



Office for
Environmental
Protection

Office for Environmental
Protection
County Hall
Spetchley Road
Worcester
WR5 2NP

03300 416 581
www.theoep.org.uk

05 April 2022

The Rt Hon George Eustice MP
Secretary of State for Environment, Food and Rural Affairs

Rebecca Pow MP
Minister for Nature Recovery and the Domestic Environment

Department for Environment, Food and Rural Affairs
2 Marsham Street
London
SW1P 4DF
By email only

Advice on the Consultation on Biodiversity Net Gain Regulations and Implementation

Dear Secretary of State and Minister Pow

I am pleased to submit this advice in response to the consultation on Biodiversity Net Gain Regulations and Implementation. We are presenting it under our power in Section 30(3) of the Environment Act 2021 to give advice on changes to environmental law proposed by ministers.

As part of our work, we have met with your policy team who have welcomed our engagement with the matters set out in the consultation. In particular, we were asked to consider the following topics: monitoring, evaluation and reporting; exemptions; irreplaceable habitats; and the biodiversity gain site register. We have addressed these subjects in our advice.

We very much welcome the overall ambition and thrust of the proposed approach. There are eight areas, however, where we consider that it could be further strengthened so as to better achieve government's ambitions to halt and reverse the decline of biodiversity in this country.

We detail those areas and go on to make eleven recommendations for Defra and Government to consider in developing secondary legislation, policy and guidance to support the integration of biodiversity net gain within the English planning system. Building on these strategic points, we also respond to some of the specific consultation questions in the annex to this letter.

Turning now to the individual areas and our recommendations:

1. Biodiversity net gain is an ambitious step which, if properly designed, implemented and enforced, can support the Government's goal to halt the decline of species by 2030 and promote nature's recovery

We welcome the ambition to achieve biodiversity net gain through the planning system. We also welcome the commitment that biodiversity net gain will link to major programmes such as the Environmental Land Management Schemes, Local Nature Recovery Strategies, and Nature Recovery Networks. We believe it right that environmental restoration, protection and improvement are embedded within the English planning system.

Each of these initiatives is new. They are in many respects related, and we advise that, as a priority, you make the relationship and interactions between biodiversity net gain and these programmes clear, and ensure that the objectives, ambitions and priorities are coherent.

We see biodiversity net gain as having an essential complementary role to other approaches to development and urban planning, such as the recent Green Infrastructure Framework developed by Natural England. There are also links to be made to the legal duty to achieve net zero greenhouse gas emissions by 2050. The commitment to coherence between multiple programmes is welcomed.

Local authorities, in particular, will need to be sure-footed, across programmes. In our view, the detailed guidance on how payments from a variety of funding streams, covering multiple measures, can be treated for the purposes of implementation, auditing, and reporting in respect of biodiversity net gain will be important. Benefits must not be double-counted, and true additionality must be achieved.

Other Government departments, such as DLUHC, DfT and BEIS will also have to ensure that the aim to halt and reverse the decline of biodiversity is properly reflected within their policies. As you appreciate, we believe the Environmental Principles and associated policy statement can provide the necessary grounding, and we urge publication of the statement at the first opportunity.

Recommendation 1a: We recommend that the Government considers a higher minimum biodiversity net gain percentage than that stated in the Environment Act 2021, to increase the prospect of true net gain.

We question whether 10% net gain will be enough to meet Government's biodiversity ambitions. The Impact Assessment suggests that biodiversity net gain, as presently designed, is likely to achieve *no net loss* rather than actual gain.

We have no evidence to suggest that in practice, developers will generally aim for higher rates of net gain, or that the majority of authorities will follow Lichfield's lead¹ in setting a higher value.

¹ We note that Defra refers to Lichfield District as a case study of a planning authority who require 25% net gain for new developments (measures against gross units lost, as opposed to the full within-boundary baseline) within the Impact Assessment for NSIPs (p19). Other evidence has been provided in the Impact Assessment for biodiversity net gain (p26) which notes that doubling the net gain requirement from 10% to 20% increases the annual net direct costs to developers by approximately 9%. See Department for the Environment, Food & Rural Affairs. (2021). *Biodiversity net gain for*

We cannot point to a correct percentage figure. It is not a precise science. Our advice is that the Impact Assessment provided is understandably imprecise, and it is not clear that 10% will drive enhancement.

We therefore recommend consideration of a higher minimum biodiversity net gain requirement than the 10% required by the Environment Act 2021. Assuming compliance, the policy would then be more likely to deliver a true biodiversity net gain across the English planning system, contributing to the goal of halting and reversing the decline of biodiversity as outlined in the 25 Year Environment Plan.

Recommendation 1b: We recommend that the Government considers a single system for terrestrial and marine net gain.

The creation of a single system would better support the delivery of biodiversity net gain associated with developments that will affect both terrestrial and marine environments, for example, offshore wind.

We advise that the Government already has the power, via schedule 15 of the Environment Act 2021, to create a single net gain system covering both the biodiversity and marine net gain for Nationally Significant Infrastructure Projects (NSIPs). We understand there will be a separate consultation on marine net gain later in the year.

We recommend that this approach is taken to all relevant development within the English planning system.

2. Clarity and commitment on the transition to environmental net gain

Recommendation 2: We recommend that Defra sets out further detail on the status of and plan for the development and implementation of environmental net gain.

The consultation document notes that there are no immediate plans to legislate for *environmental* net gain, yet embedding environmental net gain for development is one of the first goals of the 25 Year Environment Plan (2018).²

Whilst the Government's ambition for biodiversity net gain is welcomed, the document lacks detail about the status of environmental net gain. As noted in the consultation document glossary, environmental net gain goes beyond biodiversity net gain to achieve increases in the capacity of affected natural capital to deliver ecosystem services.

Nationally significant infrastructure projects, Impact Assessment. Department for Environment, Food & Rural Affairs. Retrieved from https://consult.defra.gov.uk/defra-net-gain-consultation-team/consultation-on-biodiversity-net-gain-regulations/supporting_documents/Impact%20Assessment_BNG%20for%20NSIPs_November%2021.pdf; Department for the Environment, Food & Rural Affairs. (2018). *Biodiversity net gain, Impact Assessment.* Department for Environment, Food & Rural Affairs. Retrieved from https://consult.defra.gov.uk/land-use/net-gain/supporting_documents/181121%20%20Biodiversity%20Net%20Gain%20Consultation%20IA%20FINAL%20for%20publication.pdf.

² Department for Environment, Food & Rural Affairs. (2018). *A Green Future: Our 25 Year Plan to Improve the Environment.* HM Government. Retrieved from <https://www.gov.uk/government/publications/25-year-environment-plan>

The implementation of environmental net gain is a crucial next step to ensure that the impacts of development on natural capital and associated ecosystem services are also addressed. In our view, this is necessary to ensure delivery of the Government's ambitious goals to halt and reverse the decline of biodiversity in England. We recommend that Defra provides further detail on its future plans to ensure that the net gain system is broadened to include natural capital and ecosystem services.

3. Government has the opportunity to learn from the experience of other countries who have adopted programmes similar to biodiversity net gain

Recommendation 3: We recommend that Defra and the Government should continue to consider and learn from the experience of others (including the early adopters in England) to increase materially the prospects of success.

The creation of the biodiversity net gain system presents an opportunity to learn from over 100 countries worldwide who have adopted similar policies.

There is considerable research to hand. Defra and Government may find particularly helpful the Australian and North American experiences, plus that of the early adopters of biodiversity net gain in England³.

In short, others' experience shows that biodiversity net gain-type policies can struggle to achieve their objectives due to issues with implementation, monitoring, enforcement and ensuring that the policy is grounded in a strong scientific foundation. We can also see other issues associated with overstating the ability to restore or recreate ecosystem function in a timely fashion, underestimating monitoring and evaluation costs, and determining appropriate thresholds of loss.

We are happy to assist, in navigating the copious research.

4. Well-developed governance and sufficient long-term resourcing of public authorities will be critical to the successful delivery of biodiversity net gain

Recommendation 4a: We recommend that Government develops a strong system of governance for biodiversity net gain implementation, monitoring, reporting and enforcement, including publicly available information and regular review.

The consultation document does not set out the details of how good governance of biodiversity net gain – such as the mechanisms to support implementation, monitoring, reporting and enforcement of the policy – will be ensured. We advise that

³ There is a wide and varied array of research on these points, including: Ambrose, R. F. (2000). Wetland Mitigation in the United States: Assessing the Success of Mitigation Policies. *Wetlands Australia*, 19(01) 1-27; Bull, J. W., & Strange, N. (2018). The global extent of biodiversity offset. *Nature Sustainability*, 1, 790-798; Bull, J. W., Suttle, K. B., Gordon, A., Singh, N. J., & Milner-Gulland, E. (2013). Biodiversity offsets in theory and practice. *Oryx*, 47(03), 369-380; Gibbons, P., Macintosh, A., Constable, A. L., & Hayashi, K. (2017). Outcomes from 10 years of biodiversity offsetting. *Global Change Biology*, 24(02), e643-e654; Reside, A. E., Cosgrove, A. J., Pointon, R., Tresize, J., Watson, J. E., & Maron, M. (2019). How to send a finch extinct. *Environmental Science & Policy*, 94, 163-173; zu Ermgassen, S. O., Baker, J., Strange, R. A., Strange, N., Struebig, M. J., & Bull, J. W. (2019). The ecological outcomes of biodiversity offsets under "no net loss" policies: A global review. *Conservation Letters*, 12, e12664; zu Ermgassen, S. O., Marsh, S., Ryland, K., Church, E., Marsh, R., & Bull, J. W. (2021). Exploring the ecological outcomes of mandatory biodiversity net gain using evidence from early-adopter jurisdictions in England'. *Conservation Letters*, 14, e12820-e12829.

well-developed governance arrangements will make a substantial difference to the prospects of success.

We provide more advice on specific aspects of governance related to enforcement and review of the biodiversity net gain policy in Recommendations 7 and 8 below. More broadly, in our response to specific consultation questions in the annex we also highlight the importance of the use of the mitigation hierarchy (to avoid, minimise, mitigate and, finally, compensate or offset), and the inclusion of limitations and assumptions made in the biodiversity gain plan. We also discuss the need for a more comprehensive register of biodiversity net gain activity, stronger oversight over the proposed biodiversity credit market, and verification of monitoring reports by local planning authorities.

Recommendation 4b: The success of biodiversity net gain will require adequate resourcing and expertise, covering both the initial assessment of proposed activities and planning applications, and long-term monitoring, reporting, compliance and enforcement activities of local authorities, Defra, and Natural England.

Alongside good governance, resourcing will also be vital. International experience demonstrates the inevitable: poor resourcing leads to poor delivery.

The lack of the essential ecology skills and resources in local planning authorities is a well-known issue. Recent survey-based research has shown that 38% of English local planning authorities (112 of the 298 authorities who participated in the research) identified that it was not currently practical for them to deliver a no net loss or net gain policy, with 21% (24) referencing a lack of an in-house ecologist and 41% (46) noting insufficient resourcing.⁴ Defra has estimated that 197.7 FTE ecologists are needed across 152 upper-tier authorities and 59 FTE staff are needed in Defra and Natural England to deliver net gain.⁵

We welcome the Government's commitment to work with local government to assess skills needs, and that the new burdens on local authorities (following the changes to the Town and Country Planning Act 1990) will be fully funded.

In our view, it will be important to recognise pinch points in the proposed resourcing model: authorities estimated to require only one FTE ecologist, for example, will need flexible arrangements. Government will wish to be aware also of the wider resources required for success: the implementation of biodiversity net gain will be a complex, *long-term* regulatory endeavour. It will require monitoring, reporting, compliance and enforcement activity to be undertaken by local authorities, Defra and Natural England, beyond the initial assessments of proposed biodiversity net gain activities and planning applications.

⁴ Robertson, M. (2021). *The State of No Net Loss/Net Gain and Biodiversity Offsetting Policy in English Local Planning Authorities: Full Report*. CIEEM. Retrieved from <https://cieem.net/resource/lpa-survey-morgan-robertson/>.

⁵ Department of Environment, Food & Rural Affairs. (2019). *Biodiversity net gain and local nature recovery strategies, Impact Assessment*. Department of Environment, Food & Rural Affairs. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/839610/net-gain-ia.pdf

5. A robust and coherent approach to risk and uncertainty is critical to the success of biodiversity net gain

Recommendation 5: We recommend that, to address risks that increase the uncertainty of success, the scheme must be designed so that only realistic and deliverable biodiversity net gain proposals are accepted and there is effective, ongoing monitoring of its implementation.

The uncertainty of success of biodiversity net gain-type policies is an issue affecting these policies worldwide. In many cases, the uncertainty relates to the measures required to achieve net gain.

Common issues include time lags between land clearing and achieving biodiversity net gain (a consequence of a “loss today and gain tomorrow” approach); overstating the capacity of restoration science; unpredictable events affecting the likelihood of success; reliance on subjective judgement in the absence of data; establishing baseline conditions; and how the metric will change as monitoring, enforcement, and research updates.⁶

By design, the scheme could in our view reduce the risks associated with uncertainty if it allows only for realistic and deliverable biodiversity net gain proposals. To reduce the risk further, we advise a particular focus on regular monitoring, review and reporting on progress, *with an awareness of the common issues noted above*. Intelligent monitoring and review will be essential if government is to know within a reasonable timeframe whether this policy is really achieving its aims.

6. An ambitious policy must not be undermined by exemptions, loopholes and a lack of safeguards

Recommendation 6a: We recommend that exemptions are revisited, and safeguards are strengthened, to avoid loopholes. We recommend that all NSIPs deliver at least 10% biodiversity net gain.

We welcome Defra and the Government’s ambition to ensure that a wide range of development activity will be required to achieve biodiversity net gain. Our advice is that more could be achieved, should Government extend the scheme to *all* relevant development including NSIPs, and we see the case to do so.

As a specific point, we are concerned about the potential allowance of “some types of NSIP” to deliver less than 10% biodiversity net gain. These may be, by their very nature, some of the most environmentally damaging projects. This is a critical issue, but the consultation documents are light on detail explaining the logic and justification. We are concerned that this may create a two-tiered system and would undermine the achievement of a minimum 10% biodiversity net gain across all development.

We are similarly concerned about the possibility of the biodiversity credit market being undermined. The proposal on statutory biodiversity credits is light on detail, especially on matters of credit pricing structures, timelines and how the Government

⁶ See for example: Ambrose, above n 3; Bull and Strange, above n 3; Gibbons, Macintosh, Constable et al., above n 3; Lindenmayer, D. B., Crane, M., Evans, M. C., Maron, M., Gibbons, P., Bekessy, S., & Blanchard, W. (2017). The anatomy of a failed offset. *Biological Conservation*, 210 (Part A), 286-292

intends to invest the revenues to ensure additionality. There is also little detail on how the Government safeguards will operate to ensure that these credits will be truly used as a last resort.

Recommendation 6b: We recommend strengthening Biodiversity Metric 3.0 to require that the area of habitat created should be, at a minimum, the same size as that which will be impacted. The weighting presented by landscape value (e.g. as part of Local Nature Recovery Strategies or the Nature Recovery Network) should also be improved to enable greater strategic outcomes for nature.

There is a risk that perverse outcomes are generated by the effect of trading loss of habitat area upon the promises of future habitat condition or the trading of gains in habitats or species that should be protected by other legislation. The proposed calculations do not give sufficient weight to the important landscape context in terms of, for example, Local Nature Recovery Strategies. Nor do the calculations require that the area of habitat created be, at minimum, the same as that proposed to be lost or impacted. We advise that Defra and Government revisit these issues to ensure that the metric is robust and can deliver real net gains for biodiversity.

7. Detail is needed on the implementation and enforcement of net gain plans

Recommendation 7: We recommend that, given the time scales involved, the new regime needs to account for the challenges of ensuring net gain obligations are maintained and remain enforceable over the long-term. This must include the transfer of the responsibilities and accountabilities for biodiversity net gain when land is sold or transferred to different owners.

Many of the biodiversity net gain provisions in the Environment Act 2021 concern the submission and approval of plans by developers. This forms much of the focus of the consultation. However, actual biodiversity net gain will only be secured if these plans are effectively implemented in practice and in the long-term.

We see that conservation covenants may have a significant role to play to support biodiversity net gain. However, they are only enforceable between the parties to the covenant and their successors in title. In its report on conservation covenants, the Law Commission considered that compliance with covenants was likely to be high in the early years but could then decrease as the land subsequently changed ownership.⁷ This is important because the requirement for biodiversity net gain is for a minimum of 30 years and it is possible that the land will change ownership during that time.

In my “Farm Inspection and Regulation Review”⁸, I recommended that all land used for farming have a registered “keeper”. This would ensure that the onus of

⁷ Law Commission. (2014). *Conservation Covenants*. Law Commission. Retrieved from <https://www.lawcom.gov.uk/document/conservation-covenants/>

⁸ Stacey, G. (2018). *Farm Inspection and Regulation Review*. Department for Environment, Food & Rural Affairs, 58. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/764286/farm-inspection-regulatio-review-final-report-2018.pdf

responsibility for the management of land and the associated environment rests with a named individual (keeper), and transfers to a new keeper if the land changes hands. We advise that this concept has potential here, for embedding ongoing biodiversity net gain obligations. It would place regulatory responsibility onto the shoulders of an identifiable point-of-contact at any one point in time. This is of value when biodiversity net gain activities may be occurring over decades.

Other environmental laws involving long-term commitments concerning land (such as landfill waste and mineral sites) have incorporated mechanisms such as advance funding commitments to guard against problems of companies ceasing to exist or lacking the necessary resources to carry out long term obligations after commercial operations have ceased. We advise that Defra and the Government should consider these approaches to support the delivery of biodiversity net gain. We are concerned that, without effective implementation and appropriate avenues for enforcement of the net gain plans, biodiversity net gain will not be achieved.

8. Government should review the operation of biodiversity net gain across England at least every five years

Recommendation 8: We recommend that the Government commit to a review of the implementation and enforcement of biodiversity net gain plans across England every five years as a minimum.

Periodic and meaningful monitoring and review will allow for a full and regular assessment of the effectiveness of the system, obstacles to policy delivery and areas for revision. We advise this is essential, given the known issues with delivery and monitoring of biodiversity net gain.

Given the resourcing challenges, it will be important that monitoring and review arrangements cover the resource, skills and expertise needed to support effective implementation, compliance, monitoring and evaluation of biodiversity net gain. They should assess whether an appropriate level of biodiversity net gain is being delivered in practice. They should also assess the continuing appropriateness of the net gain methodologies and the creation of bespoke compensation mechanisms.

In reviewing biodiversity net gain periodically, we advise that Defra and the Government should consider how effectively the system is contributing to the aim within the 25 Year Environment Plan and other work to halt and reverse the decline in biodiversity. In our view it will be helpful to evaluate the policy in this broader context.

In conclusion

I hope that you find our advice and specific recommendations helpful.

While some of the proposals in the consultation document are presented in some depth, others are much less detailed at this stage. We would therefore welcome the opportunity to see additional detail and to provide further advice as the draft legislation and guidance are developed following the consultation.

We would be pleased to discuss with you or your officials how any further advice can be of most value.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G Stacey', with a long horizontal flourish extending to the right.

Dame Glenys Stacey
Chair, Office for Environmental Protection

Annex

Advice on the Consultation on Biodiversity Net Gain Regulations and Implementation – Response to specific consultation questions

We welcome the ambition to achieve net gain in the planning system and the step change this could deliver. We also support several of the specific proposals on which Defra and the Government are consulting. At the same time, we have a number of recommendations and suggestions where we consider the policy could be further strengthened.

We are limiting our response on the specific consultation questions to a selection of those in the consultation document, as set out below. These are the questions on which we have particular strategic or specific advice to offer, and which relate to and build on the eight issues and the 11 recommendations outlined in the main body of our letter. Those 11 recommendations are:

Recommendation 1a: We recommend that the Government considers a higher minimum biodiversity net gain percentage than that stated in the Environment Act 2021, to increase the prospect of true net gain.

Recommendation 1b: We recommend that the Government considers a single system for terrestrial and marine net gain.

Recommendation 2: We recommend that Defra sets out further detail on the status of and plan for the development and implementation of environmental net gain.

Recommendation 3: We recommend that Defra and the Government should continue to consider and learn from the experience of others (including the early adopters in England) to increase materially the prospects of success.

Recommendation 4a: We recommend that Government develops a strong system of governance for biodiversity net gain implementation, monitoring, reporting and enforcement, including publicly available information and regular review.

Recommendation 4b: The success of biodiversity net gain will require adequate resourcing and expertise, covering both the initial assessment of proposed activities and planning applications, and long-term monitoring, reporting, compliance and enforcement activities of local authorities, Defra, and Natural England.

Recommendation 5: We recommend that, to address risks that increase the uncertainty of success, the scheme must be designed so that only realistic and deliverable biodiversity net gain proposals are accepted and there is effective, ongoing monitoring of its implementation.

Recommendation 6a: We recommend that exemptions are revisited, and safeguards are strengthened, to avoid loopholes. We recommend that all NSIPs deliver at least 10% biodiversity net gain.

Recommendation 6b: We recommend strengthening Biodiversity Metric 3.0 to require that the area of habitat created should be, at a minimum, the same size as

that which will be impacted. The weighting presented by landscape value (e.g. as part of Local Nature Recovery Strategies or the Nature Recovery Network) should also be improved to enable greater strategic outcomes for nature.

Recommendation 7: We recommend that, given the time scales involved, the new regime needs to account for the challenges of ensuring net gain obligations are maintained and remain enforceable over the long-term. This must include the transfer of the responsibilities and accountabilities for biodiversity net gain when land is sold or transferred to different owners.

Recommendation 8: We recommend that the Government commit to a review of the implementation and enforcement of biodiversity net gain plans across England every five years as a minimum.

Further, in our response to selected questions from the consultation document, we present a number of additional recommendations below:

Recommendation 9: We recommend that Defra requires local planning authorities and the Planning Inspectorate to publish information demonstrating use of the mitigation hierarchy to illustrate why a proposal cannot avoid or minimise impact (question 29).

Recommendation 10: We recommend that Defra develop detailed guidance that offers safeguards against the negative impact to irreplaceable habitat, including the methods that will be used to calculate the bespoke compensation mechanism, and requires publication of the application of the mitigation hierarchy (question 29).

Recommendation 11: We recommend the development of an appropriately flexible definition of irreplaceable habitat that covers the wide breadth of habitats and features that are irreplaceable (question 29).

Recommendation 12: We recommend that limitations and assumptions should be a compulsory inclusion in the biodiversity gain information and the biodiversity gain plan (question 29).

Recommendation 13: We recommend that the biodiversity gain site register includes both on-site and off-site biodiversity net gain activity, as well as use of the “bespoke compensation mechanism” (question 38).

Recommendation 14: We recommend the inclusion of additional information on the biodiversity gain site register. Specifically, we recommend that the register include additional details of gain site custodians, any planning obligations or conservation covenants, and the biodiversity gain plan submitted to the planning authority (question 40).

Recommendation 15: We recommend that Defra amend the definition of additionality to be more appropriate to the context of biodiversity net gain through specific reference to biodiversity and/or the environment, moving beyond the Green Book definition of providing, simply, additional social value (question 44).

Recommendation 16: We recommend that the proposed approach to combining payments does not start until guidance has been produced which explains how payments are to be credibly differentiated for creation, monitoring, evaluation, and enforcement purposes (question 47).

Recommendation 17: We recommend that proposals for the use of statutory biodiversity units be developed in greater detail to address risks which could undermine the credit market for the biodiversity net gain scheme (question 48).

Recommendation 18: We recommend that any such trading mechanism for biodiversity units must be accompanied by detailed regulatory oversight of the operation of a private market (question 48).

Recommendation 19: We recommend consideration of the creation of panels of independent assessors of biodiversity net gain proposals to review that the proposals do represent a realistic path to achieve biodiversity net gain and include appropriate monitoring and reporting schedules (question 52).

Recommendation 20: We recommend that the Government consider the need for across-the-board, project-level verification of the developer's monitoring reports by local planning authorities and responsible bodies to ensure that the contents of the report accurately reflects the on-the-ground picture (question 52).

Recommendation 21: We recommend that the minimum content of monitoring reports should go further than proposed. In particular, we advise that every report should include a comparison against the expected condition proposed in the relevant net gain plan (question 52).

Recommendation 22: We recommend further, detailed development of the legislative framework and arrangements for enforcement of delivery of project-level commitments, including through review of and updates to existing guidance on planning enforcement activities. This needs to address several points including the adequacy of enforcement resources and expertise for planning authorities, and specific issues around the enforceability of biodiversity net gain commitments which may be reflected in obligations passed to private householders or conservation covenants (question 52).

Question 8) Do you agree with our proposal not to exempt developments which would be permitted development but are not on account of their location in conservation areas, such as in areas of outstanding natural beauty or national parks?

We agree with the proposal to not exempt these types of developments.

It has been evidenced that in places such as Areas of Outstanding Natural Beauty and National Parks, protection of biodiversity is not as effective as it needs to be because they are not set up primarily for this purpose. While such areas cover 28% of the land in England, it may be as little as 4.9% of this land area that represents effective protection for nature.⁹ This is at odds with their designation as nationally significant landscapes. Therefore, in our view, it is important that mechanisms like biodiversity net gain work to secure greater strategic delivery for biodiversity across relevant areas of policy and do not exist in isolation.

⁹ Starnes, T., Beresford, A. E., Buchanan, G. M., Lewis, M., Hughes, A., & Gregory, R. D. (2021). The extent and effectiveness of protected areas in the UK. *Global Ecology and Conservation*, 30, e01745.

Question 12) Do you agree with our proposed approach that applications for outline planning permission or permissions which have the effect of permitting development in phases should be subject to a condition which requires approval of a biodiversity gain plan prior to commencement of each phase?

As a matter of good governance, we agree with this proposal. As the scale of developments can vary considerably across geography and time, we note the importance of the ability for a biodiversity gain plan to be reconsidered and approved as each phase becomes viable. This should support effective mitigation and management of risk, including the delivery of maximum gain from the scheme during its first phases.

The proposal creates an important safeguard to avoid the pitfalls of long-term permissions not evolving to match changes in practices and priorities. Areas of policy or spatial-planning for nature conservation that are still developing will have to be reflected within the setting of updated plans. This should enable biodiversity net gain to be a successful part of the wider ambition to deliver the 25 Year Environment Plan goals and avoid it being statically grounded in outdated evidence and approaches.

Question 18) Do you agree that the above approach is appropriate for setting out the biodiversity net gain requirement for NSIPs?

We welcome the inclusion of NSIPs within biodiversity net gain. The OEP considers that all infrastructure projects should fall within the scope of biodiversity net gain. The inclusion of NSIPs represents a more complete coverage over developments that affect the environment. It also gives a clear signal that developers across the board will be required to undertake the actions necessary to ensure that their activity contributes to the Government's ambitions for nature recovery.

In the pages immediately above this question (p41), there is a statement that: "It may be the case that some types of NSIP are unable to deliver a 10% biodiversity net gain but may be able to deliver a lower percentage target. We intend to apply the 10% as a minimum requirement broadly but, if modifications prove to be necessary, we would prefer to apply a different percentage requirement rather than to apply an exemption." We are concerned that this proposal could create a two-tiered system whereby some NSIPs may be subject to different biodiversity net gain obligations.

We note that the consultation document contains limited detail explaining why some NSIPs may be subject to different conditions, what those conditions might be, or how any different approaches for NSIPs would work in practice. Government should retain a minimum percentage gain for NSIPs which is the same as for other developments. There is a risk that a different standard could result in a perverse incentive for developers to alter their proposals to try and secure categorisation as NSIPs, thereby avoiding the more stringent 10% gain requirements applicable to non-NSIPs.

More generally, England joins over 100 countries worldwide that have introduced biodiversity net gain-type policies into their environment and planning systems. International experience demonstrates the need for caution in the use of exemptions

and the presence of loopholes in biodiversity net gain-type policies.¹⁰ For example, research into the biodiversity offset policy goal of “improving or maintaining environmental outcomes” in New South Wales (Australia) found that extensive exemptions allowed approximately 87% of rural native vegetation clearing to occur without offsetting the loss.¹¹

As we note in Recommendation 6a of our accompanying letter, **we recommend that all NSIPs are required to deliver a minimum 10% biodiversity net gain** to prevent the proposed approach from essentially becoming a loophole and, as a result, limiting the overall effectiveness of the scheme. These projects are significant, in both scale and number, and obligations attached to their development consent orders could contribute, significantly, to the goal to halt the loss of biodiversity and species abundance by 2030 in England as outlined in the recently proposed environment targets and the 25 Year Environment Plan.

Question 29) We will continue to work with external stakeholders and industry on the form and content of the template. Do you agree with the proposed information to be included in a biodiversity gain plan as shown in the draft template?

We welcome the introduction of a standardised format for the biodiversity gain plan. The introductory section outlining the early details of the biodiversity gain plan sets out strong ambitions to create consistency in planning submissions. There are, however, some important clarifications that we consider need to be made in relation to the mitigation hierarchy, the “bespoke compensation mechanism”, and data inclusion in the plan.

Mitigation hierarchy and thresholds of loss

There is limited detail surrounding the use of the mitigation hierarchy: the requirement to first avoid, then to minimise, then to mitigate and, as a last resort, to offset or compensate. The hierarchy has been long recognised as a critical aspect of biodiversity net gain-type policies.¹²

Recommendation 9: We recommend that Defra requires local planning authorities and the Planning Inspectorate to publish information demonstrating use of the mitigation hierarchy to illustrate why a proposal cannot avoid or minimise impact.

A critical point where we consider further clarity is needed is how, in practice, a local authority and developer can show that they have taken the necessary precautionary steps through the mitigation hierarchy.

We note that where there is a proposal which would affect irreplaceable habitat, there is a slightly more stringent use of the mitigation hierarchy, with a developer required to justify their proposed impacts. However, we are concerned that the

¹⁰ See, for a detailed example of this point, Gibbons, Macintosh, Constable et al., above n 3.

¹¹ Ibid.

¹² Bull, Suttle, Gordon et al., above n 3; Milner-Gulland, E., Addison, P., Arlidge, et al., (2021). Four steps for the Earth: mainstreaming the post-2020 global biodiversity framework. *One Earth*, 4, 75-87; Phalan, B., Hayes, G., Brooks, S., et al. (2018). Avoiding impacts on biodiversity through strengthening the first stage of the mitigation hierarchy. *Oryx*, 52(02), 316-324.

biodiversity gain plan is built upon assumptions that compensation is acceptable for damage to irreplaceable habitat.

We note that Defra have consulted the Business and Biodiversity Offsets Programme (BBOP) when developing the mitigation hierarchy (p17). However, the proposal to allow for “bespoke compensation” for irreplaceable habitats, designated sites for nature and impacts on protected species appears to be in conflict with BBOP’s second principle for establishing a framework for designing and implementing biodiversity offsets:¹³

“Limits to what can be offset: There are situations where residual impacts cannot be fully compensated for by a biodiversity offset because of the irreplaceability or vulnerability of the biodiversity affected.”

We are therefore concerned with Defra’s apparent assumption that the various components of irreplaceable habitat are in fact *replaceable* and that their loss can be compensated for. This risks signalling to developers that they can impact irreplaceable habitat that should be outside of the scope of biodiversity net gain. Such a signal could result in a significant loss to England’s most valuable biodiversity, despite the observation in the recent Nature Recovery Green Paper that the UK is already one of the most nature-depleted countries in the world.

If Defra is to introduce “bespoke compensation” for instances of wholly exceptional reasons that development can cause the loss or deterioration of irreplaceable habitats, there must be robust safeguards to ensure that the avoid and minimise steps of the mitigation hierarchy have been followed. As impacts on these habitats can have a profound impact on England’s environmental and cultural heritage, the documentation outlining the application of the mitigation hierarchy should be published on the public register. Detailed guidance highlighting methods for calculating the bespoke compensation mechanisms should be published and routinely reviewed to ensure there is full transparency associated with any proposed loss to this type of habitat.

Recommendation 10: We recommend that Defra develop detailed guidance that offers safeguards against the negative impact to irreplaceable habitat, including the methods that will be used to calculate the bespoke compensation mechanism, and requires publication of the application of the mitigation hierarchy.

We welcome steps taken by Defra to recognise and protect the natural capital, ecosystem services and cultural heritage provided by irreplaceable habitats (p31). We also note the forthcoming secondary legislation that will list habitats considered irreplaceable for the purposes of biodiversity net gain. Any definition of irreplaceable habitat needs to encompass the wide scope of irreplaceable habitats and must be clear and easily understood.

We would welcome the opportunity to engage with Defra as this work on definitions and protections for irreplaceable habitats is developed.

¹³ Business and Biodiversity Offsets Programme. (2018). *The BBOP Principles on Biodiversity Offsets*. Forest Trends. Retrieved from https://www.forest-trends.org/bbop_pubs/principles/.

Recommendation 11: We recommend the development of an appropriately flexible definition of irreplaceable habitat that covers the wide breadth of habitats and features that are irreplaceable.

The optional inclusion of limitations and assumptions made during the biodiversity net gain process

Limitations and the use of assumptions are crucial pieces of information that can form the foundation from which a decision may be made. They are important considerations for policy-level reporting and assessment. However, within the biodiversity gain plan template, this information is listed as optional (p107). Noting the importance of this data for understanding the successful implementation of biodiversity net gain, we advise the compulsory inclusion of this data. Otherwise, there is risk that decision-making takes place without understanding the potential shortcomings of the calculations determining the proposed loss and gain listed in the plan.

If decision-making across a national scale is built on unsteady scientific foundations and an overuse of assumptions, this may result in difficulty assessing policy-wide progress towards biodiversity net gain.

Recommendation 12: We recommend that limitations and assumptions should be a compulsory inclusion in the biodiversity gain information and the biodiversity gain plan.

Question 30) Do you agree that further guidance is needed to support decision-making about what constitutes appropriate off-site biodiversity gains for a given development?

We agree that further guidance is needed to support decision-making for off-site biodiversity net gain activity.

As part of a package of ambitious new policies within the 25 Year Environment Plan and linked to the Environment Act 2021, the successful implementation of biodiversity net gain requires a joined-up approach. Biodiversity net gain links to other schemes such as Local Nature Recovery Strategies, the Nature Recovery Network, Environmental Land Management Schemes, Green Infrastructure guidance, access to nature and green space, and other potential markets such as carbon or nutrient offsetting.

Recent reports, such as the Environmental Audit Committee's 'Biodiversity in the UK: bloom or bust?', consider evidence which suggests that, although local stakeholders may prefer on-site biodiversity gains, strategic, targeted off-site biodiversity gain activity can yield greater benefits for biodiversity. Notably, benefits of off-site gains include the ability of the off-site gain to be dedicated to biodiversity value and to strategic planning for nature across England, such as through contributing to ecological corridors and the Nature Recovery Network. This also can safeguard against the biodiversity gains being undermined by its parent development (e.g.,

recreational pressure degrading the site over the long-term which may improve access to green space but can undermine biodiversity net gain).¹⁴

We also see important complements between biodiversity net gain and the recent Natural England Green Infrastructure Framework principles for urban planning, access to nature and the development of infrastructure.¹⁵ Further guidance and clarity on how both programmes can complement and work together would be helpful. In particular, such guidance can usefully address how green infrastructure can be included legitimately within the biodiversity net gain system.

The supporting guidance should encourage not only the implementation of appropriate, and realistically achievable, net gain measures but also outline reporting and auditing obligations for developers. We provide further detail on this point in our response to question 52 below.

We fully support the integration of government programmes and schemes to maximise environmental benefits. However, there is a need for further clarification and guidance on aspects such as the need to evaluate and ensure true additionality of off-site biodiversity net gain activity. We provide further detail on this point at question 44 below.

Question 38) Do you agree that the eligibility criteria for adding sites to the biodiversity gain site register are sufficient?

Recommendation 13: We recommend that the biodiversity gain site register includes both on-site and off-site biodiversity net gain activity, as well as use of the “bespoke compensation mechanism”.

The introduction of a biodiversity gain register represents an important first step towards ensuring that planning authorities, Defra, Natural England, and community stakeholders have access to important data and information about net gain projects. A public register will enable monitoring, auditing and, potentially, support enforcement activity. With this in mind, we welcome Defra’s statement that “the register should transparently show where gains are being delivered” (p68).

Transparency in decision-making is important for enabling community trust in the process. It allows communities to see the quality of information upon which decisions are, and can be, made. International experience shows that the absence of clear, easily accessible information in planning systems can lower community trust in the decision-making process.¹⁶

¹⁴ zu Ermgassen, Marsh, Ryland et al., above n 3 cited in Environmental Audit Committee. (2021). *Biodiversity in the UK: bloom or bust?* First report of the Session 2021-2022, House of Commons. Retrieved from <https://publications.parliament.uk/pa/cm5802/cmselect/cmenvaud/136/136-report.html>.

¹⁵ Natural England. *Introduction to the Green Infrastructure Framework - Principles and Standards for England*. Retrieved from <https://designatedsites.naturalengland.org.uk/GreenInfrastructure/Home.aspx>.

¹⁶ See, especially, Chapter 4: Trust in the EPBC Act, Chapter 10: Data, information and systems, and Chapter 11: Environmental monitoring, evaluation and reporting in Samuel, G. (2020). *Independent Review of the EPBC Act - Final Report*. Canberra, Australian Capital Territory, Australia: Department of Agriculture, Water and the Environment.

However, we propose that the scope of the register should be extended. If it is to deliver the intended transparency, the register will need to reflect off-site, on-site and combination biodiversity net gain activities. As we note in our answer to question 29, we also recommend that any “bespoke compensation mechanisms” used following impacts to irreplaceable habitat, designated sites for nature and impacts on protected species be included in this public register. We recognise that Defra is “exploring how the on-site information on gains in biodiversity gain plans can be included or linked to [the register]” (p64) and recommend that such an approach be included in the system.

Without including on-site activity on the biodiversity gain site register, the register will not transparently show where the majority of gains are required to be delivered.¹⁷ There is also a risk of a lack of monitoring, auditing, reporting and, where necessary, enforcement of biodiversity net gain obligations for on-site activity due to this information simply not being publicly available and reported alongside information about off-site gains. This risks the creation of a two-tiered system whereby off-site biodiversity net gain activities will be subject to stricter scrutiny than those on-site.

We note that the Impact Assessment for NSIPs references studies identifying success rates of biodiversity net gain-type projects ranging from 0% to 74%, with other studies finding rates of success of 6% to 20%.¹⁸ With such a high risk of failure¹⁹, it is crucial that sufficient information is available to allow robust assessment, monitoring, reporting, and auditing of individual projects and policy-wide progress towards the goal of achieving at least 10% biodiversity net gain. This then gives the opportunity for remedial measures to be considered at the earliest possible stage.

Please see our response to question 52 below for further detail on our recommendations regarding the proposed register.

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?

A publicly accessible register, recording information for all biodiversity net gain projects, is a crucial governance feature of any biodiversity net gain-type policy.

We recommend that the following information is also included:

- Developer(s) details
- The nomination of a “keeper” who will be the primary contact for the biodiversity net gain activity for regulatory purposes (see Recommendation 7 in our accompanying letter)

¹⁷ zu Ermgassen, Marsh, Ryland et al., above n 3.

¹⁸ Bull, Suttle, Gordon et al., above n 3; Maron, M., Hobbs, R. J., Moilanen, A, et al. (2012). Faustian bargains? Restoration realities in the context of biodiversity offset policies'. *Biological Conservation*, 155, 141-148 both cited in Department for the Environment, Food & Rural Affairs (2021), above n 1.

¹⁹ There is a wide library of literature on the issues impacting the success of biodiversity net gain-type policies. See, for example, Ambrose, above n 3; Bull, Suttle, Gordon et al, above n 3; Lindenmayer, Crane, Evans et al., above n 6; Maron, Hobbs, Moilanen et al., above n 18; Reside, Cosgrove, Pointon et al., above n 3.

- Biodiversity net gain information and net gain plan submitted to the planning authority
- Details of any planning obligation or conservation covenant
- Where possible GIS data should be provided to support geospatial analysis and integration with existing planning information (such as with the Environmental Land Management Schemes)
- File names of reports submitted to the planning authority to support biodiversity net gain activity (for greater ease of data extraction or request)

Further detail on our recommendations for the scope of projects which should be covered by the register is set out in our responses to questions 38 and 52.

We welcome the commitment to ensuring that biodiversity net gain sites are in fact legitimate representations of additionality plus enhancement of biodiversity. At present there is limited detail regarding what constitutes a legitimate site within the context of this register, and greater clarification on this point would be welcome.

Recommendation 14: We recommend the inclusion of additional information on the biodiversity gain site register. Specifically, we recommend that the register include additional details of gain site custodians, any planning obligations or conservation covenants, and the biodiversity gain plan submitted to the planning authority.

Question 44) Do you agree with our proposals for additionality with respect to:

- a) measures delivered within development sites?
- b) protected species and off-site impacts to protected sites?
- c) on-site impacts on protected sites, and any associated mitigation and compensation?
- d) achievement of River Basin Management Plan Objectives?

Additionality is a fundamental principle that underpins the use of biodiversity net gain-type policies globally. This point has been noted by the Business and Biodiversity Offsets Programme, whose principles we also refer to in our answer to question 29:²⁰

“Additional conservation outcomes: A biodiversity offset should achieve conservation outcomes above and beyond results that would have occurred if the offset had not taken place. Offset design and implementation should avoid displacing activities harmful to biodiversity to other locations.”

We note that Defra use the Green Book definition of additionality: “a real increase in social value that would not have occurred in the absence of the intervention being appraised” (p71). This definition does not make reference to biodiversity or the environment.

Recommendation 15: We recommend that Defra amend the definition of additionality to be more appropriate to the context of biodiversity net gain through specific reference to biodiversity and/or the environment, moving beyond the Green Book definition of providing, simply, additional social value.

²⁰ Business and Biodiversity Offsets Programme, above n 13.

We welcome commitments to complement and link into other biodiversity and nature recovery programmes to meet the goals of the 25 Year Environment Plan. We are, however, concerned that the enhancements listed in the consultation documents as acceptable contributions towards biodiversity net gain can undermine achievement of additionality (p72). Biodiversity net gain should be in addition to, and not part of, existing legal obligations.

Many of the measures able to contribute towards biodiversity net gain obligations are statutory obligations for other programmes. Notably, there is allowance for mitigation and compensation measures for legal obligations in respect of protected species and protected sites to be counted towards biodiversity net gain activities. If these measures are counted towards biodiversity net gain obligations, there is a risk of double counting of benefits and the prevention of a true gain occurring.

Question 47) 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?

We welcome the commitment for the market for biodiversity units to work alongside other nature recovery and conservation programmes and other environmental markets such as nature-based carbon and nutrient trading. We encourage decision-making that promotes environmental protection and conservation activity that is strategic, connected, and aims to maximise environmental benefits through local delivery and utilising local knowledge.

There is a current lack of detail as to how payments for biodiversity units will be combined with other payments for environmental services from the same piece of land. A clear method is needed to distinguish between activities relating to different programmes on the same parcel of land to ensure that the same gain cannot be counted towards multiple programmes. A clear and transparent system is required to identify and evidence the multiple benefits (e.g. carbon, biodiversity and nutrient offsetting). Without such a system, there is a risk that the obligations cannot be clearly differentiated, preventing accurate reporting at both the project and policy-level.

Recommendation 16: We recommend that the proposed approach to combining payments does not start until guidance has been produced which explains how payments are to be credibly differentiated for creation, monitoring, evaluation, and enforcement purposes.

Question 48) Are these proposals for statutory biodiversity credits sufficient to:

- a) Ensure, when supported by suitable guidance, that they are only used by developers as a last resort?**
- b) Mitigate the market risk associated with the sale of statutory biodiversity credits by the UK Government?**

We have a number of concerns about these proposals. The consultation document and the accompanying market analysis acknowledge the “significant risk” posed by the use of statutory biodiversity credits (p76). We think these risks are very real, and

that the Government will need to take care to ensure that they are mitigated or replaced by alternative options.

An essential feature of the operation of a tradeable biodiversity credits market, such as that proposed within this consultation, is the credit price. The price needs to reflect the scarcity and replaceability of a particular type of biodiversity unit. For some types of habitat, it will be extremely difficult to deliver biodiversity net gain. Some of the reasons for this difficulty will be that some types of habitat are regionally rare, have a naturally restricted range, may be heavily fragmented and degraded or are difficult to recreate.

Both the credit price and the availability of credits signal scarcity and replaceability. Without statutory biodiversity credits, where credits are not available or the credit price is too high, development would not take place as it would not be economically viable once full environmental costs are taken into account. However, by introducing statutory biodiversity credits for situations where developers are unable to obtain a biodiversity credit through other routes, this distorts the market and could enable development where the cost to the environment would have been too high previously.

From the consultation document, it is not clear what the “last resort” test would be, or at what point a developer would be eligible to purchase a statutory biodiversity unit.

The consultation document notes that the arrangement would be short term to safeguard against the market struggling to supply sufficient biodiversity credits. Before the creation of secondary legislation, policy, and guidance, the necessary detail will need to be developed on a number of points.

For example, there is an absence of detail on a proposed timeline for the use of statutory biodiversity credits. The consultation document (p77-78) notes that the statutory biodiversity credits are to support a potential lack of supply. However, there is no indication of any threshold whereby the use of statutory biodiversity units will conclude if a certain level of supply is achieved.

There are important details of additionality and equivalence (often phrased as *like-for-like*) that need to accompany the proposal to introduce the statutory biodiversity units. For example, how will the funds collected by the Government following the purchase of statutory biodiversity credits be used?

As these funds will have been collected to enable a developer to fulfil a biodiversity obligation, there is an expectation that they will be used in relation to the matter affected by the development, but this is not explicitly stated.

The consultation document and the accompanying market analysis does reference the “significant risk” posed by the use of statutory biodiversity credits, however, there is a lack of further detail of how this risk will be mitigated or the alternative options that have been explored.

Recommendation 17: We recommend that proposals for the use of statutory biodiversity units be developed in greater detail to address risks which could undermine the credit market for the biodiversity net gain scheme.

We also note the statement that “we do not currently propose to establish a centralised trading platform for biodiversity units or for the UK Government to take on other roles which could be performed by the private sector or other third parties, such as brokering” (p59). There is no detail on how these activities by the private sector or third parties would operate, and we consider that regulatory oversight of the market’s operation will be important. There are lessons to be learnt from the regulatory arrangements and oversights guiding the operation of carbon markets for example.

Recommendation 18: We recommend that any such trading mechanism for biodiversity units must be accompanied by detailed regulatory oversight of the operation of a private market.

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?

One important aspect of getting biodiversity net gain right is ensuring that mechanisms and procedures for *project-level* management, monitoring and enforcement are effective. As we have noted, England is following over 100 countries who have adopted similar policies into their planning systems and has the opportunity to learn from their experience.

Reflecting on the Government’s current proposals, we have identified several elements of project-level management which we consider require further exploration. First, the need to ensure local authorities are appropriately resourced and skilled to deliver biodiversity net gain. Second, the need for independent oversight of biodiversity net gain proposals. Third, the importance of a publicly available register detailing biodiversity net gain projects. Fourth, the value of proactive progress monitoring of ongoing projects. Finally, the need for a robust enforcement mechanism including in relation to the proposed use of conservation covenants. All of these activities will require adequate funding and people with the necessary skills and expertise.

Under-resourcing of local authorities could undermine delivery

Local authorities need to be sufficiently resourced to support rigorous delivery, evaluation, monitoring and enforcement of biodiversity net gain.²¹ The demands on local authorities in considering and approving biodiversity gain plans for planning applications will be considerable. A simple estimation of non-householder Town and Country Planning Act 1990 applications which may be subject to the new requirements totals 228,000 in the most recent year available.²²

²¹ Robertson, above n 4.

²² Using Government planning statistics, the most recent year October 2020 to September 2021 presented 228,000 non-householder planning applications out of 478,000 total. Further accuracy is limited by available data on the detail of planning applications. Data available: Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities & Local Government. (2021). *Planning applications statistics*. HM Government. Retrieved from <https://www.gov.uk/government/collections/planning-applications-statistics#2021>.

Given this, we welcome Government's commitment to work with local government to assess skills needs, and that the new burdens on local authorities will be fully funded to support biodiversity net gain. This is essential to the effective delivery, evaluation and enforcement of biodiversity net gain, which will require the appropriate competencies in ecological science, planning control, regulatory activities being embedded across the development sector.

International experience demonstrates that a lack of resources allocated to decision-makers, like local authorities, can result in rushed or delayed decision-making, a lack of auditing, an absence of enforcement action, and can undermine public support.²³

Notably, Australia has extensive experience with biodiversity net gain-type policies, and there is a wide body of literature on the operation of these policies. A note of caution should be taken from research examining the operation of the screening of development applications associated with the Environmental Protection and Biodiversity Conservation Act 1999 (Australia). Planning officers were given a large degree of discretion when establishing the planning conditions applicable to development. This led to unlawful and inconsistent decision-making and ambiguity of allowable actions.²⁴

To ensure public confidence that local authorities will be able to operate the system effectively and consistently, the Government will need to be transparent on the skills shortages that exist, the funding mechanisms available to deal with this and the implementation timetable. We suggest that this is considered as a matter of urgency. It is crucial that decision-makers are well-resourced to implement biodiversity net gain in the English planning system, if it is to achieve the outcomes intended. As we note in Recommendations 4a and 4b, in our letter accompanying this advice, **the biodiversity net gain system must be supported by well-developed governance, including publicly available information and regular review to demonstrate if the regime is in fact contributing to a net gain of biodiversity across a range of scales, and adequate, long-term resourcing.**

Biodiversity net gain proposals need to be independently assessed

To ensure that biodiversity net gain obligations are rigorous, realistic and reportable, we recommend that Defra considers the use of independent assessors of proposed biodiversity net gain activities.

These could be expert panels aligned to one or more English local planning authorities, who would independently assess biodiversity net gain proposals. Part of the responsibility of these panels would be to ensure that the proposals are feasible, account for risk and uncertainty, demonstrate a realistic pathway to achieving biodiversity net gain, demonstrate transparent inclusion of data and other information, and include an appropriate reporting schedule and proposed content for monitoring reports and any necessary remedial measures. The panel could also consider whether the mitigation hierarchy has been rigorously applied and followed.

²³ See Lindenmayer, Crane, Evans, et al., above n 6; Macintosh, A., & Waugh, L. (2014). Compensatory mitigation and screening rules in environmental impact assessment. *Environmental Impact Assessment Review*, 49, 1-12; Samuel, above n 16.

²⁴ Macintosh and Waugh, above n 23.

These panels could then provide independent technical advice to local planning authorities and provide a means of addressing the lack of ecology skills in certain local authorities.

Recommendation 19: We recommend consideration of the creation of panels of independent assessors of biodiversity net gain proposals to review that the proposals do represent a realistic path to achieve biodiversity net gain and include appropriate monitoring and reporting schedules.

Importance of a comprehensive publicly available register

As we set out in our response to questions 38 and 40, we welcome the proposal to develop a publicly available register of gains. However, as we advise above, this should not be limited to recording off-site gains. Instead, **we recommend that the biodiversity gain site register be inclusive of both on-site and off-site biodiversity net gain activity** (recommendation 13 in response to question 38). This register should provide a 'one-stop shop' for information about all biodiversity net gain projects and sites. This would improve transparency of implementation of the policy.

We refer again to the recent study of 'early-adopter jurisdictions'.²⁵ This found that 95% of biodiversity units considered had been delivered on-site or on directly adjacent land owned or managed by the developer – with 91% of units delivered within the direct development footprint. If the register is not extended to include such projects, it could mean that it contains information about a small minority of gain sites only – minimising its value and reducing transparency across the board.

Beyond transparency, a comprehensive register is also an important governance measure to contribute not only to the proper management, monitoring and reporting of proposals and implementation at a project-level, but also to policy-level oversight of progress against objectives. We welcome Defra and the Government's commitment to work with stakeholders to design the register in a way that "allows local communities to access information on habitat sites being delivered and for these sites to be tracked and monitored over time." (p63). Our view is that this register will only genuinely support the policy objectives if it includes on-site as well as off-site net gain projects.

Proactive progress monitoring of ongoing projects

Monitoring the progress of ongoing net gain projects to assess delivery against commitments is vital. It is a critical aspect of governance and is important to inform decisions about whether enforcement action may be required.

There is little detail in the consultation document about how this monitoring will take place. The consultation document notes that "[i]t will be the landowner or developer's responsibility to ensure monitoring and reporting obligations are fulfilled, or adequately delegated to another body" and suggests a "typical schedule" and minimum content for monitoring reports (p81). It also notes the "considerable scope

²⁵ zu Ermgassen, Marsh, Ryland, et al., above n 3.

for discretion and expert opinion when monitoring is agreed between habitat providers, planning authorities and responsible bodies”.

In view of this, we are concerned that there is a risk of failure at both project and policy level if the scheme over-relies on unchecked landowner or developer self-monitoring.

Recommendation 20: We recommend that the Government consider the need for across-the-board, project-level verification of the developer’s monitoring reports by local planning authorities and responsible bodies to ensure that the contents of the report accurately reflects the on-the-ground picture.

Recommendation 21: We recommend that the minimum content of monitoring reports should go further than proposed. In particular, we advise that every report should include a comparison against the expected condition proposed in the relevant net gain plan.

We welcome Defra’s commitment to “provide guidance on monitoring” (p81) and note the importance of this being sufficiently clear and specific to enable a consistent approach to monitoring across the country.

Enabling enforcement of biodiversity gain commitments

The long-term success of this policy relies on adequate enforcement of the biodiversity net gain commitments. Government correctly recognises the equal importance of capacity and transparency as well as the legal powers available for enforcement (p82). We agree that the success of the proposed policy relies on getting all of this right. We cannot yet be certain of this on the basis of the proposals made so far, since much of the important detail upon which this success will rest remains to be developed.

The issue of enforcement is dealt with rather briefly in the consultation document. It notes that “planning authorities have a range of existing planning enforcement tools at their disposal, and the Environment Act [2021] includes mechanisms to ensure commitments through conservation covenants are adhered to” (p82).

We have considered the adequacy of the existing enforcement tools that planning authorities may exercise in the biodiversity net gain context. We are concerned about the ability and capacity of local planning authorities to consider these tools to enforce net gain commitments made through planning conditions and obligations.

We know that planning enforcement can be under-resourced in practice. Recent analysis demonstrates significant declines in local planning authority enforcement action, which already appears to be disproportionately low when compared with the number of planning decisions made. Without proper funding and support, the addition of a new category of enforcement cases risks would just add to the pressure.

Government is considering changes to guidance to support effective on-site biodiversity gains and invites views on this. We support this and suggest that a

review is undertaken with a specific objective of ensuring that the right balance is struck in relation to enforcement of biodiversity net gain commitments.

The National Planning Policy Framework sets out that enforcement action is discretionary meaning that local planning authorities will not necessarily take enforcement action in every case.²⁶ Instead, local planning authorities can determine their own criteria for taking enforcement action. This is not unusual or unreasonable, as long as the authorities have reasonable resources and expertise which allows them to approach this effectively.

Government should therefore ensure that local planning authorities are adequately resourced to be able to take enforcement action. We also advise that the refreshed guidance should emphasise an expectation that local authorities should take enforcement steps in relation to under-delivery of biodiversity net gain commitments. Otherwise, there is a real risk that, without the deterrent pressure of enforcement action, management organisations or developers will not deliver their biodiversity net gain commitments and the overall policy objectives will be undermined.

There will need to be clarity within plans and proposals on how continuing accountabilities for the maintenance of biodiversity net gain obligations are to be met and funded. These will need to provide confidence that the biodiversity net gain measures will continue to be implemented throughout the entire period of the commitment.

We are particularly concerned about a point relating to the possible reliance on conservation covenants for securing delivery of net gain commitments. As provided for in the Environment Act 2021, conservation covenants will be a private agreement between a relevant landowner and the relevant responsible body, which may be the Secretary of State or another designated body. The arrangement results in a private agreement between the relevant parties which will not be enforceable by regulators. This creates a clear problem which Government will need to address when it comes to ensuring that biodiversity net gain obligations are enforceable.

We also note that there may be some disincentives for the farming community to enter into conservation covenants. Taking land out of agricultural production can mean farmers lose the benefit of Agricultural Relief, which enables the transfer of some agricultural property free of inheritance tax. We suggest that the Government further consider the impacts of this on farmers' appetite to enter into covenants.

Recommendation 22: We recommend further, detailed development of the legislative framework and arrangements for enforcement of delivery of project-level commitments, including through review of and updates to existing guidance on planning enforcement activities. This needs to address several points including the adequacy of enforcement resources and expertise for planning authorities, and specific issues around the

²⁶ Ministry of Housing, Communities & Local Government. (2021). *National Planning Policy Framework*. Ministry of Housing, Communities & Local Government, paragraph 59. Retrieved from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005759/NPPF_July_2021.pdf

enforceability of biodiversity net gain commitments which may be reflected in obligations passed to private householders or conservation covenants.

Question 54) Do the above proposals for policy-level reporting, evaluation and enforcement seem sufficient and achievable?

Many of the important measures needed to support policy-level reporting and evaluation will be the same measures that support project-level reporting, evaluation and enforcement. Throughout our response to this consultation, we have outlined areas of the proposed biodiversity net gain policy that we think can be strengthened to support monitoring and evaluation at both the project and policy level, and how to ensure that the policy can be enforced. All of the recommended points would support both project-level and policy-level monitoring, evaluation and enforcement activity.

In our response to this question, we also provide further detail on one of our main recommendations.

Five yearly reviews of biodiversity net gain (see also recommendation 8 in our accompanying letter)

The weight of evidence within academic research suggests that biodiversity net gain-type policies struggle to achieve their objectives of no net loss to the environment or net gain of biodiversity.²⁷

Decades of research and implementation of biodiversity net gain-type policies show that there are issues associated with overstating the ability to restore or recreate ecosystem function and structure, time-lags between clearing and achieving net gain, and determining appropriate thresholds of loss.²⁸ There are also well-attested and significant issues associated with compliance with conditions by developers, enforcement by local authorities and a difficulty in auditing progress.²⁹

These issues are noted within Defra's Impact Assessment and reports presented to Defra, and the difficulties surrounding the implementation of biodiversity net gain-type policies will be well-known to Defra and Government. They have been frequently noted as undermining policy level success.

We welcome the proposed reporting requirement for all local authorities and other designated authorities to publish five yearly biodiversity reports (p85). Further to this, and noting the importance of policy level evaluation and monitoring, as we state in our accompanying letter, **we recommend that the Government commit to undertaking (at least) five yearly reviews of the operation of biodiversity net gain across England.**

²⁷ For example, see zu Ermgassen, Baker, Strange et al., above n 3.

²⁸ See, for example, Ambrose above n 3; Bull and Strange, above n 3; Bull, Suttle, Gordon et al., above n 3; Gibbons, Macintosh, Constable et al., above n 3.

²⁹ Gibbons, Macintosh, Constable et al., above n 4; Lindenmayer, Crane, Evans et al., above n 6; zu Ermgassen, Marsh, Ryland et al., above n 3.