

# Environment Act 2021

## BRIEFING

*After years of delays, debates and slow decision-making, we now have an Environment Act! The progress of the Bill through Parliament was punctuated by disagreements between the House of Lords and the House of Commons, but, in theory, the Act should lead to some stronger protections for the environment. The speed and form this progress will largely be down to the Office for Environmental Protection ("OEP") because it is the OEP that will in set out the framework for the application of the law. Here we provide a little more detail on some of the key provisions which clients need to be aware of.*

### BIODIVERSITY NET GAIN

Biodiversity net gain ("BNG") has been a big issue for a number of years with a number of developers and statutory undertakers voluntarily agreeing to include plans for net gain with their developments, some even going so far as suggesting their own planning conditions to that effect. A consultation was launched on 11 January 2021<sup>1</sup> with a view to understanding how BNG might be applied in practice; the consultation closes on 5 April 2022. There will be a £4m funding pot in order to help Local Planning Authorities to prepare for the new BNG requirements.

### TOWN & COUNTRY PLANNING ACT 1990

From when the relevant provisions are brought into force, all developments granted planning permission under the Town and Country Planning Act 1990 will have a deemed condition requiring them to submit and have approved a biodiversity gain plan. This requirement will come into effect in November 2023, two years from the Environment Bill receiving Royal Assent. It seems from the recently announced consultation that there will be some narrow exemptions for more constrained types of developments, including those impacting habitat areas below the minimum threshold (yet to be decided), householder applications and change of use applications.

The gain plan must set out how the development will achieve at least a 10% net gain in biodiversity. This can be delivered through a combination of on-site measures, off-site measures or using statutory biodiversity credits, where a developer can buy biodiversity credits from

habitats markets which then invest in local or national habitats. Under section 100 a national register for net gain delivery sites is being created, although when it will be implemented is unclear.

When the BNG provisions come into effect, projects which currently could aim to achieve no net loss will have to obtain a 10% gain. It might seem an obvious point, but this will likely require a greater land take, particularly rural or agricultural land where more space will be available. This will need to be factored into business cases and costings for projects. The 10% figure could be increased in future but there has been no indication so far that this will happen imminently.

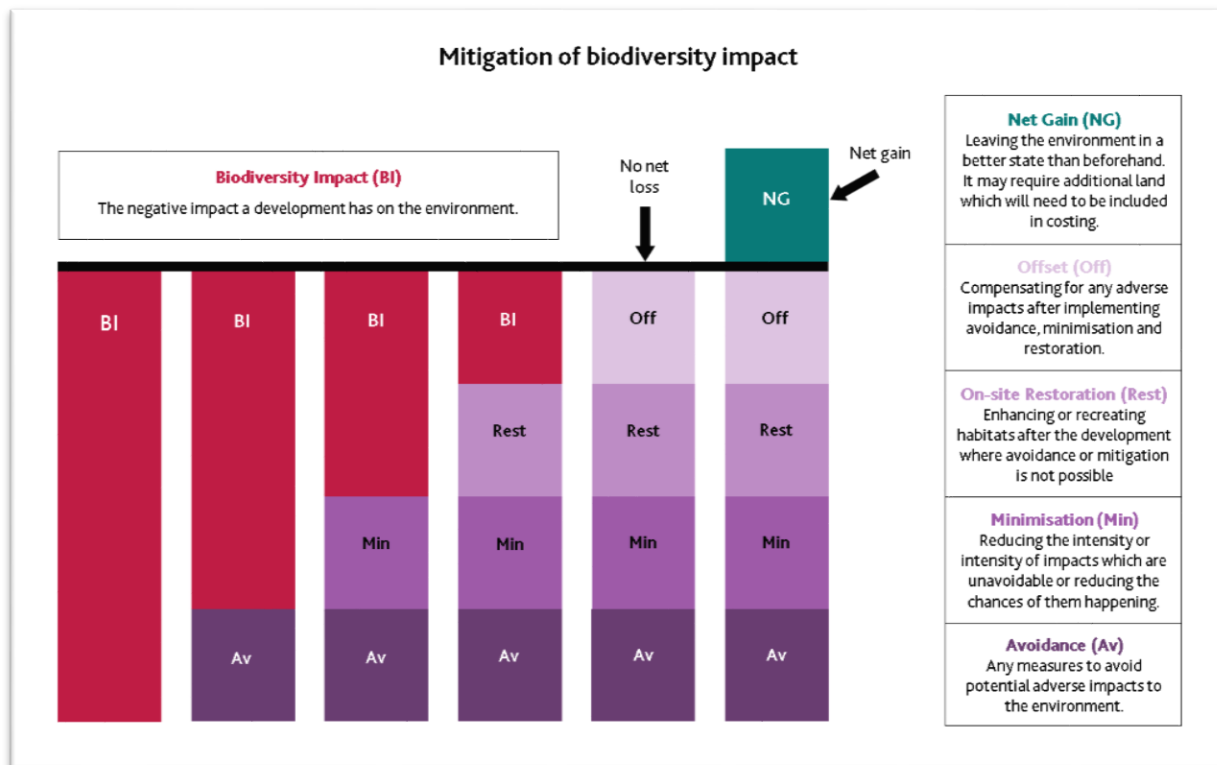
If they have not already been doing so, developers should start to consider how they would be able to provide net gains in their developments and ensure that they are in a position to start producing the net gain plans once this becomes law. It is important to keep an eye out for any NPPF policy changes in relation to this.

### PLANNING ACT 2008

Any Nationally Significant Infrastructure Projects are decided under the Planning Act 2008. In early drafts of the Environment Bill, such developments were to be exempt from the net gain requirements. The introduction of Schedule 15 of the Act was suggested to be an area in which the Parliamentary process strengthened protections for the environment. However, the convoluted method via which net gain is to be introduced for NSIPs rather suggests otherwise.

The Act amends the Planning Act such that a biodiversity gain statement setting out a biodiversity gain objective must be provided for any given type of development. The recently announced consultation proposes that a single "core" statement will be consulted on for a range of relevant NSIPs, but that ultimately this will be incorporated into each of the National Policy Statements. The objective must be at least 10% and the gain statement will set out more details for that type of development. There will be some narrow exemptions to

<sup>1</sup> <https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-biodiversity-net-gain-regulations/>



the BNG requirement where certain projects are unable to deliver BNG or for which the requirement is disproportionate; the types of projects that may satisfy these exemptions are yet to be seen.

It is also worth noting that although we may be some time from BNG being a legal requirement, developers may wish to consider implementing it from today as there may be some resistance to a development which does not comply.

We have made the point that additional land requirements will be particularly significant for large-scale NSIPs and could be costly. Interestingly, the recent consultation states that although developers might “want to use compulsory acquisition powers to extend the boundary to deliver on-site biodiversity gains”, the government would “expect that it would generally be preferable” for developers to provide gains “without resorting to additional compulsory acquisition of land”. This puts landowners in a relatively strong negotiating position because they will know developers will be strongly encouraged to acquire land by agreement.

## CONSERVATION COVENANTS

Part 7 of the Act covers conservation covenants, which are voluntary agreements between a landowner and a responsible body, for example a conservation charity or public body. The purpose of such covenants is to require a landowner to do or not to do something on the land or allow or require the responsible body to do something on the land for a variety of environmental aims. The law

governing conservation covenants comes into force on 30 September 2022.

As local land charges, which are charges or restrictions on the use of land, these agreements have the ability to bind subsequent owners of the land as long as the covenant is signed as a deed and includes provisions about the duration of the obligation and the consideration owed to the landowner. Under section 125, if the landowner breaches a conservation covenant the available remedies are specific performance, an injunction, damages and an order for payment of an amount due under the obligation. Schedule 18 of the Act lays down the requirements which must be met in order to discharge these covenants, unless it is by agreement.

The introduction of conservation covenants is something which has had the support of the Law Commission from all the way back in 2014<sup>2</sup>. Their report identified three examples of how such covenants might be used:

- The protection of woodland over generations – i.e. the use of a conservation covenant to ensure that anyone inheriting the land continues to protect any particular special features on the land.
- The sale of heritage property – i.e. enabling conservation bodies to sell heritage properties to private individuals with the knowledge that future owners would be obliged to preserve its heritage value.
- The provision of biodiversity offsetting sites – i.e. compensating harm caused by the development of one site by providing an ecological gain on another site and ensuring its maintenance by the use of a conservation covenant.

<sup>2</sup> Law Commission Report No 349, p.2

Given the introduction of biodiversity net gain, it is probably this final example which will become most relevant. The covenants could be a tool to ensure that any environmental mitigation implemented will be maintained as such even if on third party land.

## **OFFICE FOR ENVIRONMENTAL PROTECTION**

The Office for Environmental Protection ("OEP") was legally formed on 17 November 2021 and has been set up to replace the functions of the European Commission and the European Environment Agency following Brexit. The OEP commenced its duties on 24 January 2022.

The OEP is intended to be an independent body tasked with ensuring that the environment is protected according to the Act and advising the government on any suggested changes to the law, which includes law relating to climate change. It is also in place to investigate suspected compliance failures by public authorities and to deal with any complaints made about breaches of this nature, but complainants will have to provide evidence that they have exhausted the public authority complaints procedure, which may be difficult to demonstrate. It is worth monitoring the OEP's publications for guidance on protecting the environment before or during developments.

There has been some criticism that the OEP will not be completely independent, as any draft guidance must first be laid before Parliament. Furthermore, both the Ministry of Defence and the Treasury are exempt from the obligation to pay regard to environmental principles.

## **HABITATS REGULATIONS**

The Secretary of State may amend the Conservation of Habitats and Species Regulations 2017 for a number of specified purposes (see section 112 of the Environment Act), albeit in making such regulations they must have particular regard to the importance of furthering the conservation and enhancement of biodiversity and must not reduce the level of environment protection provided. Developers and their consultants will have become used to the existing positions under the Habitats Regulations and so must continue to keep up to date with any changes which the Secretary of State proposes. The potential for change reinforces the need to seek appropriate, advice at the relevant time.



## KEY DATES

Although the Act received Royal Assent in November, we were all in the dark about when its provisions would be implemented. Luckily, we now have some clarity about dates due to the Environment Act 2021 (Commencement No.2 and Saving Provision) Regulations 2022:

- The BNG requirement will be brought in during November 2023 for Town and Country Planning Act 1990 developments and no later than 2025 for NSIPs. These dates were provided in the consultation paper so are not certain.
- The law governing conservation covenants will come into force on 30 September 2022.
- The OEP began to carry out its functions from 24 January 2022.
- The Secretary of State has the power to amend the Habitats Regs from 24 January 2022.

Even with those dates in mind, there is still some general uncertainty on timings. Furthermore, developers do not have much time to understand and apply the above elements before the relevant provisions come into force, which makes it all the more important to keep up to date with the implementation of the Act, and seek expert advice on its requirements.

Although some might argue that the Environment Act 2021 could have gone further, there is no doubt that the changes made represent an attempted shift in the government's approach to tackling environmental issues. All the topics covered in this note could have ramifications for businesses and developments, particularly biodiversity net gain, so it is important that developers take the new law into account in the early stages to ensure they are fully compliant.

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Provisions	When do they come into force?
<b>OEP functions</b> <ul style="list-style-type: none"> <li>• Persons with function of a public nature must co-operate with the OEP.</li> <li>• The OEP will monitor environmental progress.</li> <li>• A person may make a complaint to the OEP, which the OEP may investigate.</li> </ul>	24 January 2022
<b>Habitats Regulations</b> <ul style="list-style-type: none"> <li>• The Secretary of State may amend the Habitats Regs for a number of specified purposes.</li> </ul>	24 January 2022
<b>Conservation covenants</b> <ul style="list-style-type: none"> <li>• The introduction of local land charges requiring a landowner to do or not to do something on the land.</li> </ul>	30 September 2022
<b>BNG under the Town and Country Planning Act 1990</b> <ul style="list-style-type: none"> <li>• Requires at least a 10% biodiversity net gain.</li> </ul>	November 2023 (subject to change)
<b>BNG under the Planning Act 2008</b> <ul style="list-style-type: none"> <li>• Subject to the Secretary of State's statement, NSIPs must achieve at least a 10% biodiversity net gain.</li> </ul>	November 2025 (subject to change)

This briefing note is not intended to be an exhaustive statement of the law and should not be relied on as legal advice to be applied to any particular set of circumstances. Instead, it is intended to act as a brief introductory view of some of the legal considerations relevant to the subject in question.