

The institutional and regulatory framework for biodiversity net gain

October 2019

Wildlife and Countryside Link (Link) is the largest environment and wildlife coalition in England, bringing together 54 organisations to use their strong joint voice for the protection of nature. Our members campaign to conserve, enhance and access our landscapes, animals, plants, habitats, rivers and seas and work to ensure that evidence is available and used to guide environmental decision making. Together we have the support of over eight million people in the UK and directly protect over 750,000 hectares of land and 800 miles of coastline.

This briefing is supported by the following Link members:

A Rocha

Association of Local Records Centres

Bat Conservation Trust

British Ecological Society

Butterfly Conservation

Campaign to Protect Rural England

Friends of the Earth

Institute of Fisheries Management

Open Spaces Society

Plantlife

The Wildlife Trusts

RSPB

Wildfowl and Wetlands Trust

Wildlife Gardening Forum

Woodland Trust

WWF-UK

Introduction

Biodiversity net gain should go beyond mitigating and compensating the impacts of development. It should enhance natural capital and support the recovery of nature in line with the national plan for the recovery of nature and restoration of ecosystems. Biodiversity net gain could help to deliver sustainable development, restore nature, and create and enhance places where people live and work. As a result, access to nature should also be enhanced, urban areas greened and pressures from development, pollution, flood risk and climate change reduced and mitigated.

However, success will depend on implementation and questions remain over:

- which statutory or public bodies and other organisations are to be charged with delivery and oversight at local to national level, and ensuring these measures will be adequate.
- how well biodiversity net gain will be integrated with other 25 Year Environment Plan aspirations, including whether the cumulative effect of individual biodiversity net gain decisions will positively contribute to local, national and UK plans for nature's recovery and ecosystem restoration.
- how robustly the new biodiversity net gain requirements will be delivered for each development for the short and long term. This includes whether adequate safeguards, including oversight, can be put in place to prevent net gain agreements being extinguished or amended in a manner that would conflict with the purpose for which they were established, or for profit-making purposes.
- whether net gain and conservation covenants can be used together to secure lasting benefits, given the proposal that net gain sites and their management might only be secured for 30 years.
- whether net gain will work in synergy with other mechanisms such as environmental land management schemes, to maximise the speed and extent of nature's recovery.

Principles for an institutional framework of biodiversity net gain

Link member organisations have identified a series of key points and principles for the institutional and regulatory framework for biodiversity net gain:

1. Biodiversity net gain for England must be coordinated, delivered, monitored, reported on, and integrated effectively with other elements of 25 YEP delivery (at all levels from local to national).
2. Local, sub-national and national oversight will be required.
3. Biodiversity net gain on the ground will be planned and delivered locally, with local planning authorities key in ensuring biodiversity net gains are secured and enforced as part of the planning process. Where possible, local partnerships, often working across local planning authorities, should be charged with delivering biodiversity net gain.
4. The biodiversity net gain required at each gain site must be calculated, agreed, secured and monitored over the full obligation period for both on-site and offsite gain sites.
5. To ensure its effective integration with other 25 Year Environment Plan policy elements and local planning, biodiversity net gain should be underpinned and informed by Local Nature Recovery Maps and Local Nature Recovery Strategies, and linked to clear statutory targets through the Environment Bill. The Nature Recovery Network (NRN) should be nationally connected through an overarching National Framework and to be incorporated within Local Nature Recovery Strategies. The Local Nature Recovery Map and strategies should identify where development can take place:

a. in a sustainable way, without harm to the environment

b. in a manner that protects and restores nature on site, taking account of species ecological functionality and core sustenance zones, and contributes to nature's recovery locally and in support of the NRN. (Further information on the principles for an NRN map are set out in Link's NRN discussion paper, which should be read in conjunction with this document).

6. In order for Local Nature Recovery Maps and Strategies to support the delivery of net gain, mapping must be based on a suitable geo-spatial information (e.g. GIS) infrastructure.

The establishment and maintenance of these systems will need funding, in order to ensure required data are:

- adequate to the task, i.e. of a quality and spatial scale to inform decision making and regularly updated;
- subject to clear audit trails;
- suited to the purposes of monitoring and assessment to ensure that biodiversity net gain is delivered in a timely fashion, with any failings highlighted, their causes identified, lessons learned and remedies applied as required;
- easily aggregated and reported across areas and at different spatial levels, to ensure co-ordination and reporting across those levels or areas; and
- helpful to the regular revision of net gain procedures, policies and goals.

7. To engender public confidence and give certainty that required outcomes will be achieved, the systems for securing biodiversity net gain must be well regulated, fully transparent and open to independent review, with scope for a third-party complaints process. The net gain system must be underpinned by a robust system of monitoring and accreditation. Accreditation of net gain providers and surveyors would help regulate the system.

8. All relevant site information should be recorded, held and be readily accessible in accordance with the [F.A.I.R. data principles](#). Information management systems will need to be designed to integrate local administrative needs and national reporting requirements. Any such systems will need to

- Comply fully with nationally agreed data and data handling standards;
- incorporate the proposed national register of priority habitat areas and local mapping in dynamic fashion;
- facilitate handling and publication of all relevant data - both administrative (e.g. target habitat condition, required actions, site ownership, the responsible net gain delivery and oversight bodies, site condition summaries and the location of/links to baseline and monitoring data) and ecological/environmental (e.g. species and habitat information, water chemistry, assessments based on such data);

- enable all parties to operate effectively and to be held to account;
- be designed to accommodate the future delivery of wider environmental net gain.

9. Habitats created or enhanced through net gain must be permanently secured and maintained to address biodiversity decline. However, there may be instances where a compensation site ceases to achieve its objectives through climate change, coastal morphology or other extraneous factors such as a change of priority. In such situations, amendments or replacements should be accommodated in law.

For habitats that require continued management, provision will need to be made for funding for upkeep upfront. There may be a point - particularly if the net gain payment was not invested (for example in an endowment fund)- where it is reasonable to conclude that the value of the net gain payment has been fully applied. However, rather than reflect this through expiry of the obligation, habitat management costs associated with permanency of provision could be supported by discretionary access to management payment schemes or tax incentives.

The institutional framework

Although Link acknowledges that there are many possible ways in which biodiversity net gain can be implemented, Link suggests the following framework for delivering biodiversity net gain, organised at five spatial levels, with various public authorities having responsibility for delivery.

Level 1 – National

DEFRA should provide leadership of the biodiversity net gain system, including the provision of detailed guidance setting out the national objectives, the contribution that biodiversity net gain is designed to make to achieving the 25 Year Environment Plan, and the policy Government expects public authorities to adhere to when applying biodiversity net gain. Defra should review its policies at least every five years to reflect recommendations made by Natural England.

DEFRA must set the right Governance and regulatory framework to underpin the market. It is essential that:

- The adopted system can be trusted to deliver. Measures, including adopted standards, guidance, codes of conduct and self-regulation in combination with monitoring programmes, and procedures for dealing with shortcomings will need to be sufficient to guarantee such trust. Additional accreditation measures will be required to provide the necessary certainty.

- Defra requires future liabilities to be accounted for in advance. This must include provision of a robust financial guarantee upfront to ensure net gain sites can be secured for the long term regardless of whether habitat providers become insolvent.
- Defra sets out a clear mechanism to protect net gain sites in perpetuity through a clear route to designation and appropriate policy protection. This will require regular monitoring to ensure sites are delivering conservation outcomes.
- Defra acts as the custodian of underpinning foundational information (including baseline, habitat suitability and land cover mapping, habitat priorities and natural capital opportunities) to advise developers and potential habitat suppliers of the opportunities.

Natural England (NE) should be designated the lead public authority, charged with overseeing biodiversity net gain. NE will require additional statutory powers and duties to oversee the biodiversity net gain system, as well as increased resources (both skills and capacity) to ensure it is then applied correctly and consistently. NE is currently unable to adequately fulfil existing functions effectively. Consequently, improved resources are a prerequisite to NE involvement.

In order to fulfil its function, and ensure that biodiversity net gain is integrated effectively with other elements of the 25 Year Environment Plan (and future nature strategy), including Nature Recovery Networks, NE will need to establish a national register of all 'biodiversity net gain' sites, informed by local information (see level 3 for further information). Link is pleased to see therefore that the Government has recently stated its intention to establish a publicly available habitat register of compensatory habitat sites. This should include details about progress towards delivering gain at each site. The JNCC's N2K register (<http://jncc.defra.gov.uk/page-1458>) provides an example of how this might be presented. The National Biodiversity Network Atlas and/or the Multi- Agency Geographic Information Site could provide suitable platforms; or it could be integrated into Nature Recovery Network monitoring.

Net gain systems will need to be supported by effective, interoperable data and information management standards. These will need to be agreed between UK organisations involved in net gain administration and outcome monitoring, and data management bodies and should be in accordance with FAIR Data principles and existing standards such as the Darwin Core and Ecological Metadata Language.

Level 2- Sub-national

There should be sub-national oversight to foster integration between Local Planning Authorities and across Local Nature Recovery Networks, with this role performed by NE. NE should be charged with ensuring that, generally, biodiversity net gain is secured by local planning authorities in accordance with Local Nature Recovery Network maps, Local Nature Recovery Strategies and plans.

NE should be charged with performing a yearly check on the progress of net biodiversity gain, against national indicators and the comprehensive national plan for nature's recovery and ecosystem restoration, with a five-yearly full report to be submitted to DEFRA and published. As the proposed biodiversity net gain system is a relatively 'new' idea, NE should also be charged with making any recommendations for change every five years. This should be integrated into 25 Year Environment Plan monitoring and reporting processes. In addition, NE should be provided with duties and powers to:

- Ensure net gain providers are 'fit and proper' to maintain the role through accreditation, ongoing oversight, setting insurance and capital reserve requirements.
- Ensure net gain units and credits are genuinely 'additional', and are not being supported inappropriately by other funding streams
- Monitor net gain to provide a comprehensive overview of the performance of the system. In addition to annual checks, this must include systematic sampling of sites.
- Review net gain sites regularly to review progress with target habitat condition and identify which sites require designation.
- Provide a system for third party complaints (recognising the need to work closely with the Office for Environmental Protection on this to avoid duplication of duties).

Once established, the Office for Environmental Protection (OEP) should provide strategic oversight of the net gain system and hold Government to account, ensuring the net gain system is functioning overall and it achieves the objectives of the 25 Year Environment Plan. This would include addressing systemic failures and intervening in strategic cases or where a damaging precedent could be set.

Level 3 - Local

Local, 'on the ground' planning, administration, delivery and monitoring of net gain will be crucial to policy outcomes. Local planning authorities (LPAs), local environmental records centres (LERCs) and local partnerships will all have important, complementary roles to play in the planning, administration, delivery and oversight of biodiversity net gain.

Link welcomes the Government's announcement that it will introduce new duties to support better spatial planning for nature through the creation of Local Nature Recovery Strategies (LNRSs).

LNRSs should be developed and implemented by local partnerships that ensure broad representation, and effective, transparent governance. The network of Local Nature Partnerships (LNPs) established in the wake of the 2011 Natural Environment White Paper (NEWP) could provide a useful starting point for defining LNRS. Additionally, a number of LNPS have already undertaken natural capital, ecological network and habitat opportunity mapping. However, the network is incomplete, with a number of gaps and overlaps and there is wide variation in the organisation, resources and capabilities of surviving LNPs. Lessons should be learned from LNP successes and failures. Whilst avoiding overlaps, and minimising administrative layers, LNRS implementation should facilitate local delivery and cross-boundary working rather than impose additional burdens.

Underpinning each LNRS should be geospatial environmental data of adequate resolution and coverage and the means to be able to manage, update, summarise, disseminate and report on these data, including the provision of dynamic Local Nature Recovery Maps which present current circumstances, environmental issues, improvement opportunities, planned and delivered changes.

LNRS mapping should highlight where development would be best targeted or better avoided to minimise loss of or harm to sites of extant and potential high value within the LNRS area, and locations where biodiversity net gain delivery should be targeted to create more, bigger, better, joined and more resilient networks of sites.

Data collection, provision and handling in support of local gain administration and LNRS coordination will need to comply with national standards and should be facilitated and reinforced by the use of compliant geospatial data systems.

Importantly, planning authorities will need to be given the requisite statutory duties and, importantly, resources to monitor and enforce biodiversity net gain obligations (as well as the commensurate powers to raise charges in order to fund such regulatory oversight). This must include a strengthened and effective biodiversity duty on public authorities. At present, many local planning authorities do not have the necessary skills, capacity or expertise to implement effectively biodiversity net gain, or associated tools to deliver the 25-Year Environment Plan. Defra will need to provide template procedures and guidance for LPAs to follow or adapt to local need. There should be a clear procedure to correct issues that result in a failure to deliver the promised biodiversity net gain or (given the long timescales involved) where such an outcome appears likely. In extremis, planning authorities and/or NE may need compulsory purchase powers to enable them to take biodiversity net gain sites into

public ownership, although a well-conceived biodiversity net gain system should minimise the need to use such powers, if not eliminate it entirely. Careful thought must be given to avoiding situations where a liable party can walk away from an agreement, for example by going into administration, to avoid legal enforcement (see earlier points on the need for accreditation and financial guarantees in this regard).

Every local planning authority should be required to take account of the draft and published LNRS for their area (and the LNRS for any adjoining authority) within their local plans and other strategies in full accordance with their biodiversity obligations. This should include setting out how development will deliver 10% gain for each development (Link suggests this should be 20%) as a minimum and the circumstances where a higher level of gain will be sought. Higher level of gain might include the use of an alternative mechanism, such as a “natural greening factor” within urban areas. Local planning authorities should be able to set higher levels where justifiable. This should support their LNRS and address their area’s green infrastructure, ecological networks and biodiversity needs and be carried out in consultation with local communities. All local planning authorities should be required to provide or contribute to the provision of biodiversity and environmental data area for their area in support of the LNRS and net gain implementation.

Every local planning authority should maintain or contribute to the management of a local spatial register of:

1. sites subject to biodiversity net gain obligations in their area;
2. biodiversity net gain delivery sites where required gain obligations are met or have been met;
3. where identified potential net gain sites (or habitat banks) are available;
4. any other available net gain capacity within the local authority area.

Alternatively, they should be able to delegate this function, entering into agreements (for example, with Local Environmental Records Centres) to provide this service; ensuring public accessibility and consistency with national data standards, ensuring relevant data are exchanged with a National Sites Register.

A collaborative approach in delivering biodiversity net gain is highly desirable in order to ensure biodiversity net gain results in genuine gains for biodiversity, supports the delivery of an effective Nature Recovery Network and ensures that biodiversity net gain delivers for nature, communities and development. Collaboration between local planning authorities can also facilitate the sharing of resources, including capacity and expertise.

In addition and where appropriate, local planning authorities should be empowered to delegate post-permission monitoring to third parties, such as recognised and trusted conservation bodies or partnerships. The process must remain transparent throughout, with a reporting process to the local planning authority in place.

Depending on the local situation, different elements of the biodiversity net gain process could be administered either by individual local planning authorities in whose areas a development falls, or by a strategic authority, or by a partnership acting on behalf of planning authorities. Accreditation will be key, so providers are working to common standards.

Local authorities will also need to ensure that development and net gain sites are not deliberately degraded prior to entering the planning process (baseline mapping and guidance will be required from Defra to support local authorities and ensure a consistent approach). One lesson learned from the Warwickshire offset pilot is that this is likely to require baseline habitat type and condition mapping.

Conservation Covenants

Link is concerned with current proposals around conservation covenants. Of particular concern are the proposals for profit-making bodies to act as responsible bodies (and the proposed wider stretch of responsible bodies generally).

Our strong view is that profit-making bodies will put shareholder interest ahead of conservation outcomes.

For conservation covenants to work effectively Link believes:

- The holder or at least one party to a covenant must have a clear conservation remit which is tied to the duration of the covenant. This should include delivery of target habitat condition and clear mechanisms for monitoring and enforcement.

- Appropriate funding mechanisms must be ensured by statute and form a key part of each covenant. This must guarantee a funding stream for management of the site for the duration of the covenant.
- There must be a clear route to legal action when a covenant is breached.
- Unilateral discharge should be impermissible. There should be clear criteria for when a covenant can be modified or discharged, including the involvement of an appropriate court or tribunal.

Level 4 – Individual Gain Delivery Sites

All proposals should follow a biodiversity metric as the starting point in assessing the proposed impact, level of gain, and the types of interventions that may be required. This should guide development to avoid harm in the first place.

Planning authorities will also need to ensure that every biodiversity net gain site, whether a habitat bank, a tailored net gain or some enhancement within or close to a development, delivers the required level and type of enhancement. Gains should be delivered at or in support of Local Nature Recovery Network target locations.

The thresholds and methodology would need careful consideration, but a simplified biodiversity assessment could be used for development below specified size thresholds. Above those thresholds, a formal metric calculation must be applied, with more detailed species assessments taking account of species ecological functionality and core sustenance zones, community, habitat surveys and assessments undertaken and appraised as required. These thresholds could be outlined by Local Planning Authorities within their local plans

Biodiversity net gains must be secured as part of the development process, and be additional to other planning related biodiversity and green infrastructure requirements. A clear and effective legal mechanism should be used to secure net gain (refer to our earlier comments on conservation covenants).

Post-development, there should be a continuing legal obligation on developers (and future owners / occupiers) of each site to have a site management plan, detailing objectives for and management of the gain site for the duration of the required gain. There should be simple annual reporting of site

condition against the site management plan. These should identify areas where proposed gains might not be achieved and any actions required to remedy this as early as possible. These annual reports should feed into annual monitoring by the local planning authority and then Natural England as well as more detailed assessments on a regular basis.

There needs to be an inspection role for planning authorities and /or NE, with statutory powers to amend site management plans, issue warning notices, enforcement notices and ultimately, to seek criminal penalties. Natural England will need to issue clear guidance and standards setting out the conditions under which they would take regulatory action. As referred to under level 1, the Office for Environmental Protection (OEP) should provide strategic oversight of the biodiversity net gain system and hold Government to account.

Level 5 – Development Site Gain Obligations

Below agreed thresholds only, development site gain obligations could be addressed by a simple menu of proportionate actions.

Any development consent should condition the required level of biodiversity net gain to be secured and set out how this will be achieved. For example, these could take the form of section 106 agreements, or conditions that ensure relevant agreements are in place, or require conservation covenants to be entered into prior to development.

The developer would be responsible for providing evidence that biodiversity net gain has been met in simple cases (e.g. by providing photographs to the planning authority concerned).

Data and information needs and transparency

Link would like to emphasise the importance of addressing data and information management needs in relation to net gain assessment and delivery at local to national level, optimising the system and securing public support

There will need to be integration across the different spatial levels and the organisations responsible to ensure that biodiversity net gain is planned for and delivered, in accordance with Local Nature Recovery Strategies, the national Nature Recovery Network, the national plan for the recovery of nature and restoration of ecosystems, and wider environmental reporting requirements.

An effective biodiversity net gain system will rely on good collection, management and use of data and information of all forms. This must be adequate to the planning, monitoring and reporting at

different levels, adhering to data and archival standards that will facilitate access, aggregation and analysis.

Data systems will need to be developed to facilitate this and ensure consistency of approach. These should also be able to handle other environmental data to enable integrated environmental net gain assessments data, such as those relating to natural capital valuations and ecosystem services assessment.

Baseline habitat data, derived from site surveys and satellite imagery, and information relating to the location, extent, type and status of habitats and species and related meta-data, will be crucial to individual site assessment, biodiversity metric valuation and tracking gain obligations and delivery at every scale. It will also be essential in the evaluation of any suspected habitat degradation.

At the local level, it will be vital to ensure that the collection, management, provision and use of data will be adequate to support local planning, LNRS mapping, and net gain delivery, monitoring and reporting. Adherence to agreed data standards and the use of spatial database systems based on these standards will be critical to facilitating implementation, enforcement and evaluation of net gain including identification of remedial actions where necessary e.g. in identifying gain sites from which action reports have not been received, assessing progress at heathland restoration locations or tracking the number and location of swift nest boxes provided via development.

This will be essential to administering, monitoring and evaluating the success of biodiversity net gain, and highlighting the need for remedial action locally and to ensuring seamless data combination across LPA areas and at England or UK level, e.g. to monitor progress against the 25 Year Environment Plan and other targets for nature.

Individual Link members have specific expertise that may be of assistance in this area.

The information systems adopted must also be fully transparent and accessible, enabling all parties to be held to account and ensuring that independent review is possible. This will aid accountability where things go wrong and standard remedial procedures fail to achieve required outcomes.

Net gain for changes outside of the Town and Country Planning Act, including in the marine and coastal environment

Link believes that the application of net (biodiversity) gain should in principle include other types of development that do not fall within the scope of the Town and Country Planning Act. This includes Nationally Significant Infrastructure Projects (under the Planning Act, 2008) and the marine and

coastal environment, which should be implemented through marine spatial planning and licensing. If implemented according to the criteria set out in this wider Link position and with the overall aim to ensure recovery of the natural environment, we believe that it would make a valuable contribution to ensuring sustainable development at sea and helping to meet Good Environmental Status.

Development of net gain for the offshore area is not as advanced as on land, however, and there is a need to consider the particular characteristics of the marine environment and its human uses. We note the Government's recently announced intention to look at this matter further with the help of the Natural Capital Committee, and hope that the stakeholder-led process to define the scope, objectives and detail of net gain will assist in providing an effective way forward for net gain in the marine environment in the near future.

Conclusion

Link believes that biodiversity net gain - if legislated for and implemented effectively, within the biodiversity mitigation hierarchy, could make a significant and lasting contribution towards nature's recovery.

Link and Link members look forward to working with DEFRA, NE, JNCC, NBN, planning authorities and all other stakeholders with the aim of establishing an effective system of biodiversity net gain in England.

Footnote:

As this policy is developed and rolled out, care needs to be taken to avoid introducing a confusing array of acronyms and terminology.

For questions or further information, please contact:

Dan Pescod

Head of Policy and Advocacy

Wildlife and Countryside Link

T: 020 7820 8600

E: dan@wcl.org.uk