



Net Gain Consultation

Department of the Environment, Food and Rural Affairs

First Floor, Seacole Block

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8 February 2019

By email only: netgainconsultation@defra.gsi.gov.uk

Dear Sirs,

NET GAIN CONSULTATION PROPOSALS

The following comments are on behalf of the United Kingdom Environmental Law Association ('UKELA') and reflect views expressed by members of our Nature Conservation and Planning and Sustainable Development Working Parties.

The 'Net Gain' Policy in Principle

UKELA support the principles articulated in the revised National Planning Policy Framework July 2018 ('NPPF') that local planning authorities should, in preparing spatial plans, identify and pursue opportunities for securing measurable net gains for biodiversity and, when deciding planning applications, encourage biodiversity

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Registered charity 299498, company limited by guarantee in England 2133283

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improvements in and around developments (especially where measurable net gains for diversity may be secured) and support developments whose primary objective is to conserve or enhance biodiversity (NPPF paragraphs 174 & 175).

The proposals in the consultation paper would go one step further, mandating a net gain in biodiversity (rather than simply supporting and encouraging it) in certain circumstances.

Those circumstances are, apparently, where having applied the ‘mitigation hierarchy’ it is judged that loss or harm to biodiversity is both unavoidable and incapable of being adequately mitigated on-site. In such cases existing planning policy allows the provision of off-site measures in compensation to be considered as “a last resort” with the developer either undertaking or arranging for the compensating measures to be carried out themselves or making a payment towards compensating measures provided by others. It is now proposed that in such cases the compensating measures should be of such a scale and kind that an overall net gain in biodiversity is secured, assessed by reference to an objective measure such as the DEFRA Biodiversity Metric.

UKELA broadly supports the Government aim to secure net improvements to biodiversity in such cases. However, we consider that there are a number of issues bearing upon how such a policy may be applied in practice through the mechanisms offered by the existing planning system in England. Our comments by reference to the consultation questions (or in certain cases groups of questions) are set out below.

The Consultation Questions

- 1) Should biodiversity net gain be mandated for all housing, commercial and other development within the scope of the Town and Country Planning Act?**

In principle any development has the potential to cause harm to biodiversity. Indeed, some activities which are not development for the purposes of the Town

and Country Planning Act 1990, such as an intensification of agricultural use, may also do so in some circumstances. If the policy is to be applied in accordance with the existing 'mitigation hierarchy' as expressed in paragraph 175 of the NPPF (as the consultation paper implies), then it would only be engaged where there would be 'significant' harm to biodiversity which could not be avoided (e.g. by locating the development elsewhere). Such a combination of factors is likely in itself to limit the number of cases in which net gain would be mandated and to attempt to devise exemptions by size or category of development would be inappropriate in our view.

The more important question is where or how to set the threshold for 'significant' harm in this context if existing biodiversity is to be measured according to a metric and harm (and net gain) assessed accordingly? For instance, at present the requirement for Environmental Impact Assessment ('EIA') is only engaged for certain categories of development where the scale would exceed certain specified thresholds and there would be likely to be 'significant' environmental effects (assessed by reference to a range of factors but ultimately on a project-specific basis). The implication of the consultation proposals is that the net gain policy would in principle apply to proposals well below the existing thresholds for EIA with harm determined on a systematic basis according to a generally applicable metric. Plainly if the EIA and net gain regimes are to operate in parallel in the spatial planning and development management systems, they must lead to consistent outcomes.

Elsewhere in the consultation paper it is suggested that the policy could specify a percentage net gain, measured according to the metric, to be achieved as a minimum in order to satisfy the net gain requirement; and that where the net gain expressed in biodiversity units is small in absolute terms, it might be justified to permit the developer to make payments under a tariff system rather than attempt to craft a small off-site compensation scheme of their own. The two suggestions indicate a possible approach for determining the scope of the policy by reference to the biodiversity value of the site (e.g. sites below a certain biodiversity value would be excluded) and/or by reference to the loss (or gain) of biodiversity as a result of the development in question (e.g. a percentage loss or gain below a

specified threshold would not be 'significant' for the purposes of the policy). Such an approach would have the merit of being based upon biodiversity value, rather than simply the size of the site or the character of the development.

2) What other actions could the Government take to support the delivery of net gains?

Under the consultation proposals, the incentive for the developer to provide or contribute to net gain is the prospect of obtaining planning permission. There is no similar incentive for a developer whose scheme would not engage the policy (either because there would be no significant harm to biodiversity or the harm would be adequately mitigated) to go further.

3) Should there be any specific exemptions?

4) Are there any sites that should be granted exemptions and why?

See (1) above.

5) As an alternative to an exemption, should any sites instead be subject to a simplified biodiversity assessment process?

See (1) above. According to where the threshold is set for the policy to be engaged there may be a case for a form of simplified assessment or a screening process to determine whether a 'full' assessment is necessary.

6) Do you agree that the DEFRA metric should allow for adjustments to reflect important local features such as local sites? Should the DEFRA metric consider local designations in a different way?

If the metric effectively represents biodiversity value, then there should be no need for adjustments to reflect local designations founded upon biodiversity interest. However, local designations, if not directly related to the biodiversity value of the land concerned, will normally be a measure of its importance in the

locality and to the surrounding community and therefore highly relevant to where and in what form any compensating measures should be provided.

7) Should local authorities be required to adopt a robust district level licensing approach for great crested newts, where relevant, by 2020?

Given the long-term nature of population dynamics it may be too early to say that this approach is successful and the evidence of experience to date should be reviewed on an adaptive management basis before it is wholeheartedly adopted.

8) For what species is it plausible to use district level or strategic approaches to improve conservation outcomes and streamline planning processes?

See (7). There is clear potential in the approach but given population dynamics and variation between species experience to date and/or pilot studies should be evaluated before applying the approach more widely.

9) Are there wider elements of environmental net gain that could be better incentivised?

Whilst there is the potential to attempt to account for the overall environmental 'footprint' of development, the challenge in every case would be to determine an appropriate baseline and how any 'gain' would be assessed and valued (and over what time period).

10-11) Is the DEFRA biodiversity metric an appropriate tool/possible improvements to the DEFRA metric?

There needs to be clearer treatment of issues of coherence and substitution (see (14) and (20)).

12) Would a mandatory 10% increase in biodiversity units be the right level of gain to be required?

There are uncertainties in ensuring implementation and, even if schemes are implemented perfectly, in achieving long-term success. Whilst it is acknowledged

that some aspects of uncertainty are built into the metric, a target of 10% allows only a limited margin for error. Bearing in mind the circumstances in which the policy would be engaged it would be preferable to establish a high target, at least at the outset, but subject to future review in the light of experience.

13) In clearly defined circumstances, should developers be allowed to pay through the tariff mechanism without fully exhausting on-site and local compensation opportunities?

Although this option might be seen as a logical consequence of adopting a net gain approach which allows an element of substitution, there is the risk that public confidence in the system will be undermined if it is believed that developers are being allowed simply to pay in exchange for harming biodiversity, rather than being required to make every effort to avoid such harm with compensation only entertained as a last resort.

The question is posed by reference to the example of a “minor loss of habitats which are not of particular value to wildlife”. We have already commented on determining the scope of the policy primarily by reference to biodiversity value and/or anticipated impact (see (1) and (5), perhaps in conjunction with a screening mechanism), noting that the mitigation hierarchy in paragraph 175 of NPPF applies where there is ‘significant’ harm to biodiversity. If an appropriate threshold for significance is adopted the circumstances canvassed in the question may not arise.

14) Would this be an appropriate approach to directing the location of new habitat?

It is important that a strong spatial element is included throughout the system (see (6)).

Apart from the issues identified in the consultation paper, there is growing evidence of the health benefits of access to nature; see for example *The cost-effectiveness of addressing public health priorities through improved access to the natural outdoors* (Aug 2017) <http://valuing->

nature.net/sites/default/files/documents/Reports/Naturally_healthy/EKN%20Naturally-Healthy-Report-Final-96dpi.pdf .

15) How could biodiversity assessments be made more robust without adding to burdens for developments or local planning authorities?

Assessments must be thorough and must reflect the full natural cycle. Every site is different and the endless variety and variability of nature cannot be reduced to a few simple categories. There are no short-cuts. An advantage of including a 'screening' stage is that it would permit the scope of the assessment in any individual case to be proportionate to the circumstances.

16 - 19) The Use of 'Baseline' Mapping, etc

The possibility of falling back on off-site compensation arises in circumstances that are specific to the development and site under consideration. It is the combination of (i) a development proposal whose characteristics make harm to biodiversity unavoidable (e.g. because the development is necessary and cannot be located elsewhere) with (ii) a site which has inherent biodiversity value the loss of which it is desirable and possible to compensate for, that allows net gain to be entertained. Since any assessment in such circumstances would be necessarily bespoke, baseline mapping would not be of great assistance.

Experience of the original procedure for designating SSSIs under the Wildlife and Countryside Act 1981 suggests that there is a real risk of attempts being made to "alter the baseline" in preparation for development.

20 -21) The Use of 'Habitat Opportunity Maps' etc

These questions concern a vital element in any net gain discussion. Unlike greenhouse gases, biodiversity is not fungible. Abstract biodiversity units are not interchangeable. Each species requires specific habitat. Each site depends on a network of connections with other sites. Some species require very different habitat in distant places at different times of their life or annual cycles. A new inland wetland is no substitution for the loss of coastal dunes. A real danger of any net gain approach is that it allows uncontrolled substitutions. A full 'like-for-

like' requirement (any lost habitat must be replaced by habitat of exactly the same kind) removes the flexibility which is an advantage of a net gain approach, but flexibility must be controlled and the results monitored. Otherwise there is a real danger of some sorts of site being lost in exchange for those which are cheaper and easier to enhance or (re)create, and of nature being translocated from areas of development pressure to those where land is more readily (and cheaply) available. There must be clear direction and robust monitoring to avoid harmful redistributions arising (locally and nationally) and strong "red flagging" to ensure that important sites can never be "traded" for others.

22 - 23) Stimulating a Market for Biodiversity Units

A market is only likely to develop if the net gain system becomes mandatory and will depend upon other legal and policy features that will influence supply. These includes taxation, agricultural support arrangements, property law and tenure, fiduciary obligations (where making land held under trust available as habitat may not produce the best short-term financial return), etc.

24 - 25) Duration

Plainly compensating habitats must be secured for a substantial period of time. Research shows that even apparently fairly quickly developing habitat may take decades to come close to the richness of undisturbed sites - and this is looking only at the large species, not the unknown diversity of the microfauna; see for example Woodcock et al,¹ 'which indicates that it may take 60 years for functional equivalence to be achieved and 150 years for fuller (but still not complete) equivalence – obviously a woodland would take much longer than a meadow. The system would be brought into disrepute if a site dedicated to nature as a price for development elsewhere is then itself sacrificed to development, especially if community and voluntary action has gone in to supporting the new site (as may often be desired). Replacing old trees with new ones which never get beyond 20 years old before being replaced by further new ones as development takes over would be a total failure of a net gain system.

¹ *Can long-term floodplain meadow recreation replicate species composition and functional characteristics of target grasslands?* (2011) 48 *Journal of Applied Ecology* 1070

26 - 27) Conservation Covenants

Whilst the Law Commission's proposals for a new form of 'conservation covenant' would support the net gain approach by enabling positive obligations to be imposed on the use of land in the long-term, enforcement would in practice depend upon the landowner's capacity to perform the obligations meaning, in most cases, whether there were sufficient resources available to enable them to do so. For example, if compensating habitat is created by a developer on land which is subject to conservation covenants imposing positive management obligations on the basis that the land would then vest in a trust having responsibility to perform the obligations, it would be necessary to be confident at the outset that the trust would have sufficient income or, as it may be, capital in order to meet the obligations in the long-term in order to rely on the arrangement to secure net gain.

28 - 33) The Use of Tariffs

It is important to be clear whether what is proposed is simply an 'impact fee' or a mechanism genuinely intended to match or exceed the value of the biodiversity loss. If the latter, then the application of a tariff would appear to be incompatible with the principle that the case for offsetting would arise out of the distinct circumstances of the individual development proposal and site under consideration.

34) Burdens on Local Authorities

The burdens on local authorities will be increased to the extent that development proposals are brought forward that engage the net gain policy. In practice such proposals ought to be comparatively rare, since for most forms of development that threaten significant harm to biodiversity the harm will be avoidable, either because unless the development has unique or distinct characteristics that call for a specific site it will usually be possible to locate it (or an alternative)

elsewhere, or because suitable mitigation can be achieved as part of the scheme.

If the net gain approach were to function as a form of 'impact payment' approach of more general application, the additional burden on local authorities would be substantial.

35) How could the proposals be refined to manage any negative impacts on the scale and delivery of other developer contributions?

At the spatial planning stage, where there is a choice between sites, if the costs of providing compensating habitat are such that a development would be unable to meet other obligations, that is likely to weigh against the site being selected ahead of alternatives not subject to the same constraint.

At the development management stage, where there is a compelling case in favour of granting planning permission for a development despite the harm to biodiversity that it would cause, applying the Viability Guidance issued with the NPPF revisions in July 2018 would enable the overall quantum available for developer contributions of all kinds to be determined. It would then be for the decision maker to decide on the relative weight to apply to each when deciding whether to grant planning permission either (a) at all or (b) on what terms.

36) Collection and Use of Tariff Revenue

See our earlier comments on coherence, substitution and location ((11), (14) and (20).

37) How could the proposed net gain process be improved for developers?

Developers value certainty, clarity and consistency. The scope of the net gain policy and the circumstances in which it would be engaged should be stated clearly to enable developers to account for the policy when negotiating for land and formulating site-specific development proposals.

38) What others steps, considerations or processes in environmental planning could be integrated within a net gain approach?

Whilst the focus of the consultation is on what might be termed 'conventional' development proposals there are many other forms of development falling broadly under the heading of infrastructure which have the potential to cause harm to biodiversity and which are more likely to fit the criteria in paragraph 175 of NPPF for off-site compensation to be considered.

39) Would any particular types of development be disproportionately affected by a mandatory biodiversity net gain requirement?

No.

40) Staggered transitional arrangements.

According to the scope of the policy (e.g. where the threshold of significance is set and whether some form of screening is incorporated) transitional arrangements will assist implementation.

41 - 43) Dispute Resolution and Enforcement

Disputes may arise at any stage in the process, i.e. during the planning application (about the extent of harm to biodiversity, whether the net gain policy is engaged, what compensating provision is necessary), following a grant of planning permission during the implementation of the development and compensating measures (in discharging conditions or complying with the terms of a planning obligation or, in future, a conservation covenant) or after the development and compensating measures are completed (in enforcing the terms of a planning obligation or conservation covenant). Disputes may be resolved by planning appeal or in the courts depending upon the nature of the dispute and stage in the process. We do not consider that new dispute resolution mechanisms are necessary but are concerned that the enforcement burden will fall primarily on local planning authorities in each case and that adequate resources will need to be made available to support them.

44) Should local authorities be required to provide information about habitat losses and gains?

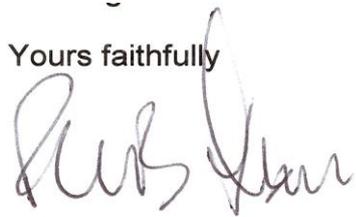
Transparency will be key to building public confidence. In the case of individual development proposals there are already publicity requirements as part of the planning application and EIA processes. Reporting at a local authority-wide level is unlikely to be necessary only as a result of adopting a net gain policy but may be a useful measure supporting the delivery of the 25 Year Environment Plan.

45) What technological or other innovative mechanisms could facilitate the delivery and monitoring of biodiversity net gain?

We have no immediate suggestions in answer to this question.

We trust that these comments are of assistance and would welcome the opportunity to participate in further consultation in due course.

Yours faithfully



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On behalf of UKELA