spent to compensate for losses. We propose this alteration is made as early as possible, and should be reported in the JNCC’s biodiversity indicators which report the annual spending on conservation by both the government, and environmental NGOs. The reason for this is for third parties to be able to identify if there is any evidence that the government is reducing its spending in nature conservation in tandem with increased private sector funding for conservation – which would render the ‘benefits’ of net gain unadditional, thereby undermining its ecological outcomes.

-----  
With thanks to Sophus and Jo for their advice, from the Community Planning Alliance

[www.communityplanningalliance.org](http://www.communityplanningalliance.org)