Biodiversity Net Gain & Habitat Banking

Implementation Guidance for West Midlands Combined Authority

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The West Midlands Combined Authority (WMCA) has commissioned HCR Law to prepare this advice upon the implementation of Biodiversity Net Gain (BNG) and Habitat Banking.

The advice is provided on the basis of the law and guidance in effect as at 09 December 2024.

IMPORTANT NOTES

- Chapters 1 & 2 of this document primarily provide an overview of the law, policy and guidance relating to Biodiversity Net Gain. However, there are elements of commentary and opinion from the authors which are highlighted by way of the use of text boxes. The remaining chapters are exclusively commentary and opinion other than where expressly referenced.

- This document is initial advice and is not intended to comprehensively advise. Specific advice should be obtained on a case-by-case basis and in light of the particular circumstances of each case;

- This advice is accurate at the date of preparation, but please check for updates to law and practice;

- The subject of this advice is an evolving area and guidance and market conditions are likely to change; and

- This advice is prepared for the benefit of WMCA and its constituent authorities and can be shared with stakeholders linked with the WMCA and constituent authorities for the purpose of the consideration of BNG within the WMCA area and as such is to be relied upon in the manner mentioned above.

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1. BNG LAW AND POLICY

1.1 Legal Background

The Environment Act 2021 mandates net gain in biodiversity through the planning system, requiring at least a 10% increase in biodiversity in respect of all applications for planning permission submitted after 12 February 2024 (with some limited exceptions) after development, compared to the level of biodiversity prior to the development taking place, as measured by a Metric set out by Defra.

The intention being to ensure that habitats for wildlife are left in a reasonably better state than they were before the development. The requirement is considered key to fulfilling the Government's target to halt species decline by 2030.

The regime has a statutory footing and the key pieces of legislation are as follows:

Legislation	**Title**	**Summary of key provisions**
Primary Legislation	Environment Act 2021 ("the 2021 Act")	Makes provision about targets, plans and policies for improving the natural environment; for statements and reports about environmental protection; for the Office for Environmental Protection; about waste and resource efficiency; about air quality; for the recall of products that fail to meet environmental standards; about water; about nature and biodiversity; for Conservation Covenants; about the regulation of chemicals; and for connected purposes. In particular, the legislation makes provision for Nature and Biodiversity in Part 6 by way of the establishment of the Biodiversity Net Gain regime and provides for the creation and effect of Conservation Covenants in Part 7.

	Note also the Natural Environment and Rural Communities Act 2006 (as amended) ("the NERC Act")	The Biodiversity Duty (section 40) is amended to a general duty to both conserve and enhance biodiversity
Secondary Legislation	The Biodiversity Gain Requirements (Exemption) Regulations 2024 ("the Exemption Regulations")	Lists the exemptions to the requirement to deliver BNG
	The Biodiversity Gain Requirements (Irreplaceable Habitats) Regulations 2024 ("the Irreplaceable Habitat Regulations")	Modifies the BNG regime in relation to irreplaceable habitats
	The Biodiversity Gain Site Register Regulations 2024 ("the Register Regulations")	Requires Natural England to establish and maintain the Biodiversity Gain Site Register and regulates the use of that Register
	The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 ("the Fees Regulations")	Sets out financial penalties and fees payable in respect of applications relating to the Biodiversity Gain Site Register

	The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024 (“the Modification Regulations”)	Applies the BNG regime in respect of phased developments
Other relevant legislation	Natural Environment and Rural Communities Act 2006 (as amended) (“the NERC Act”)	The Biodiversity Duty (section 40) is amended to a general duty to both conserve and enhance biodiversity
	Town and Country Planning Act 1990 (as amended) (“the 1990 Act”)	The planning regime is amended to account for the requirements to deliver BNG (Schedule 7A)

1.2 Statutory basis for Biodiversity Net Gain (“BNG”)

The Environment Act 2021 (“the 2021 Act”) establishes the BNG regime and creates a new form of legal document through which the BNG regime can be secured, known as Conservation Covenants (see paragraph 1.14 below). BNG can also be secured through the existing Section 106 planning obligation mechanism (see paragraph 1.10.2 below).

The 2021 Act makes amendments to existing legislation, most notably the Town and Country Planning Act 1990 (“the 1990 Act”) and is accompanied by numerous pieces of secondary legislation as detailed in paragraph 1.1 and section 1 of this advice more generally.

Broadly speaking, the BNG regime comprises the following key features:

(i) The imposition of a mandatory requirement to comply with a Biodiversity Gain Condition to achieve the Biodiversity Objective of securing a net gain of 10% in new development (subject to exemptions);

(ii) The BNG is to be calculated based on the pre-development and post-development biodiversity values of a development site using the Biodiversity Metric;

(iii) In achieving BNG the Biodiversity Hierarchy is to be observed so far as possible, which prefers on-site delivery of BNG but allows for off-site gains to be secured where appropriate and for last resort to be had to Statutory Credits where necessary;

(iv) The details for the provision, maintenance and monitoring of the BNG will be documented in a Habitat Maintenance and Monitoring Plan ("HMMP") which will be approved pursuant to the Biodiversity Gain Condition and secured for a period of 30 years by way of planning condition, Section 106 Agreement or Conservation Covenant;

(v) The BNG must then be delivered and monitored in accordance with the approved Biodiversity Gain Plan ("BGP") and will be enforced on that basis.

1.3 Biodiversity Gain Objective

Section 40 of the NERC Act has been amended by section 102 of the 2021 Act to introduce the general duty on public authorities to both conserve and enhance biodiversity.

The amended section 40(A1) will require public authorities with functions exercisable in England to from time to time consider what action the Local Authority can properly take, consistently with proper exercise of its functions, to further the general biodiversity objective.

This requires public authorities in England when undertaking their functions to consider what action can be taken from time to time (consistent with the proper exercise of their functions) to further the Biodiversity Objective.

Public authorities must then take these proposed actions to further the general biodiversity objective and are required to periodically report on these actions. The first review must be undertaken within 1 year of the Environment Act 2021 coming into force and at least every 5 years thereafter (section 40(1C) and (1D)).

1.4 The Biodiversity Hierarchy

The Biodiversity Hierarchy, (which does not apply to irreplaceable habitats) set out the hierarchy to be adhered to in seeking to deliver BNG (Article 37A Development Management Procedure Order). This provides that:

(i) first, in relation to on-site habitats which have a medium, high and very high distinctiveness (a score of four or more according to the Biodiversity Metric), the avoidance of adverse effects from the development and, if they cannot be avoided, the mitigation of those effects; and

(ii) in relation to all on-site habitats which are adversely affected by the development, the adverse effect should be compensated by prioritising in order, where possible, the enhancement of existing on-site habitats, creation of new on-site habitats, allocation of registered Off-Site BNG and finally the purchase of biodiversity credits.

Local planning authorities must take into account the Biodiversity Hierarchy when deciding whether to approve the Biodiversity Gain Plan. In particular, the authorities are to consider whether the Biodiversity Hierarchy has been applied and if not, the reason why not. In the usual way, the Local Planning Authority should give reasons in the event that the Biodiversity Gain Plan is not approved.

Please note that this is distinct from the Mitigation Hierarchy set out in paragraph 186(a) of the NPPF which states that a planning application should be refused if significant harm to biodiversity resulting from the development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigates or, as a last resort, compensated for. The PPG advises that how BNG will be secured for a development may be relevant to consideration of the policy in the NPPF, especially in relation to adequate mitigation and compensation (paragraph 008 Reference ID: 74-008-20240214).

1.5 Biodiversity gain condition

Section 98 of the 2021 Act makes provision for biodiversity gain to be a condition for planning permission in England. This requirement is dealt with in Schedule 14 of the 2021 Act by way of the insertion of a new Section 90A and Schedule 7A in the 1990 Act.

In particular, the legislation provides that this condition will be deemed to apply in respect of all planning permissions subject to BNG.

To meet the Biodiversity Gain Objective for which planning permission is granted, the biodiversity value attributable to the development must exceed the pre-development biodiversity value of the on-site habitat (see paragraph 1.7) by at least 10% (para 2(1) and (3) Schedule 7A 1990 Act).

The biodiversity value of a development is the post-development value of on-site habitat plus the biodiversity value of any registered Off-Site biodiversity gain value allocated to the development plus the biodiversity value of any biodiversity credits purchased for the development (para 2(2) Schedule 7A 1990 Act) (see paragraph 1.9).

The BNG regime does not replace or override any provisions and policies relating to other environmental designations, protected status or species-based features, such as bird or bat boxes and any such requirements would also apply.

1.6 Biodiversity Metric

The Biodiversity Metric uses habitats and 'biodiversity units' as a proxy for biodiversity. The units resulting from the Biodiversity Metric calculation will fall into one of three 'modules' being area units, hedgerow units or watercourse units. The respective modules are assessed and valued separately and the BNG to be delivered to offset the development should reflect the habitat categories lost as a result of the development.

All references to biodiversity value are to be calculated in accordance with the Biodiversity Metric (para 3 Schedule 7A 1990 Act). The Biodiversity Metric measures biodiversity value or relative biodiversity value of habitat or habitat enhancement. The Biodiversity Metric can be updated from time to time by the Secretary of State but all iterations must be laid before Parliament (para 4, Schedule 7A 1990 Act).

The current Biodiversity Metric (this is the statutory version which replaced the earlier version 4.0 (which in turn replaced version 3.1)) and associated user guides is available using the following link:

https://www.gov.uk/government/publications/statutory-biodiversity-metric-tools-and-guides

Please see more detail in paragraph 2.7.

1.7 Pre-development on-site habitat value

The pre-development on-site habitat value is generally calculated at the 'relevant date' being the date of a planning application or in any other case (i.e. where planning permission is not granted in response to an application), on the date the planning permission is granted (para 5(1) to (2) Schedule

7A 1990 Act). This is unless an earlier date is agreed with the Local Planning Authority which is after the date on which Schedule 7A came into force, i.e. on 12 February 2024.

The Local Planning Authority has discretion to agree another date and will need to decide whether to exercise that discretion in light of the particular circumstances of a request or the Local Authority's instigation. This may be to reflect a notable event or incident which altered the ecological condition of the site, policy or based on the information available. Given the statutory commencement of this requirement, the agreement of an alternative date (after 12 February 2024) would need to be justified as this may be a basis for legal challenge if not properly considered and justified.

1.8 Degradation

1.8.1 What is degradation?

Degradation is a deliberate reduction in the biodiversity value of on-site habitat as a result of works or activities carried out on-site so as to influence the outcome of the application of the Biodiversity Metric. Or, in other words, to lower the baseline biodiversity value of the land so as to reduce the BNG requirements for a development.

Whilst it is not formal policy or guidance, British Standard BS42020:2013, section 6.4.8 recommends that a retrospective impact assessment will be required where it is obvious that habitats at a site have been cleared or damaged prior to assessment by an ecologist. If evidence is available to demonstrate that deliberate damage or complete removal of habitats on an application site, the worsened condition will not be taken in to consideration, information will be gathered to ascertain the past habitat value of the site which will form the BNG baseline against which the proposals will have to deliver.

1.8.2 What are the dates to be aware of?

(i) On or after 30 January 2020 without planning consent

If a person carries on activities on land after 30 January 2020 otherwise than in accordance with a planning permission or other permission of a kind to be specified by the Secretary of State, as a result of which the biodiversity value of the on-site habitat is lower on the relevant date than it would have otherwise been, then the pre-development biodiversity value for the on-site habitat shall be taken to be the value immediately prior to carrying on those activities (para 6 Schedule 7A 1990 Act).

Therefore, if works are undertaken on land after 30 January 2020 without planning consent so as to degrade the biodiversity value of the on-site habitat, then the predevelopment biodiversity value is fixed as at the date prior to carrying out the degrading works.

Planning permission is defined in the 1990 Act as permission under Part III (which includes permitted development) or s293A (urgent crown development) but not permission in principle. Therefore, works undertaken without planning permission or the benefit of permitted development rights will be caught by this section.

However, it is not clear what the position is if no planning permission was required for those activities. For instance, planning permission is not required to plough a field; if that reduces the habitat value of the land, it is not clear that this will be caught by this provision. Or in other words, whether works must be unlawful in order for them to amount to degradation. It may well be that case law or appeals decisions are determined on this point in due course.

Over time this may become more difficult to evidence and assess but landowners and developers will be aware of the provisions and so, should be ensuring that they equip themselves with the evidence on this point and factor this into their commercial arrangements on the acquisition and disposal of land.

(ii) On or after 25 August 2023 with planning consent

If works are carried out on land after 25 August 2023 in accordance with a planning permission that lower the biodiversity value of the site, the pre-development biodiversity value of the on-site habitat is taken to be the biodiversity value immediately before the carrying out of the activities (i.e. the relevant date shall be the date immediately before works) (paragraph 6A Schedule 7A 1990 Act).

This provision operates to restore the baseline to the less favourable baseline position, even if the works were authorised. However, in this instance, there is a possibility that the Local Planning Authority could be invited by the applicant to agree to an alternative date and this would be a point for consideration by the Local Planning Authority (see paragraph 1.7).

(iii) LPA approach

It may be that the Local Planning Authority undertakes investigations as to whether degradation has occurred as a matter of course. For example, to require historic images (perhaps from a public source such as Google Earth, if available) of the site to be supplied with an application. Any such information required or requested to be submitted should be realistic and achievable for a landowner/applicant

to supply. Particularly given that the landowner/applicant may not have had an interest in the site at the relevant date.

The Metric User Guide suggests using dated records, imagery and historic field surveys to determine pre-degradation habitat types. It advocates a precautionary approach when assigning condition scores, i.e. to use a higher condition score in the absence of contrary evidence.

The Metric User Guide provides advice to those completing or reviewing the Biodiversity Metric. This suggests that the pre-degradation habitat type should be used as the site's baseline together with evidence of how this habitat type and condition has been determined in the user comments. The time between the habitat loss and compensation should be noted in the Metric using the 'delay in starting habitat creation or enhancement' function

The PPG provides (at paragraph 036 Reference ID: 74-036-20240214) that Local Planning Authorities may want to require more information to be provided on this point at submission or while consideration is underway. This may include:

- A statement of the degradation activities that have been carried out;
- Confirmation of the date immediately before these works were carried out;
- Pre-development biodiversity value of the site on this date;
- Completed metric calculation tool showing the calculations; and
- Any available supporting evidence (Para 6 of Schedule 7A of the 1990 Act)

This information should allow the Local Planning Authority to determine whether the degradation works were lawful or unlawful and how the works impact the requirement to deliver BNG.

As the baseline biodiversity value is the key starting point for an application it should be agreed with the applicant early in the planning process.

There is no express provision as to the timing to agree the baseline biodiversity value. Applicants are likely to have in mind the baseline biodiversity value of their site as part of their site appraisal and design, in which case they may have or seek to establish the position at pre-application or application stage. If that is not the case, then pre-application advice may wish to advise that the biodiversity baseline is considered, if no baseline information has been submitted with the request

for advice. Otherwise, the Local Planning Authority may wish to consider whether baseline biodiversity value information is submitted with an application (see paragraphs 1.17.2 to 1.17.3).

(iv) Statutory presumption

If there is insufficient evidence of biodiversity value immediately before the activities referred to above were carried out, then the biodiversity value shall be taken to be the highest biodiversity value of the on-site habitat reasonably supported by any available evidence relating to the on-site habitat (paragraph 6B Schedule 7A 1990 Act).

If planning permission is granted in respect of land which is included on the Biodiversity Gain Site Register then the pre-development biodiversity value shall be the biodiversity value of the on-site habitat at the relevant date and if not included in that value, the value of the habitat enhancement which is to be achieved on that land (para 7 Schedule 7A 1990 Act).

1.9 Post-development biodiversity value

The on-site habitat is the projected habitat value as at the time at which the development is completed (para 8 Schedule 7A 1990 Act). This is calculated by either adding the amount of any increase in the value of the on-site habitat at the time the development is completed, or, reducing by the amount of any decrease in value of the on-site habitat at the time the development is completed.

"Completed" is not defined in the Act and could give rise to an issue where a development is not built out in full. Local planning authorities may wish to consider adopting an agreed approach in this regard.

If the addition to the value of the on-site habitat at the completion of the development, according to the Biodiversity Gain Plan, is considered to be significant by the Local Planning Authority then the increase in biodiversity value can only be taken into account in calculating the post-development biodiversity value. However, this is only if the maintenance of the habitat enhancement for at least 30 years after the development is completed is secured by planning condition, Conservation Covenant or planning obligation (para 9 of Schedule 7A 1990 Act).

The DEFRA Guidance provides guidance as to what is likely to constitute a significant enhancement - https://www.gov.uk/guidance/make-on-site-biodiversity-gains-as-a-developer#significant-on-site-enhancements.

To extract some examples from the Guidance, it provides that the habitat enhancement works means capital works such as planting trees, digging ponds, fencing and sowing wildflower seeds and can also mean stopping management activities that could prevent the proposed habitat enhancement from happening, for instance, stopping applying fertiliser to grassland, changing a grazing regime and stopping ditch clearing. Completion of habitat enhancement works can also mean just stopping management activities with no capital works.

See further paragraph 2.21.1 below. As to what is significant, some local planning authorities have their own policies on this (such as Birmingham and Maidenhead) and so local planning authorities may wish to consider their approach in this regard.

(i) LPA approach

In this context, paragraph 9 of Schedule 7A the 1990 Act refers to the ability to secure BNG by way of planning condition, Conservation Covenant or planning obligation. A planning obligation encompasses a bilateral Section 106 Agreement or a Unilateral Undertaking, so as to indicate that any of these options can be found to be acceptable. However, only a bilateral Section 106 Agreement is capable of being relied upon to secure Off-Site BNG and to be registered for the purposes of the Biodiversity Gain Site Register.

Therefore a Unilateral Undertaking should only be relied upon for On-Site BNG and in this instance, it would generally be assumed that a planning condition would be preferable unless there is a reason to opt for a planning obligation, i.e. the condition does not meet the statutory tests or cannot achieve or secure the correct nature or level of maintenance, monitoring and reporting in respect of any of those operations.

It should be noted that if costs are to be recovered by the Local Planning Authority in respect of the time and costs incurred in monitoring the delivery of BNG then a planning obligation will need to be entered. It is not possible to recover any such costs pursuant to a planning condition.

This will be a key motivation to use a planning obligation in view of the level of resource likely to be incurred in monitoring compliance even if that maintenance is limited to reviewing monitoring reports submitted to the Local Planning Authority by the BNG provider.

In order to rely upon a planning condition, the usual legal tests for the imposition of a planning condition would need to be satisfied (section 70 1990 Act). Also, the condition must be necessary,

relevant to planning, relevant to the development to be permitted, enforceable, precise and reasonable in all other respects (paragraph 55 of the NPPF).

1.10 Registered Off- Site BNG

In the event that the Biodiversity Gain Objective cannot be adhered to by way of the delivery of BNG on-site, then subject to compliance with the Biodiversity Hierarchy, it is possible to look for off-site solutions.

1.10.1 What is a registered Off-Site BNG?

Registered Off-Site BNG means any habitat enhancement to be delivered on land not within the planning application red line in order to meet the BNG requirement of the proposed development.

1.10.2 How to secure Off-Site BNG?

For more information on Section 106 Agreements see paragraph 2.24.1.

Any registered Off-Site BNG is required to secured by a Conservation Covenant or planning obligation which is recorded in the Biodiversity Gain Site Register (paragraph 10 Schedule 7A 1990 Act).

PAS has published a template Section 106 Agreement for the creation of Off-Site BNG (https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng) on which we have the following observations:

1.10.2.1 Parties

The template does not deal with a situations where the obligations in relation to Off-Site BNG are included in the Section 106 Agreement for the development as a whole. In this situation, it will be necessary to ensure that the obligations in relation to the development site are expressed to bind that land only and that the obligations in relation to the BNG land are expressed to bind the BNG land only.

1.10.2.2 Conditionality

The template provides for the Section 106 Agreement to come into effect on completion. This is unlikely to be acceptable to a developer who will at least require it to be conditional on grant of the relevant planning permission, and ideally commencement of the development.

1.10.2.3 Statement of Achievability

The template includes provision for a statement of achievability to be submitted when the Section 106 Agreement is entered into to assist the Local Planning Authority with their assessment as to whether the BNG works and maintenance are achievable. This is something that may be challenged by developers on the basis that the HMMP should be sufficient to demonstrate deliverability.

1.10.2.4 Timeframe for Completion of Works

The template requires the BNG works to be done within 12 months of registration of the Section 106 Agreement, although it acknowledges that this is not a statutory requirement. Developers are likely to resist a commitment to carry out works before development has commenced and therefore a requirement to carry out the works within 12 months of commencement of development may be more appropriate. They may also want to adopt a phased approach to the completion of the works (which is acknowledged in the template).

1.10.2.5 Certificate of Completion

The template includes a sign off process whereby the enforcing Local Authority must inspect the habitat creation works on completion and certify that they have been completed to their satisfaction. This may be objectionable for developers in that they will be concerned about delays to the development due to a failure/delay to inspect/issue the Certificate. A deemed approval provision may be appropriate by way of a compromise.

1.10.2.6 Notification of Allocation and Monitoring

The template requires the enforcing Local Authority to be notified when the land/units are first allocated and when the BNG capacity has been fully allocated. Such provisions are unlikely to be necessary in a Section 106 Agreement that is expressly linked to a particular development as the units are effectively allocated on completion of the Section 106 Agreement. They are only appropriate where there is some surplus capacity to be allocated to a different development(s).

1.10.2.7 Monitoring by Enforcing Local Authority

The template imposes an obligation on the enforcing Local Authority to monitor the implementation of the HMMP by way of inspection of the site on an annual basis for the first 5 years and then every 5 years thereafter. Local authorities may prefer to impose monitoring requirements on the BNG landowner/developer and adopt more of an oversight role.

1.10.2.8 Monitoring Fee

The template provides for a monitoring fee to be paid annually for the full 30 year period. It may be more appropriate for the monitoring fee to be paid every 5 years after the first 5 years, but local authorities should consider what is required in each case with reference to the above monitoring requirements.

1.10.2.9 Access Rights

The template includes access rights for the Local Planning Authority to both the BNG land and neighbouring land in the same ownership. Landowners are likely to be concerned to ensure that nothing can be done to prevent or interrupt their use/activities on land beyond the designated BNG land.

1.10.2.10 Modification of HMMP

Whilst the template includes provision for modification of the HMMP, it is not clear enough that the BNG landowner can instigate this process at any time. This is something that is likely to be required by most BNG landowners.

1.10.2.11 Variation Events

The template includes a broad range of variation events that can give rise to amendments to the Section 106 Agreement. Specifically, there is provision for the Section 106 Agreement to be amended where there is a change to the Metric. Also, where the land becomes encumbered by any right that would be incompatible with BNG, such as designation as a new town, village green or the creation of public rights of way. Local Planning Authorities should consider limiting this to encumbrances which are not within the landowners' control, which is not the case in the template currently.

1.10.2.12 Modification Notice

The template includes provision for the service of a Modification Notice where the BNG landowner wishes to release land from the Section 106 (where not allocated). This is unlikely to be required in a Section 106 Agreement dealing with Off-Site BNG for a specific development unless there is some uncertainty as to whether the whole of the development will come forward, or is there is surplus capacity that has not yet been allocated/committed for allocation to a development(s). However, it is likely to be an important provision for a Habitat Bank provider.

1.10.2.13 Force Majeure

The template does not include a force majeure provision (i.e. a release where there is an act of god or other event outside the landowner's control which prevents compliance with the obligations in the Section 106 Agreement), and suggests that this can be dealt with in the HMMP. The inclusion of such a clause is often very important for a BNG landowner and the scope of the clause can be contentious. In particular, climate change and arson/damage as a result of antisocial behaviour are key concerns for BNG landowners. This is particularly the case for conservation charities who may have a limited pot of money for the works involved and may not have the resources to undertake remedial works.

1.10.2.14 Bond

The template includes provision for a bond to secure the obligations in the Section 106 Agreement, including the requirement to pay a monitoring contribution to the Local Planning Authority. The amount of the bond is reduced over time. A requirement to provide such a bond may well be opposed by BNG landowners/developers and alternative forms of security may be considered. The monitoring contribution will be required and this can be paid up-front or in stages, if the latter, it may or not may be included within the security. Both costs will need to be met by the landowner/BNG provider.

1.10.2.15 Financial Reporting

The template does not include any provision for financial reporting in terms of the income and expenditure relating to the BNG site. Provisions of this nature are usually resisted by the BNG landowner in any event and in most cases need not form part of the Section 106 Agreement obligations unless there are particular circumstances that make it necessary/appropriate.

1.10.2.16 Mortgagee's Clause

The template includes a standard mortgagee exclusion clause which provides that they will not be liable for the obligations in the Section 106 Agreement unless they go into possession of the land. Some mortgagees will also require the clause to exclude liability for any pre-existing breaches in the event that they go into possession (albeit that their successors will be bound). Local authorities will need to consider whether such drafting is acceptable to them.

(i) Limitation of Liability

Where the BNG obligations form part of the wider Section 106 Agreement for the development site, the template will need to be amended to broaden the exclusion provisions to include, for instance, plot purchasers.

See further paragraph 2.24.1 and 2.29.

1.10.3 How to calculate?

The habitat enhancement is calculated as the amount by which the projected value of the habitat on the Off-Site BNG site at the end of the 30 year maintenance period exceeds its pre-enhancement value at the 'relevant date' (paragraph 10(1A) Schedule 7A 1990 Act). For these purposes, the 'relevant date' is the date on which the application is made to register the land on the Biodiversity Gain Site Register or such other date as may be specified in the Conservation Covenant or planning obligation (paragraph 10(1C) Schedule 7A 1990 Act).

1.11 BNG in NSIPs

The Government has said that BNG will apply to nationally significant infrastructure projects ("NSIPs") from November 2025 although such projects are likely to need to examine their impact on habitats in the meantime.

Section 99 of the 2021 Act provides for BNG in relation to development consent for NSIPs. These provisions are set out in Schedule 15 of the 2021 Act which provides for various amendments to the Planning Act 2008, including the addition of a Schedule 2A.

Schedule 2A requires a statement of government policy in relation to the biodiversity gain to be achieved in connection with development to which a development consent order application may relate (other than development excluded by regulations made by the Secretary of State) (a Biodiversity Gain Statement). Where there is a Biodiversity Gain Statement in relation to development, the Secretary of State may not grant the application unless the biodiversity gain objective set out in that statement is met (i.e. the biodiversity value attributable to the development must exceed the pre-development biodiversity value of the on-site habitat by at least 10%).

The statement may specify what the pre-development biodiversity value of the on-site habitat consists of and the date by reference to which it is calculated and what the biodiversity value attributable to any development consists of (including the value of any on-site habitat, the value of any Off-Site BNG allocated to the development and the value of any biodiversity credits purchased for the development).

1.12 Establishment of the Biodiversity Gain Site Register

Section 100 of the 2021 Act provides for the establishment of a Biodiversity Gain Site Register by way of secondary legislation. That takes the form of the Biodiversity Gain Site Register Regulations 2024 (see further paragraph 1.15.3 below).

The 2021 Act provides that a Biodiversity Gain Site is land where:

(i) a person is required under a Conservation Covenant or planning obligation (whether by way of Section 106 Agreement or Unilateral Undertaking) to carry out works for the purpose of habitat enhancement;

(ii) that or another person is required to maintain the enhancement for at least 30 years after completion of those works (note that completion of the work is not defined and so the decision notice or agreement may need to specify this); and

(iii) for the purpose of Schedule 7A of the 1990 Act the enhancement is made available to be allocated in accordance with the terms of the covenant or obligation to one or more developments for which planning permission is granted.

This latter requirement gives rise to a question as to whether a biodiversity gain site that was secured prior to Schedule 7A coming into force (i.e. 12 February 2024) can be allocated to a development to discharge the Biodiversity Gain Condition. We know of at least one example where a site secured prior to 12 February 2024 has been registered.

There is provision for secondary legislation to make provision for the Biodiversity Gain Register to be made accessible to the public and to make provision about the nature and content of the register and how applications to record land on the register should be dealt with and recorded. Regulations can also be made to substitute a different period of time for the 30 year maintenance period mentioned above.

1.13 Statutory Credits

1.13.1 What are Statutory Credits and how are they available?

Section 101 of the 2021 Act provides for the ability to purchase a credit from the Secretary of State to meet the Biodiversity Gain Objective (known as Statutory Credits). The DEFRA Guidance provides that buying Statutory Credits is a last resort for developer if they are unable to implement On-Site or Off-Site BNG.

The 2021 Act requires the Secretary of State must publish information about the 'arrangements' in relation to Statutory Credits (section 101(5) of the 2021 Act). The arrangements may include the arrangements relating to applications to purchase credits, the amount payable in respect of a credit of a given value, proof of purchase and reimbursement for credits purchased where development is not carried out (section 101(3) of the 2021 Act). Therefore the advice available on the above link should remain available.

The DEFRA Guidance provides that in order to purchase Statutory Credits the applicant must evidence that they have considered on-site BNG and the reasons why this is not possible. The applicant must also provide evidence to show that they have approached at least 3 local or national suppliers, Habitat Banks or trading website and that insufficient options are available for Off-Site BNG. Please note that the requirement to show that there are not Off-Site BNG options available is removed where the BNG required equates to 0.25 biodiversity units or less. In this instance, where a very small amount of biodiversity units are required, resort may be had to Statutory Credits sooner in this instance.

The DEFRA Guidance provides that the applicant should discuss the proposed reliance upon Statutory Credits with the Local Planning Authority as part of the BNG strategy. If this is agreed, then it can take 8 weeks for the applicant's application for Credits to be approved. If so, the applicant will receive an invoice. After payment of the invoice, the application will receive proof of purchase which can be sent to the Local Planning Authority as part of meeting the BNG requirement.

Statutory Credits are available, together with the associated guidance, online via the following link:

https://www.gov.uk/guidance/statutory-biodiversity-credits

1.13.2 How will Statutory Credits be priced?

According to section 101(4) of the 2021 Act , the pricing under the arrangements "*does not discourage the registration of land in the biodiversity gain sites register"* . Or, in other words, the pricing of Statutory Credits should be set at a level above that which would be available on the private market. The initial prices set for Statutory Credits have been set before the private marketplace has developed and so it may be expected that prices for Statutory Credits will change as the private marketplace for Off-Site BNG matures.

Payments for Statutory Credits are not refundable and so they are likely to be secured late in the planning process when it is clear to the applicant that their BGP will be approved.

The Biodiversity Metric will calculate how many Statutory Credits are required applying the Spatial Risk Multiplier (SRM), in the same manner as if Off-Site BNG was to be provided. The SRM require that more BNG Units are obtained to offset impacts the further they are away from the development site, so as to incentivise the delivery of BNG closer to the impacts of development. This means that a Statutory Credit is worth 0.5 Biodiversity Units, so 2 credits will be required for every 1 biodiversity unit. On this basis, the SRM applies in the same way to Statutory Credits as Off-Site BNG (as per Government Guidance on Statutory Biodiversity Credits, available here: https://www.gov.uk/guidance/statutory-biodiversity-credits#:~:text=The%20spatial%20risk%20multiplier,for%20every%201%20biodiversity%20unit.).

The Statutory Credits are priced in tiers and a price list is available online (via the link in paragraph 1.12.1) which will be updated 6 monthly and at least 10 weeks' notice will be provided of changes in pricing.

Statutory Credits cannot be transferred to another permission or site, the purchase of the Credits fixes the application of the credits to the site and development in question. This is a further reason for dealing with this issue late in the planning process.

1.13.3 What is the procedure for an applicant to buy Statutory Credits?

Once the Biodiversity Metric calculations have been completed, an applicant will know how many and which units they require. If they cannot source units on the open market, then as the last resort, Statutory Credits can be bought from the Government.

1.13.4 How will receipts from the sale of Statutory Credits be spent?

The money received in respect of the sale of Statutory Credits can only be used: to carry out works for habitat enhancement on land in England; to purchase interests in land in England with a view to carrying out works or securing the carrying out of works and operating and administering the arrangements (save for works required to be carried out under another piece of legislation (section 101(6) of the 2021 Act).

The Secretary of State must publish annual reports as to the discharge of its functions and to include details of the payments received, how they have been used and where used for habitat enhancement, the projected biodiversity value of the habitat enhancement after completion of the works (note that completion of the work is not defined and so the decision notice or agreement may need to specify this) (section 101(8) to (10) of the 2021 Act).

1.14 Conservation Covenants

See also paragraph 2.24.2.

Part 7 of the 2021 Act provides for Conservation Covenants, which are voluntary, legally binding private agreements between landowners and responsible bodies, designated by the Secretary of State, which conserve the nature or heritage features of the land, enabling long-term conservation. Prior to the introduction of Conservation Covenants, landowners could not impose positive obligations to do something (as opposed to a restrictive covenant not to do a specified thing) in a way which ensured that they ran with the land and bound successive owners. In addition, the law would not permit a freehold restrictive covenant to bind the burdened land unless there was neighbouring land which benefitted from it.

Conservation Covenants are a form of agreement newly created by the 2021 Act and so are not commonly used as yet, no doubt partly at least to them being relatively new and untested in England. The law gave the requirements to enter into Conservation Covenants but did not prescribe the form of the agreement and so this will be a matter for negotiation.

The starting point for the preparation of Conservation Covenants is expected to be a property document, in view of the creation of covenants relating to land. However, this will be adjusted to reflect the statutory regime and may also draw upon templates for other environmental land schemes.

Conservation Covenants are not specifically created for BNG and so the statutory regime relating to this form of agreement is not specifically adapted to suit BNG. Therefore Conservation Covenants would need to be prepared in such a way as to satisfy the respective statutory regimes to which they are being applied.

The Local Planning Authority will not be a party to the Conservation Covenant agreement unless they are a Responsible Body or landowner. Although, the Local Planning Authority may require sight of a completed Conservation Covenant agreement when acting in its Local Planning Authority function in order to verify the delivery of BNG. However this is not strictly necessary where the land is registered on the Biodiversity Gain Site Register and there is evidence of allocation to the individual development.

As Conservation Covenants are private agreements they may include provisions which would not ordinarily feature in planning obligations. It may therefore be that landowners and/or Responsible

Bodies ask that some parts of the Conservation Covenant are redacted so that they do not enter the public domain.

As Conservation Covenants are a newly established form of legal agreement and there is no statutory precedent or template, the form of the document is yet to be established. In this regard, it is important to also note that Conservation Covenants are designed to be a flexible tool and so will be bespoke documents, they are also not specifically created for the delivery of BNG albeit that this is one of the ways in which they may be relied upon.

1.15 Secondary legislation – Regulations

1.15.1 The Biodiversity Gain Requirements (Exemption) Regulations 2024

The Biodiversity Gain Requirements (Exemptions) Regulations 2024 ("the Exemption Regulations") exempt certain developments from the biodiversity gain requirement which would otherwise be imposed as a general condition on the grant of planning permission.

The developments which fall within the categories defined in this legislation are not required to deliver BNG but may still be subject to local policy requirements to deliver a net gain.

The following are exempted from statutory BNG in the Exemption Regulations:

- Small developments where an application for planning permission is made or has been granted prior to 2 April 2024 – this is a temporary exemption which applies where the application was made by 2 April 2024 or planning permission is granted which has effect before 2 April 2024 for small development (regulation 3(1)).

  In this context, 'small development' is development which is not major development as defined in Regulation 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (regulation 3(3)).Major development is defined as involving:

  - The winning or working of minerals or the use of land for mineral-working deposits;
  - Waste development;
  - The provision of 10 or more dwellings or dwellings on a site of 0.5 or more hectares;
  - The provision of 1,000 square metres or more of floorspace; and
  - Development of a site of 1 hectare or more.

  Where the planning permission is a variation under section 73 of the 1990 Act (as amended) and the original planning permission was subject to the small sites exemption, then the variation planning permission will also be exempt from the biodiversity gain condition (regulation 3(2)).

- De minimis exemption – applies where two conditions are met. Firstly, that the development does not have an impact on on-site priority habitat (this is determined by reference to

whether there is loss or degradation of the biodiversity value of a habitat in the list published under s41 Natural Environment and Rural Communities Act 2006)) (regulation 4(4)). Secondly, that the development impacts <25sqm of on-site biodiversity habitat that has a biodiversity value of >0, or, <5m in length of linear habitat (as identified in the biodiversity metric) (regulation 4(1) to (3)).

- Householder applications – meaning householder applications within the meaning of article 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (regulation 5). Namely, for the development of an existing dwellinghouse or within its curtilage.

- High-speed railway network – the biodiversity gain plan condition does not apply to development forming part of, or ancillary to, the high-speed railway network (as defined in the High Speed Rail (Preparation) Act 2013 (regulation 6). However, there is an expectation that BNG will still be provided for projects of this nature.

- Off-site gain developments which are undertaken solely or mainly for the purpose of fulfilling the biodiversity net gain requirements of another development (in whole or part) – in determining whether the exemption applies no account is to taken of public access or the use of the site for recreation or educational purposes, if that access or use is permitted without payment of a fee (regulation 7).

- Some (but not all) self-build and custom build developments – this includes developments of <10 dwellings, the site is no larger than 0.5 hectares and the development comprises only self-build or custom build dwellings (as defined in section 1(A1) of the Self-build and Custom Housebuilding Act 2015. (regulation 8). The Government has indicated that they may reconsider this exemption and look to reduce the circumstances in which it applies, but there are no firm proposals available as yet.

There is no discretion for local planning authorities in relation to the exemptions, if the criteria are met then mandatory BNG will not apply. However, local policy will still apply.

These exemptions will be reviewed by the Secretary of State at least every 5 years (regulation 9).

1.15.2 The Biodiversity Gain Requirements (Irreplaceable Habitats) Regulations 2024

The Biodiversity Gain Requirements (Irreplaceable Habitats) Regulations 2024 (“the Irreplaceable Habitat Regulations”) modify the BNG requirements in relation to any part of a development for

which planning permission is granted where the on-site habitat is irreplaceable habitat. This is due to the technical difficulty in recreating irreplaceable habitats once destroyed or recreation would take a very considerable time.

’Irreplaceable habitat’ is defined in the Regulations, which includes the below tables in the Schedule. In Table 1, each ‘habitat’ is defined as per section 41 of NERC Act. In Table 2, each habitat should be construed in accordance with column 2. More guidance may follow from Natural England (regulation 2(4)). The table will be subject to review at least every 5 years (regulation 5).

Table 1 Habitats contained in the List

Habitat
Blanket bog
Lowland fens
Limestone pavements
Coastal sand dunes

Table 2 Other habitats

Habitat	Description
Ancient woodland	Ancient woodland is areas of woodland that have been continuously wooded since at least 1600. Ancient woodland includes— (i) Ancient Semi-Natural Woodlands (ii) Plantations on Ancient Woodland Sites (iii) Ancient Wood Pasture and Parkland (iii) Infilled Ancient Wood Pasture and Parkland
Ancient trees and veteran trees	Ancient and veteran trees can be found as individual trees or collections of trees in any setting. Ancient trees have passed beyond maturity into an ancient life stage or are old in comparison with other trees of the same species which exhibit one or more of the following— (i) demonstrably great age relative to others of the same species (ii) changes to their crown and trunk development indicative of the ancient life stage

	Veteran trees are mature trees that share physical and other characteristics in common with ancient trees, due to their life or environment, but are neither developmentally nor chronologically ancient. All ancient trees are veteran trees, but not all veteran trees are ancient. Veteran and ancient trees which have died are still recognised as such because they retain significant biodiversity value for many decades. Veteran trees exhibit one or more of the following— (i) significant decay features such as deadwood, hollowing or signs of advanced decay in the trunk or major limbs (ii) a large girth, depending on and relative to species, site and management history (iii) a high value for nature, especially in hosting rare or specialist fungi, lichens and deadwood invertebrates
Spartina saltmarsh swards	Spartina (cord-grass) saltmarsh swards colonise a wide range of substrates, from very soft muds to shingle, in areas sheltered from strong wave action. It occurs on the seaward fringes of saltmarshes and creek-sides and may colonise old pans in the upper saltmarsh
Mediterranean saltmarsh scrub	Mediterranean and thermo-Atlantic halophilous (salt-tolerant) scrub develops in the uppermost levels of saltmarshes, often where there is a transition from saltmarsh to dunes, or in some cases where dunes overlie shingle. The form that most closely resembles the scrub vegetation of the Mediterranean is restricted to south and south-east England and is formed predominantly of bushes of shrubby sea-blite Suaeda vera and sea purslane Atriplex portulacoides

[NB – Tables as at date of publication – check for amendments]

1.15.2.1 What if a development would harm an irreplaceable habitat?

Any impacts upon irreplaceable habitats cannot be calculated using the Biodiversity Metric and so they are removed from the baseline (see DEFRA Guidance & Metric User Guide). Although, the presence of the irreplaceable habitat should be recorded in the Metric.

The Defra Guidance provides that you will only get planning permission for development that results in loss of irreplaceable habitat in exceptional circumstances. It also advises

developers to consider irreplaceable habitats from the start, recording irreplaceable habitat in their BNG calculation and in the Biodiversity Gain Plan.

Where the proposed development would not cause a loss or deterioration to irreplaceable habitats then any enhancement to the same can count towards the post-development biodiversity units.

The Irreplaceable Habitat Regulations modify Schedule 7A of the 1990 Act to effectively require local planning authorities to refuse planning permission for development which would harm an irreplaceable habitat unless that harm is minimised and a compensation strategy is in place that secures appropriate compensation relative to the baseline habitat type, and which does not include the use of Statutory Credits (Regulation 3 Irreplaceable Habitat Regulations).

Where bespoke compensation is used, the developer/applicant must agree the same with the Local Planning Authority on a case-by-case basis. Once agreed, then 'bespoke compensation agreed' can be selected in the Biodiversity Metric to remove the losses from the calculation albeit none of the bespoke compensation actions will be recorded in the Metric. The User Guide gives more detail on how to address the position in relation to on-site bespoke compensation.

The above modifications do not apply in relation to phased development (Regulation 4 Irreplaceable Habitat Regulations).

1.15.3 The Biodiversity Gain Site Register Regulations 2024

The Biodiversity Gain Site Register Regulations 2024 ("the Register Regulations") require Natural England to establish and maintain the Biodiversity Gain Site Register which will be available in the public domain (regulations 3 and 4 Register Regulations).

The Biodiversity Gain Site Register will record Off-Site BNG sites only.

A Biodiversity Gain Site is land where a person is required under a Conservation Covenant or planning obligation in a Section 106 Agreement which is registered as a local land charge to carry out works for habitat enhancement, that person or another person is required to maintain the enhancement for at least 30 years from the completion of those works, and (for the purposes of Schedule 7A of the 1990 Act the enhancement is made available to be allocated (conditionally or unconditionally, with or without consideration) in accordance with the terms of the Conservation Covenant or obligation to one or more developments for which planning permission is granted (Regulation 6 of the Register Regulations).

The Biodiversity Gain Site Register is to be a public register (section 100(3) 2021 Act).

The Secretary of State will keep under review the supply of land for registration in the Biodiversity Gain Register and whether the 30 year maintenance period can be increased without adversely affecting supply (s100(10) 2021 Act).

1.15.4 The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024

The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024 ("the Modification Regulations") modify Part 2 of Schedule 7A of the 1990 Act for phased permissions.

Regulation 4 modifies the biodiversity gain condition so that biodiversity gain plans are required before development begins for the overall development and for each phase of the development. These plans are referred to as the overall plan and the phase plan respectively.

1.15.5 The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024

The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 ("the Fees Regulations") define the financial penalties that can be imposed and fees that are required to be paid in respect of applications to the Biodiversity Gain Site Register. See further paragraph 2.26.6 and 2.26.7.

1.16 Other Provisions of Environment Act 2021

The 2021 Act introduced various other provisions which do not relate to BNG delivery, namely:

1.16.1 Species Conservation Strategy

Section 109 of the 2021 Act provides for the preparation of a Species Conservation Strategy by Natural England in relation to all or part of England to improve the conservation status of any species of flora or fauna.

The Species Conservation Strategy may identify any features which are of importance to the conservation of the species, identify priorities in relation to the creation or enhancement of habitat, set out how Natural England proposes to exercise its functions, include Natural England's opinion on the giving by any other public Local Authority of consents or approvals which might affect the

conservation status of the species and the measures that would be appropriate to avoid, mitigate or compensation for any adverse impact.

Local authorities must co-operate with Natural England in the preparation and implementation of the Species Conservation Strategy.

1.16.2 Protected Sites Strategies

Section 110 of the 2021 Act provides for the preparation of Protected Site Strategies by Natural England for improving the conservation and management of a protected site (SSSI, European site or marine conservation zone).

The Protected Site Strategies may include an assessment of the impact that any plan, project or other activity may have on the site, include Natural England's opinion on measures to avoid, mitigate or compensate for any adverse impact and identify a plan, project or other activity that Natural England considers is necessary.

In preparing the Protected Site Strategies, Natural England must consult local planning authorities in respect of an area within which the protected site is located or the plan, project or other activity that Natural England considers will have an adverse impact is to be undertaken, along with other bodies.

1.16.3 Duty to conserve and enhance biodiversity

Section 40 of NERC Act establishes the general duty to both conserve and enhance biodiversity.

The amended section 40(A1) will require public authorities with functions exercisable in England to from time to time consider what action the Local Authority can properly take, consistently with proper exercise of its functions, to further the general biodiversity objective. The first review must be undertaken within 1 year of the Environment Act 2021 coming into force and at least every 5 years thereafter (section 40(1C) and (1D)).

The Government Guidance entitled, 'Complying with the biodiversity duty' (available here: https://www.gov.uk/guidance/complying-with-the-biodiversity-duty#when-to-meet-your-biodiversity-duty) confirms that the first consideration of what action to take for biodiversity must be undertaken by 1 January 2024 with policies and objectives to follow as soon as possible after this. The actions are to be reconsidered within 5 years of the previous consideration, or sooner.

1.16.4 Biodiversity Reports

Section 103 of the 2021 Act amends the Natural Environment and Rural Communities Act 2006 by way of the insertion of section 40A to introduce a requirements on local authorities in England to produce Biodiversity Reports. These must contain a summary of:

- the action which the Local Authority has taken over the period covered by the report (which shall be no longer than 3 years for the first report and 5 years subsequently) for the purpose of complying with its duties under section 40;
- the Local Authority's plans for complying with those duties over the 5 years following the period covered by the report;
- any quantitative data required to be included in the report by regulations; and
- any other appropriate information.

Local planning authorities must also include a summary of the following in their report:

- the action taken in carrying out its functions under Schedule 7A to the 1990 Act;
- information about any biodiversity gains resulting or expected to result from biodiversity gain plans approved by the Local Authority; and
- the Local Authority's plans for complying with those duties over the 5 years following the period covered by the report.

1.16.5 Local Nature Recovery Strategies

Local Nature Recovery Strategies for areas in England are required by sections 104 to 107 of the 2021 Act.

This is to be a statement of the biodiversity priorities for the strategy area and a local habitat map. Section 40(2A) of the Natural Environment and Rural Communities Act 2006 makes provision about the duties of public authorities in relation to these strategies and section 105 of the 2021 Act provides for regulations to be made about the procedure to be followed in the preparation and publication, and review and republication, of local nature recovery strategies.

Section 107 of the 2021 Act requires the Secretary of State to provide certain information to public authorities to assist in their preparation of local nature recovery strategies, including a national

habitat map identifying national conservation sites and other areas of particular importance for biodiversity. The Secretary of State must inform a Local Authority where an area falls within their area which could be of greater importance for biodiversity, or is an area where the recovery or enhancement of biodiversity could make a contribution to other environmental benefits, and could contribute to the establishment of a network of areas across England.

1.17 Policy Background

Policy has long required positive contribution towards biodiversity, but there was an element of flexibility and the ability to negotiate in terms of amount and timing of provision. The policy position must now be consistent with the mandatory BNG regime.

1.17.1 National Planning Policy Framework

BNG is mandatory by virtue of legislation, but there are also policy provisions contained within the NPPF which require the consideration of biodiversity, albeit without reference to the statutory regime. The latter will take priority to the former in any event.

In terms of 'Habitats and Biodiversity', paragraphs 185 to 188 of the NPPF are relevant (as at the date of publication). Please note that an update to the NPPF was proposed in draft form on 30 July 2024 and was consulted upon until 24 September 2024. The revised draft NPPF is not currently in force and it is expected to take effect in early 2025 but the precise timescales and content are not yet clear. The consultation draft of the NPPF did not include any changes to the paragraphs relating to habitats and biodiversity, but it is possible for changes to follow in the updated NPPF in due course.

All relevant policies in the NPPF will fall to be considered in the usual way, but the statutory BNG regime will apply in addition. In the event of a conflict between the statutory regime and the NPPF (which event should not arise), then the BNG regime will prevail due to its statutory footing.

The statutory BNG regime will not change existing legal or policy protections for habitats or biodiversity and those provisions or policy will continue to apply in addition to the BNG regime.

1.17.2 Planning Practice Guidance

There is a section of the PPG dedicated to BNG and this is available using the following link:

https://www.gov.uk/guidance/biodiversity-net-gain

1.17.3 Local policy position and approach

Local planning authorities are able to produce policies in relation to BNG but those policies are required to be consistent with the statutory BNG regime as detailed in this advice, regardless of the date of adoption of the policy. Or in other words, even if the policy was adopted prior to statutory BNG taking effect, as the statutory regime is now in force, it will take priority over any local policy. Please see paragraph 2.15.

1.18 Local BNG requirements

1.18.1 How to approach BNG at LPA level

How to approach BNG at Local Planning Authority level will be a matter for the Local Planning Authority to consider in accordance with its own local priorities and strategies. However, the Local Planning Authority must administer the statutory BNG scheme in accordance with the legislation and prioritise the statutory regime over any local approach or policy (whether old or new) from the date on which statutory BNG takes effect.

The statutory regime focusses on decision-making.

The Local Planning Authority should have regard to the provisions of the NPPF and PPG in going about decision-making and plan-making.

It is possible for Local Planning Authorities to adopt a more onerous requirement for BNG at local level, i.e. to increase the 10% requirement to a higher level. However, there would need to be an established evidence-base to justify this approach. Many local authorities are asking for more than 10% BNG and have been for some time.

The Planning Advisory Service (PAS) advises that any such requirement would need to be set out in a Local Plan which has been adopted and therefore found to be sound, consistent with other plan policies and viable. PAS has published a number of example local plan and supplementary planning documents, by way of an example, on their website which can be accessed here:

https://www.local.gov.uk/pas/events/pas-past-events/biodiversity-net-gain-local-authorities/journey-biodiversity-net-gain

1.18.2 Local validation checklists

The statutory BNG regime prescribes the information that the applicant must submit in order to allow the mandatory BNG regime to operate. It may be that there is further information that would assist the Local Planning Authority in administering BNG and to ensure that the Local Planning Authority has this information provided as a matter of course, it might be useful to update the local validation checklist. This has the advantage of ensuring that the Local Planning Authority is furnished with the same baseline information as a matter of course.

That said, the local validation requirements should not become unduly onerous as they may be subject to challenge.

In this regard, it will be important to bear in mind that there will be considerable costs for applicants in compiling a planning application and in gathering the reports and information required in that regard. Therefore the costs of any additional information should be borne in mind and particularly in light of the potentially harmful impact on viability.

1.18.3 What information might the LPA want to ask for with an application that is subject to BNG?

The PPG encourages applicants to engage with Local Planning Authorities in relation to BNG before submission and says that some applicants may want to submit a draft Biodiversity Gain Plan, including completed Metric, with their application (Paragraph 014 Reference ID: 74-013-20240214). The DEFRA Guidance requires the submission of a draft HMMP with the application where there is significant on-site enhancement proposed.

The PPG provides that it is good practice for developers to submit information about any potential planning obligations and this is something that the local planning authorities may want to add to local lists of information requirements (Paragraph 015 Reference ID: 74-013-20240214).

In reality, the applicant will need to submit biodiversity information as they will need to show policy compliance and that the Biodiversity Hierarchy has been followed as they would have done prior to statutory BNG requirements.

It is appropriate for the Local Planning Authority to keep under review the process for the consideration of applications which require the delivery of BNG. This is in the interests of allowing the Local Planning Authority to develop cohesive systems to help developers, landowners and the Local Planning Authority to administer the BNG regime in a timely fashion.

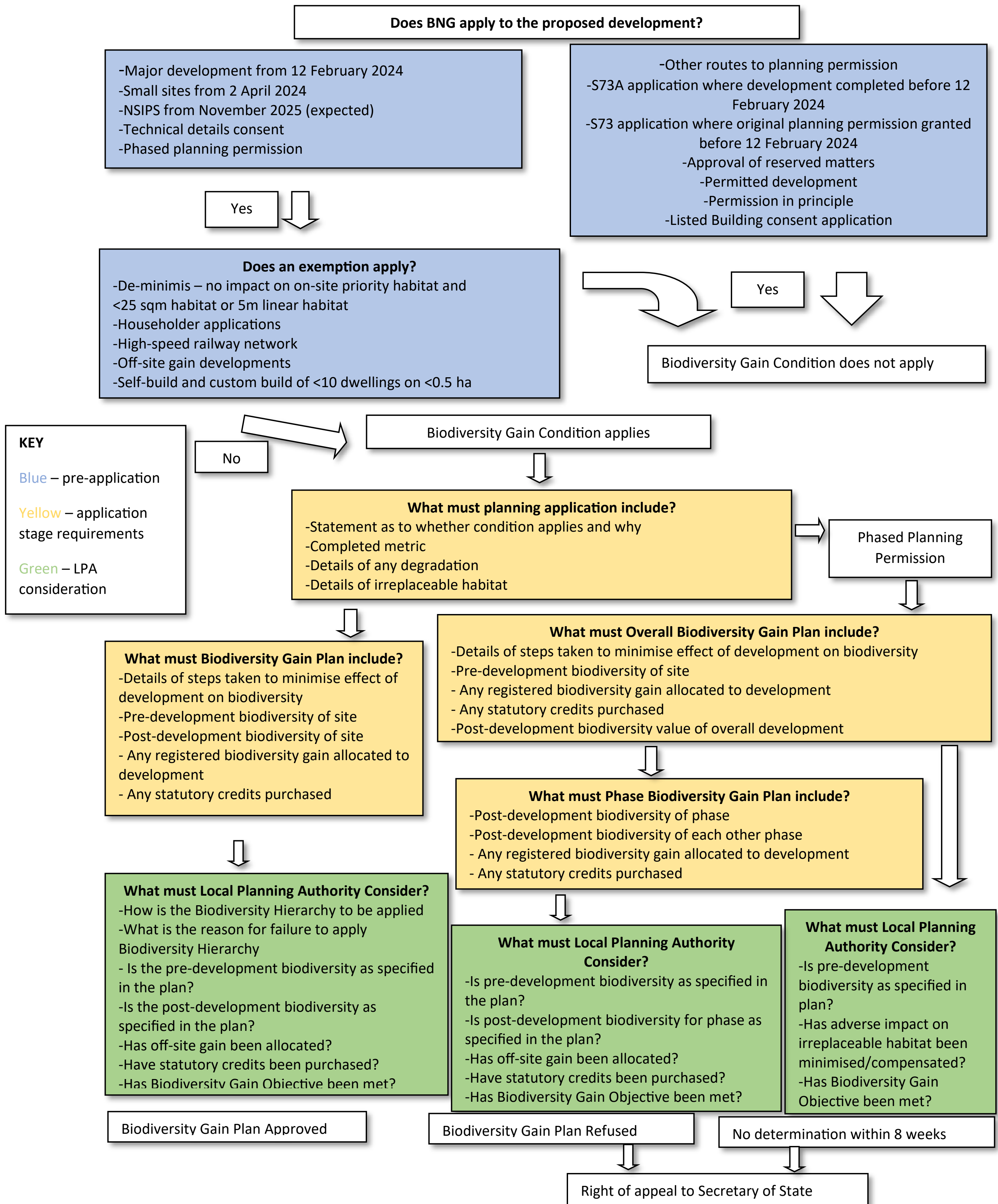
In particular, this may require further information to be provided early in the planning application process where significant Off-Site BNG is to be provided. This is in the interests of addressing the consideration of the Biodiversity Hierarchy as well as to ensure that sufficient information is available to the Local Planning Authority to impose any necessary planning conditions and to negotiate a Section 106 Agreement or Conservation Covenant. The PPG indicates that the pre-commencement condition would apply in the same way, but Local Planning Authorities may prefer to require further information to be provided.

1.18.4 Considerations for over-delivery of BNG

Where On-Site BNG gives rise to a significant excess in units, these can be used against other sites/traded (see DEFRA Guidance). For this to be possible, there would need to be a genuine oversupply of BNG which provides additionality. If the applicants are in this situation they are likely to be presenting a proposal for trading those excess units, but if not then the Local Planning Authority may want to alert the applicant to this possibility. That is unless the surplus is required in order to satisfy any local policy requirement in excess of the statutory requirements.

However, it is not clear what a significant excess is. This may be self-regulating in that the surplus units will need to be included on the Biodiversity Gain Site Register. This may prove cost prohibitive unless the surplus is significant.

2. BNG IMPLEMENTATION – DEVELOPMENT MANAGEMENT



2.1 When does BNG apply?

The Local Planning Authority is responsible for administering the BNG regime in accordance with the relevant primary and secondary legislation, as well as any local policy which may apply consistently.

The purpose of the regime is to secure the Biodiversity Objective, see paragraph 1.3 above.

The legislation applies to the Local Planning Authority although there are distinct provisions in relation to the Mayor of London, applications for planning permission by a statutory undertaker and Combined Authorities (paragraphs 12C-12J Schedule 7A 1990 Act). These provisions have not been considered further in this advice.

The starting position is that BNG applies to every planning permission granted for development in England after the statutory regime takes effect (paragraph 13 of Schedule 7A 1990 Act), but this is subject to the exemptions discussed further below. The legislation takes effect as follows:

(i) Major development on 12 February 2024, see paragraph 1.1 above;

(ii) Small sites on 2 April 2024, see paragraph 1.15.1 above;

(iii) NSIPs not yet in force but expected November 2025, see paragraph 1.11 above.

There are a number of exemptions to this rule (see further paragraph 1.15.1 above and paragraph 2.2 below).

2.2 When does BNG not apply?

The Environment Act 2021 (Commencement No. 8 and Transitional Provisions) Regulations 2024 ("Transitional Provisions Regulations") introduced the BNG regime for the purposes of planning permission granted on an application make under Part 3 of the 1990 Act. The statutory regime does not apply to:

(i) other routes to planning permission which do not entail an application for planning permission, such as local development order, simplified planning zones, neighbourhood development orders, successful enforcement appeals or deemed planning permissions. However, the Government has indicated that it is considering whether BNG should be extended to local development orders, but there are no firm proposals as yet in this regard.

(ii) retrospective applications under section 73A 1990 Act where the development was completed before 12 February 2024 (Regulation 2 of the Transitional Provisions Regulations). This has also been confirmed in the case of R (Weston Homes plc) v Secretary of State for Levelling Up Housing and Communities [2024] EWHC 2089 (Admin)). The Government has indicated that it is considering the ways in which retrospective planning permissions might be required to achieve a biodiversity net gain but there are no firm proposals as yet ;

(iii) s73 planning permission where the original planning permission was granted, or the application for the original permission was made, pre 12 February 2024 (Regulation 4 of the Transitional Provisions Regulations). The original planning permission means "*a planning permission which is the first in a series of two or more planning permissions*…". This provision will apply to any amendments to an existing outline or full planning permission, or any subsequent s73 variation to the same;

(iv) approval of reserved matters, as this is not a grant of planning permission under Part 3 of the 1990 Act; and

(v) permitted development rights.

2.3 What are the exemptions?

There are specific exemptions from the BNG requirements for certain types of development - see paragraph 1.15.1 above.

2.4 Other types of planning consent

2.4.1 Planning permission in principle

Statutory BNG will apply to the approval of technical details consent (TDC) pursuant to a planning permission in principle, but not upon the grant of a planning permission in principle as this is specifically excluded from the definition of planning permission for the purposes of the 1990 Act (as confirmed by the PPG at paragraph 03 Reference ID: 74-003-20240214). It is only at the technical details stage that the details of the development to come forward are approved and no development can take place without TDC.

2.4.2 Listed building applications

The listed building regime is not subject to statutory BNG, but any related planning application may be, subject to the exemptions discussed in this Chapter 2 above.

2.4.3 Phased planning permissions

Phased planning permission will be subject to mandatory BNG and will be treated differently to reflect the fact that not all information relating to the development is available at application stage (paragraph 19(1) Schedule 7A of the 1990 Act)..

The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024 ("the Modification Regulations") apply to modify Schedule 7A of the 1990 Act to require the approval of the overall plan and then the subsequent phase plans.

2.4.3.1 What should be included in the overall plan?

The overall plan shall provide for the development as a whole and shall detail the steps taken or to be taken to minimise the adverse effect of the development on the on-site habitat and any other habitat, the pre-development biodiversity value of the habitat, the registered Off-Site BNG allocated to the development before the date of submission of the biodiversity gain plan, any registered Off-Site BNG proposed to be allocated to the development, any Statutory Credits purchased at the date of submission of the biodiversity gain plan, any Statutory Credits proposed to be purchased in respect of the development and the post-development biodiversity value of the on-site habitat for the overall development (regulation 5 of the Modification Regulations which modified paragraph 14 of Schedule 7A of the 1990 Act).

Defra has published an overall biodiversity gain plan form, this is available on the following link: https://www.gov.uk/government/publications/biodiversity-gain-plan-phased-development-templates

Defra has published a phase Biodiversity Gain Plan form, which is available on the following link: https://www.gov.uk/government/publications/biodiversity-gain-plan-phased-development-templates

2.4.3.2 What should be included in the phase plan?

The phase plan shall provide for the development within a particular phase and shall detail the post-development biodiversity value of the on-site habitat for the phase to which it relates, the post-

development biodiversity value of the on-site habitat for each other phase of the development, any registered Off-Site BNG allocated to the development or proposed to be allocated to the development, any Statutory Credits purchased or proposed to be purchased for the development (regulation 6 of the Modification Regulations which modifies paragraph 14 of Schedule 7A of the 1990 Act).

2.4.3.3 How should the LPA consider the overall plan?

The Local Planning Authority must approve the overall plan where:

(i) The predevelopment biodiversity of the on-site habitat is as specified in the plan;

(ii) Where any part of the on-site habitat is irreplaceable habitat, the adverse effect of the development on the on-site habitat is minimised and appropriate arrangements have been made for the purpose of compensating any impact;

(iii) The Biodiversity Gain Objective is met taking into account: the post-development biodiversity value of the on-site habitat for the overall development, the post-development biodiversity value of the on-site habitat for each phase of the development, the biodiversity value of any Off-Site BNG allocated or proposed to be allocated to the development and any Statutory Credits purchased for the development (Regulation 7 of the Modification Regulations which modifies paragraph 15 of Schedule 7A of the 1990 Act).

2.4.3.4 How should the LPA consider the phase plan?

The Local Planning Authority must approve the phase plan where:

(i) The predevelopment biodiversity of the on-site habitat is as specified in the plan;

(ii) The post-development biodiversity of the on-site habitat for any phase is at least the value specified in the biodiversity gain plan recently approved for that phase;

(iii) Where the overall plan indicates that registered off-site gain shall be allocated to the development, that the Off-Site BNG has been allocated and the gain of that Off-Site BNG is as specified in the gain plain;

(iv) Where the overall plan indicates that Statutory Credits shall be purchased in respect of the development, that the Statutory Credit has been purchased and the gain of that Off-Site BNG is as specified in the gain plan;

(v) The Biodiversity Gain Objective is met taking into account: the post-development biodiversity value of the on-site habitat for the overall development, the post-development biodiversity value of the on-site habitat for each phase of the development, the biodiversity value of any Off-Site BNG allocated or proposed to be allocated to the development and any Statutory Credits purchased for the development (Regulation 8).

2.4.4 Variations to planning permission

Mandatory BNG will not apply to variations of planning permission whereby the original planning permission was granted prior to 12 February 2024, or the application for the original permission was made prior to 12 February 2024 (Regulation 4 of Transitional Provisions Regulations) (see further paragraph 2.2 above).

It is not possible to vary a planning permission to remove the Biodiversity Gain Condition (s73(2B) 1990 Act).

Where a variation to a planning permission would not lead to a change to the post-development value of the on-site habitat as specified in the earlier Biodiversity Gain Plan and where the on-site habitat is (all or partly) irreplaceable habitat the conditions to which the variation planning permission is granted do not change the effect on the biodiversity of the on-site habitat as specified in the earlier Biodiversity Gain Plan (section 73(2C) of the 1990 Act), the Biodiversity Gain Plan is regarded as approved for the purposes of the new permission under section 73. A new Biodiversity Gain Plan is not required to be submitted and approved prior to the commencement of the development subject to the section 73 permission.

However, if any conditions attached to the new planning permission granted under section 73 do affect the post development biodiversity value, then a Biodiversity Gain Plan for the new permission must be submitted and approved prior to the commencement of the permission.

Either way, unless it is very clear that that the section 73 changes will not affect the post-development value of the on-site habitat (e.g. because they related to design changes only), it will be necessary for the Local Planning Authority to be satisfied that the Biodiversity Gain Plan remains acceptable. It is likely, therefore, that the Metric calculation will need to be updated to demonstrate the position to the Local Planning Authority.

2.5 Planning application requirements

Part 3 of the Modification Regulations amends the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (S.I. 2013/2140) and Part 4 amends the Town and Country Planning (Development Management Procedure) (England) Order 2015. The amendments provide that relevant applications for planning permission must be accompanied by specified information relating to the Biodiversity Gain Condition. The Orders are further amended to make provision for decision notices on the grant of permission to include information relevant to the biodiversity gain condition and for planning registers to include biodiversity gain plan information.

An application for planning permission (save for a section 73 application, please see paragraph 2.4.4 above) will need to be submitted with the following (article 7(1A) Development Management Procedure Order:

(i) A statement as to whether the applicant believes that planning permission, if granted, would be subject to the Biodiversity Gain Condition;

(ii) If not, why not including the reasons for that belief;

(iii) Completed metric showing the calculation of the biodiversity value of the on-site habitat on the date of the application, an earlier date proposed by the applicant (with reasons for that) or the date before any degradation activities were carried out;

(iv) The publication date of the Biodiversity Metric used to undertake those calculations;

(v) If any degradation has been carried out, what and when and evidence of value before degradation including a statement that such activities have been carried out, confirmation of the date immediately before those works were carried out and any supporting evidence for this date;

(vi) A description of any irreplaceable habitat and a plan showing its location

The PPG says that Local Planning Authorities may request further information relating to BNG as part of the planning application (Para 013 Reference ID: 74-013-20240214). In reality, the applicant will need to submit biodiversity information as will need to show policy compliance and that Biodiversity Hierarchy has been followed (see paragraph 1.4).

Regulation 19 of the Modification Regulations inserts a new Part 7A into the Town and Country Planning (Development Management Procedure) (England) Order 2015 to provide for form, timing,

additional content, determination and appeals against refusal, or non-determination, of the Biodiversity Gain Plan.

2.6 Biodiversity Metric

DEFRA has published 'The Statutory Biodiversity Metric User Guide' dated February 2024 (https://assets.publishing.service.gov.uk/media/669e45fba3c2a28abb50d426/The_Statutory_Biodiversity_Metric_-_User_Guide__23.07.24_.pdf) to provide guidance and support for a competent person (assessor or reviewer) in using the Biodiversity Metric (as opposed to the Small Sites Metric, in relation to which please see paragraph 2.9). Please see paragraph 1.6 in this regard.

A 'competent person' is defined in the User Guide as:

"A competent person has the knowledge and skills to perform specified tasks to complete and review biodiversity metric calculations. You obtain this through training, qualifications, experience or a combination of them."

Specific reference is made to the British Standard, 'Process for designing and implementing biodiversity net gain (BS 8683:2021) (which is not formal policy or guidance) and only a qualified assessor can undertake a river condition assessment.

There is an opportunity to insert comments into the Metric which can assist Local Planning Authorities when acting as reviewers. This could be a useful way of speeding up the consideration of applications and completed Biodiversity Metric calculations and so local planning authorities may want to encourage the use of this facility.

If the Metric is being used by an off-site provider (i.e. a land manager, a Habitat Bank or a landowner) then this should be reflected in the Metric by selecting '*This metric is being used by an off-site provider*'

2.7 Trading Rules

When using the Metric the trading rules apply. These are defined in the Metric User Guide and are as follows:

Trading Rules		
Rule	**Rule detail**	**Comments**
Rule 1	The trading rules of this Biodiversity Metric must be followed	If the rules are not followed then BNG cannot be claimed. The trading rules set out the minimum habitat creation and enhancement requirements to compensate for specific habitat losses, up to the point of no net loss.
Rule 2	Biodiversity unit outputs, for each type of unit, must not be summed, traded, or converted between types. The requirement to deliver at least a 10% net gain applies to each type of unit.	There must be a like for like replacement of the habitat units lost by a proposed development. The 'headline results' tab of the Metric will show whether the trading rules have been met.
Rule 3	To accurately apply the Biodiversity Metric formula, you must use the statutory biodiversity metric calculation tool or small sites biodiversity metric tool for small sites. The tools remove the need for a user to manually calculate the change in biodiversity value. The tool will summarise the results of the calculation and inform a user whether the BNG objective has been met.	
Rule 4	In exceptional ecological circumstances, deviation from the biodiversity metric methodology may be permitted.	This rule should not be used for most projects and should be reserved for exceptional circumstances. It can only be used when one of the following applies: Highly complex landscape scale habitat changes such as creation of heathland or a heathland grassland mosaic; River re-meandering;

		Large-scale restoration of natural processes. It those circumstances, the rule can be applied when: the site has optimal conditions for restoration of a wildlife-rich or historic natural habitat; and the project team has the expertise and resource to deliver the habitat with negligible risk of failure. If the above are satisfied, then the rule can be used through deviations from the Metric trading rules (where there is a clear justification for the habitat intervention which is not mentioned in the Metric) or use of the 'habitat created in advance' function in the Metric (the User Guide gives further detail on taking this approach). If this rule applies then the developer/applicant should have been in touch before the submission of the draft BNG Plan in order that the Local Planning Authority can be sure that the exceptional circumstances are occurring.

Impacts to very high distinctiveness habitats should be avoided according to planning policy as losses cannot always be adequately compensated for. There will need to be a discussion with the developer or applicant as to how to achieve the BNG objective in relation to such an impact. There is a bespoke compensation option in the Metric to assist in the consideration of the options available. Pursuant to this, the Metric User Guide states that:

1. Priority should be given to replacing losses with units of the same habitat type;

2. If this is not possible, losses should be replaced with appropriate units of the same habitat distinctiveness;

3. If this is not possible, losses should be replaced by appropriate area unit of a high habitat distinctiveness.

The Local Planning Authority will need to ensure that the compensation plan arrived at is achievable and secured.

There are additional notes in the Metric User Guide to deal with:

(i) Compensation for loss of watercourses; and

(ii) Compensation for loss of high distinctiveness woodland

2.8 Metric Principles

The Metric User Guide includes 9 principles to inform the use of the Metric, these are as follows:

Metric Principles	
Principle number	**Principle detail**
1	The metric assessment should be completed by a competent person.
2	The use of this biodiversity metric does not override existing biodiversity protections, statutory obligations, policy requirements, ecological mitigation hierarchy or any other requirements. This includes consenting or licensing processes, for example woodlands.
3	This biodiversity metric should be used in accordance with established good practice guidance and professional codes
4	This biodiversity metric is not a complex or comprehensive ecological model and is not a substitute for expert ecological advice.
5	Biodiversity units are a proxy for biodiversity and should be treated as relative values.
6	This biodiversity metric is designed to inform decisions in conjunction with locally relevant evidence, expert input, or guidance.
7	Habitat interventions need to be realistic and deliverable within a relevant project timeframe.
8	Created and enhanced habitats should be, where practical and reasonable, local to any impact and deliver strategically important outcomes for nature conservation.
9	This biodiversity metric does not enforce a minimum habitat size ratio for compensation of losses. Proposals should aim to: • maintain habitat extent - supporting more, bigger, better and more joined up ecological networks •

	ensure that proposed or retained habitat parcels are of sufficient size for ecological function

[Accurate as at the date of writing – please check for updates]

The User Guide must be reviewed before completing or reviewing a Metric calculation.

Project Actions

The project actions which can be factored into the Metric (upon which more detail is provided in the User Guide) are:

(i) Habitat retention – area and woodland habitats only (i.e. not watercourses)

(ii) Habitat enhancement

(iii) Habitat creation

As and when the project actions have been defined, the Metric will apply 3 risk multipliers (save in respect of retention), being; difficulty of creation or enhancement, temporal risk or spatial risk. Further details are provided in the Metric User Guide.

There is a risk that the incorrect classification of a habitat type could cause the pre-development biodiversity value of the site to be underestimated. The User Guide considers a range of habitat types specifically to try to minimise this risk.

The submitted Metric should be based on evidence that the project targets are achievable and viable within the project timeframe. If the project targets cannot realistically be achieved on time then more achievable outcomes should be considered or a longer project timeframe should be agreed and legally secured.

2.9 Small Sites Metric

In relation to small sites (as defined in paragraph 2.1 of Chapter 1), the Small Sites Metric applies unless the site sits within a priority habitat, protected site or European Protected Site in which case the Biodiversity Metric applies. In addition, where a small site is to rely upon an off-site gain, then the Biodiversity Metric applies.

Natural England has published 'The Small Sites Metric (Biodiversity Metric 4.0) – Calculation Tool User Guide' dated May 2023 which provides that a 'competent person' for these purposes is a 'SSM

user' being a person competent in identifying habitats present on-site (pre-development) and management requirements for habitats to be created or enhanced within the landscape design (post-development). That competency is aligned with British Standard 'Process for designing and implementing biodiversity net gain: BS 8683:2021' (which is not formal policy or guidance).

2.10 On-site irreplaceable habitats

The BNG requirements are modified in relation to any part of a development for which planning permission is granted where the on-site habitat is irreplaceable habitat. This is defined in the Biodiversity Gain Requirement (Irreplaceable Habitat) Regulations 2024, which includes the above tables in the Schedule (see paragraph 1.15.2 above). In Table 1, each 'habitat' is defined as per section 41 of Natural Environment and Rural Communities Act 2006. In Table 2, each habitat should be construed in accordance with column 2. More guidance may follow from Natural England (regulation 2(4) of the Irreplaceable Habitat Regulations). The table will be subject to review at least every 5 years (regulation 5 of the Irreplaceable Habitat Regulations).

The Irreplaceable Habitat Regulations require the Biodiversity Gain Plan submitted in relation to a development which affects irreplaceable habitat to minimise the adverse effect of the development on the biodiversity of the on-site habitat and make appropriate arrangements for the purpose of compensating for any impact (Regulation 3 of the Irreplaceable Habitat Regulations which amends Schedule 7A of the 1990 Act). The compensation arrangements are only appropriate if they secure appropriate compensation relative to the baseline habitat type, and do not include the use of biodiversity credits.

The Biodiversity Metric is not capable of considering the environmental loss to an irreplaceable habitat so the statutory regime treats them differently. The Metric will record that the irreplaceable habitat features on the site but includes a marker to record that a bespoke compensation plan will be required unless there is no impact or harm to the irreplaceable habitat. The Irreplaceable Habitat will feature in the pre and post development calculations but will not be assigned a value in respect of the enhancement proposed and so will not contribute to the 10% BNG. The Irreplaceable Habitat will need to be dealt with in the Gain Plan and to be secured by way of a compensation plan.

A compensation plan should meet the requirements of local policy and should replace the habitat which has been lost. This is expected to be difficult and in some cases impossible, given the nature of the habitat in question. The DEFRA Guidance and User Manual provides further information in relation to irreplaceable habitat, together with PPG 042 Ref ID: 74-042-20240214.

The above special arrangements do not apply in relation to phased development as this is already dealt with in the modifications to paragraph 15 of Schedule 7A (see paragraph 2.4.3 above) (Regulation 4 of the Irreplaceable Habitat Regulations).

2.11 Consideration of planning applications subject to mandatory BNG

The PPG says that Local Planning Authorities should not refuse applications on the grounds that the Biodiversity Objective will not be met (Paragraph 019 Reference 74-019-20240214). The determination of the Biodiversity Gain Plan under the Biodiversity Gain Condition is the mechanism to confirm whether the development meets the Biodiversity Gain Objective.

In reality, the Local Planning Authority will have to consider if condition can be met prior to grant and this will also be in the interests of the applicant as the planning consent will have no value to them if it remains impossible to bring forward the development that has been approved.

It is unlikely that planning permission will be granted if it will not be possible to comply with the Biodiversity Gain Condition, but there are a wide range of options available to discharge the condition by way of Off-Site or On-Site BNG delivery or via the purchase of Statutory Credits.

This may be less clear in respect of an outline planning permission as there will be less certainty as to the details of the development and its impact which the BNG is required to offset. Therefore in those instances, there is potentially a greater risk to the developer as to the level of BNG to be provided as and when the layout and landscaping and all technical details (respectively) have been determined.

2.12 Publication of information

The information pertaining to BNG will be part of the application for planning permission as well as discharge of conditions and will be publicly available and published on the planning portal (Article 4ZA Development Management Procedure Order) unless there is a reason to redact all or part of this information, that would seem to be unlikely.

2.13 Consultation

There are no specific statutory consultation requirements in respect of BNG, or to publicise the submission of the Biodiversity Gain Plan prior to its determinations. Natural England is not a statutory consultee for these purposes. This is confirmed by PPG paragraph 038 Reference ID: 74-038-20240214

The aspects of the submission relating to BNG will be consulted upon in the same manner as the rest of the application and it will be for the Local Planning Authority to consider the BNG proposals in light of the statutory regime.

2.14 Technical input

It may be prudent for the Local Planning Authority to seek the input of an ecologist to interrogate the completed Biodiversity Metric and other information as this regime inherently draws upon technical expertise. Where the Local Planning Authority does not have an in house Ecologist, this role should be undertaken by a person who meets the definition of 'competent person' as per the User Guide, It will be important for Local Planning Authorities to test the validity and accuracy of the information and calculations presented to them in applications in order to ensure that they are proper and correct.

The Biodiversity Metric that has been submitted should have been completed by a competent person. The outcome of the Metric should show that an uplift of at least 10% will be created by the development, either on-site or off-site. In doing so, the trading rules will need to be complied with as will be clear from the completed Metric but will need to be verified. How the habitat enhancement or habitat creation works are to be conducted will need to be detailed in the HMMP which will require a technical review. It may be helpful to require that a georeferenced map is included with the HMMP, as well as copies of the surveys and details of the investigations carried out to inform the same and to show how those habitat parcels are suitable for the enhancement or creation proposed.

Failure to test the submission in this manner may mean that the Local Planning Authority accepts a BNG delivery which is below the standard which could or should have been required of a particular development. As well as failing to meet the statutory regime, this could render the decision to discharge the Biodiversity Gain Plan vulnerable to challenge by way of Judicial Review.

2.15 Material consideration

The Local Planning Authority can consider the related 'spin off' benefits that the delivery of BNG will have for the purpose of other local plan policies and more generally in the planning balance. For example, benefits in terms of environmental and social impacts such as recreational opportunities, access to nature, other mitigation that may be delivered by the BNG scheme, improvement to protected sites/habitats, natural flood management, carbon sequestration, etc.

However, the spin-off impacts of the BNG will also need to be considered insofar as they may have a negative effect. For example, in terms of highways safety or they may not be acceptable at all in the vicinity of airports or aerodromes.

BNG does not affect that weight that should be attached to other planning considerations, such as the consideration of the local plan policies, etc. This is because BNG is a mandatory statutory regime applies without discretion even in the event of conflict with issues such as the delivery of affordable housing where viability is challenging. This may cause applicants and developers to raise concerns, for example on issues of viability or land values, however they are not points that can be taken into account when observing the BNG regime. This is a further justification to support the early consideration of BNG in site selection and design.

Therefore the delivery of BNG will need to be considered in the context of the statutory regime, but the On-Site BNG will also need to be assessed as part and parcel of the development for which consent has been sought.

It will be inappropriate for the Local Planning Authority to attach weight to local plan policies which are inconsistent with the statutory framework for BNG or would require BNG to be delivered where a statutory exemption applies. However, any local policy requiring a biodiversity gain of more than 10% may still be relevant. See further PPG paragraph 020 Reference ID: 74-020-20240214.

In considering the BNG proposed by the developer, the Local Planning Authority will need to consider:

(i) Has the Biodiversity Metric been applied properly?

(ii) Has the Biodiversity Hierarchy been followed?

(iii) Does the development and BNG proposal align with the relevant local guidance and policies?

(iv) Is there a clear strategy for the delivery of any off-site gains? If the development is phased, is it clear how the BNG will be delivered across future phases?

(v) Are there adequate proposals for securing the gains, management, maintenance and monitoring? This may include Heads of Terms for a Section 106 Agreement where proposed or details of the discussions with a Responsible Body in respect of a Conservation Covenant.

2.16 Grant of planning permission and the Biodiversity Gain Condition

2.16.1 How to approach the grant of planning permission

In issuing the decision notice granting planning permission or approval of reserved matters, the Local Planning Authority will need to comply with Article 35 TCP(DMP)(E)O 2015. Namely, the notice must include:

(i) information relating to the Biodiversity Gain Condition including that there are exemptions, transitional arrangements and requirements relating to irreplaceable habitats;

(ii) information to note the effect of an earlier Biodiversity Gain Plan which is regarded as approved (pursuant to a section 73 application);

(iii) details of the Local Planning Authority for the purposes of the BNG regime;

(iv) where the development is phased, a statement to the effect that the Biodiversity Gain Plans are required before the development may be begun and before each phase may be begun;

(v) where the planning permission is granted subject to conditions, the reason for each condition (save for the Biodiversity Gain Condition);

(vi) where the planning permission is refused, the full reasons for refusal specifying the policies and proposals of the development plan which are relevant to the decision;

(vii) where there is a direction from the Secretary of State restricting the grant of planning permission or the Secretary of State has expressed a view that planning permission should not be granted, the notice should give details of the direction or view; and

(viii) a statement that the Local Planning Authority has worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with the application.

Every permission granted is deemed to be subject of a statutory pre-commencement condition and Local Planning Authority cannot depart from that (paragraph13, Schedule 7A 1990 Act). That condition is that development may not begin unless the Biodiversity Gain Plan has been submitted to the planning Local Authority and the planning Local Authority has approved the plan.

The PPG says that "*the local planning authority are strongly encouraged to not include the biodiversity gain condition, or the reasons for applying this, in the list of conditions imposed in the*

written notice when granting planning permission" (Paragraph: 024 Reference ID: 74-024-20240214). This is to reflect the statutory basis of the condition which is deemed to apply by law. It may be that the requirement for BNG appears as an informative.

Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 sets out the biodiversity net gain information which needs to be included on non-exempted decisions notices. The Planning Practice Guidance provides a link to a document with suggested paragraphs to fulfil these requirements (https://www.gov.uk/guidance/biodiversity-net-gain). Presumably a failure to include this information on the decision notice will have the effect of making it voidable.

The statutory condition requires the approval of a Biodiversity Gain Plan but does not secure its implementation or management of the biodiversity gain for 30 years. It will, therefore, be necessary to secure this by way of condition or, for off-site schemes, by way of Section 106 Agreement. See further paragraph 2.17 below.

The Planning Advisory Service has prepared some draft conditions providing for the preparation of a HMMP in accordance with the Biodiversity Gain Plan and imposing management and monitoring requirements, available here: https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng

Natural England has a HMMP template, companion document and checklist which are available here: https://publications.naturalengland.org.uk/publication/5813530037846016

2.16.2 Is the deemed Biodiversity Gain Condition a condition precedent?

It is well established that works that contravene pre-commencement conditions attached to a planning permission cannot be taken as lawfully commencing development authorised by that permission. This is known as the Whitley principle following the case of *Whitley & Sons v Secretary of State for Wales and Clwyd County Council [1992] 3 PLR 72* where Woolf LJ held (at paragraph 80):

> *"The permission is controlled by and subject to the conditions. If the operations contravene the conditions they cannot be properly described as commencing the development authorised by the permission. If they do not comply with the permission they constitute a breach of planning control and for planning purposes will be unauthorised and thus unlawful. This is the principle which has now been clearly established by the authorities".*

The case law in relation to the Whitley principle was comprehensively reviewed in *R (Hart Aggregates Ltd) v Hartlepool Borough Council [2005] EWHC 840 (Admin)*. In particular, Sullivan J said (at paragraph 67):

> *"I believe that the statutory purpose is better served by drawing a distinction between those cases where there is only a permission in principle because no details whatsoever have been submitted, and those cases where the failure has been limited to a failure to obtain approval for one particular aspect of the development. In the former case, common sense suggests that the planning permission has not been implemented at all. In the latter case, common sense suggests that the planning permission has been implemented, but there has been a breach of condition which can be enforced against".*

In *Bedford BC v Secretary of State for Communities and Local Government [2008] EWHC 2304* (Admin) the High Court held that a planning inspector had been correct in concluding that two conditions attached to the planning permission for the conversion to a dwelling of a thatched barn did not amount to true conditions precedent. The first condition stated that a landscaping scheme had to be approved by the planning Local Authority before the development commenced. The second condition stipulated that details of any intended boundary treatment had to be submitted to and approved by the planning Local Authority prior to the commencement of development. Waksman J said that (at paragraph 35):

> *"Where there is a condition which is manifestly not about the essential subject matter of the permission, the fact that it has to be fulfilled before the relevant operation commences does not mean that the essential operation cannot begin without its fulfilment".*

Arguably, the Biodiversity Gain Condition does not go to the heart of the planning permission insofar as it is concerned solely with biodiversity mitigation and enhancements on the wider site, rather than an integral element of the development itself. It could be argued that the condition is not about the way the development is carried out, meaning that the fact that the condition has not been formally discharged cannot mean that the development hasn't lawfully commenced. This may particularly be the case where biodiversity enhancements are being delivered Off-Site or Statutory Credits are being purchased.

As there are no other statutory planning conditions, there is no case law to indicate that a condition of this nature carries any greater weight in terms of its status as a condition precedent than any other condition.

However, to the extent that the Biodiversity Gain Plan includes provisions to mitigate the impact of the development on on-site habitats, arguably the condition does go to the heart of the planning permission in that the mitigation works are something which of necessity must be approved and implemented before the development can progress. This is particularly the case in relation to irreplaceable habitats where the Biodiversity Gain Plan must include provision for the protection of such habitat. In addition, the PPG states that significant on-site habitat enhancements are likely to form an integral part of the development (paragraph 021 Reference ID: 74-020-20240214), thus indicating that the Biodiversity Gain Condition goes to the heart of the planning permission insofar as it is concerned with such enhancements.

The status of the Biodiversity Gain Condition may well be tested in the Courts in due course, but in the meantime it would be prudent for it to be considered to be a condition precedent unless or until there is Local Authority on the issue.

2.17 Conditions/obligations for delivery of on-site BNG

As stated at paragraph 2.16 above, the statutory condition requires the approval of a Biodiversity Gain Plan but does not secure its implementation or management of the biodiversity gain for 30 years. It will, therefore, be necessary to secure this by way of condition or Section 106 Agreement.

It is within a Local Planning Authority's discretion to impose the conditions that they see fit. That would need to address all aspects of the delivery of BNG, i.e. the approval, delivery, maintenance, monitoring and reporting. The Planning Advisory Service has prepared some draft conditions providing for the preparation of a HMMP in accordance with the Biodiversity Gain Plan and imposing management and monitoring requirements, available here: https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng

Natural England has a HMMP template, companion document and checklist which are available here: https://publications.naturalengland.org.uk/publication/5813530037846016

The Local Planning Authority cannot include any requirement to pay monitoring fees or other funding in a planning condition and so, may prefer to use a legal agreement because of the additional flexibility that this allows.

PAS has published a template Section 106 Agreement for the creation of On-Site BNG (https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng) on which we have the following observations:

2.17.1 Conditionality

The template provides for the Section 106 Agreement to come into effect on completion, although there is provision for certain provisions to only come into effect on grant of the planning permission. This is unlikely to be acceptable to a developer who will require the Section 106 Agreement to be conditional on commencement of the development.

2.17.2 Monitoring Fee

The template provides for a monitoring fee to be paid annually for the full 30 year period. It may be more appropriate for the monitoring fee to be paid every 5 years after the first 5 years, but local authorities should consider what is required in each case with reference to the above monitoring requirements.

See further paragraph 2.28.

2.18 Biodiversity Gain Plan requirements

The Biodiversity Gain Plan required to be submitted pursuant to the Biodiversity Gain Condition must relate to the development for which planning permission is sought and address the following matters:

(i) information about the steps taken to minimise the effect of the development on the biodiversity of the on-site habitat and any other habitat

(ii) the pre-development biodiversity value of the on-site habitat;

(iii) the post-development biodiversity value of the on-site habitat;

(iv) any registered biodiversity gain allocated to the development and the biodiversity value of that gain in relation to the development;

(v) any biodiversity credits purchased for the development;

(vi) anything else prescribed in Regulations from time to time (para 14 Schedule 7A of the 1990 Act).

The Defra Guidance provides that developers need to provide their completed metric tool calculation, pre-development and post-development plans, a compensation plan if the development affects irreplaceable habits, a register reference number if they are using off-site

units, proof of purchase if they are buying statutory credits and a description of how they will manage and monitor significant on-site gains (i.e. a HMMP).

Defra has published a Biodiversity Gain Plan template, which is available on the following link: https://assets.publishing.service.gov.uk/media/65df0c4ecf7eb16adff57f15/Biodiversity_gain_plan.pdf

2.19 Can securing BNG be front-loaded?

The PPG encourages developers to consider BNG early in the development process and to factor it into site selection and design. It advocates discussions with the Local Planning Authority upfront utilising pre-application services. The intention being to enable feedback on the proposed strategy for meeting the biodiversity gain objective and consideration of the Biodiversity Gain Hierarchy to inform the design proposals (Paragraph 002 Reference ID: 74-002-20240214).

Developers may also want to submit comprehensive BNG information with this application – see further paragraph 2.11 above.

2.20 Discharge of the Biodiversity Gain Condition and approval of the Biodiversity Gain Plan

2.20.1 Application to discharge the Biodiversity Gain Condition

The following information is to be submitted when discharging the condition (Article 37C Town and Country Planning (Development Management Procedure) (England) Order 2015):

(i) Biodiversity Gain Plan (or overall or phased plans as appropriate);

(ii) Name and address of person(s) completing and submitting the plan;

(iii) The permission to which it relates;

(iv) Description of the development;

(v) Description of the maintenance and monitoring arrangements;

(vi) Steps taken to minimise adverse effects;

(vii) Pre-development biodiversity value of on-site habitat;

(viii) Plans at an identified scale of existing habitat;

(ix) Plans at an identified scale of proposed on-site habitat;

(x) Any registered off-site gain allocated prior to submission and its value;

(xi) Any registered off-site gain to be allocated and its value;

(xii) Any statutory credits to be purchased;

(xiii) The post-development biodiversity value on-site; and

(xiv) If phased, the value on-site post each phase.

2.20.2 What further information should/can be requested?

The legislation defines the minimum requirements in terms of the information required to discharge the Biodiversity Gain Condition, as above.

As discussed at paragraph 1.18.3 Local Planning Authorities can add to these requirements to assist the consideration of BNG as part of the determination of a planning application. Any additional requirements should appear in the local list and should be proportionate to the developments in question.

Local Planning Authorities may want to consider an integrated approach with other national and local policies relating to biodiversity and the protection of the environment, i.e. urban greening factor policies. Local Planning Authorities should consider whether it is possible to align these information requirements.

The local list may also require that the provision of a draft HMMP or Heads of Terms for a planning obligation are provided with the application. Would need to be able to justify the request for this information at this stage, for example in relation to major applications or sites with significant on-site biodiversity, as above.

The greater the impact or the more significant the increase, then the more likely it will be to submit more information at an earlier stage and/or to include Heads of Terms for a Section 106 Agreement – local lists can allow for this, as above.

2.20.3 Timing for discharge of the Biodiversity Gain Condition

The Biodiversity Gain Plan cannot be submitted until the day after the date of grant of planning permission (Regulation 37B Town and Country Planning (Development Management Procedure) (England) Order 2015).

In reality, some local planning authorities and applicants may wish to engage as to the likely provision of BNG and whether this would be acceptable or not. In that instance, the Biodiversity Gain Plan may have been submitted in draft form at an earlier stage but will only be formally submitted for the purpose of discharging the Biodiversity Gain Condition after the planning permission has been granted.

2.20.4 How to approach a Biodiversity Gain Plan and what expertise is required?

The PPG notes that BNG will often be a material consideration when determining a planning application and local planning authorities will want to consider whether the Biodiversity Gain Condition is capable of being discharged successfully through the imposition of conditions and planning obligations to secure Off-Site and On-Site BNG (Paragraph 002 Reference ID: 74-002-20240214).

Surveys by a qualified ecologist should be submitted with the application to discharge the Biodiversity Gain Condition and those surveys should be recent to the submission of the application unless there has not been any material change on the site.

2.20.5 Fees

The fee payable to discharge the Biodiversity Gain Condition is as per any other condition under per Town and Country Planning (Fees for Applications, Deemed Applications, Requests and Site Visit) (England) Regulations 2012 i.e. £145 per request. Although, it is noted that the Labour Government has indicated that they are considering legislation to increase planning application fees, it is not presently clear whether this would have an impact upon these applications.

A refund will be available if the application takes more than 12 weeks to be determined.

2.20.6 Consultation of the Biodiversity Gain Condition

There are no specific statutory consultation requirements in respect of BNG, or to publicise the submission of a Biodiversity Gain Plan prior to its determination. Natural England is not a statutory consultee for these purposes. Confirmed by PPG paragraph 038 Reference ID: 74-038-20240214.

The aspects of the submission relating to BNG will be consulted upon in the same manner as the rest of the application and it will be for the Local Planning Authority to consider the BNG proposals in light of the statutory regime.

2.20.7 Determination of Application to Discharge of the Biodiversity Gain Condition

The Local Planning Authority must give notice of its decision within 8 weeks of the day after the day on which the Biodiversity Gain Plan was submitted or such longer period as may be agreed with the applicant (article 37D TCP(DMP)O 2015).

In determining the application, the Local Planning Authority must consider:

(i) how the Biodiversity Hierarchy is to be applied;

(ii) save where there is irreplaceable habitat, where the order of priority in that hierarchy is not to be applied, the reason for that or the absence of reason (article 37D TCP(DMP)(E)O 2015).

If the Local Planning Authority and the local planning register Local Authority are different (e.g. in a National Park) (article 40(1) TCP(DMP)O 2015), then the Local Planning Authority should notify the local planning register Local Authority of its decision on an application to discharge (or not) the Biodiversity Gain Condition within 5 working days (art 37D(4) TCP(DMP)O 2015).

2.20.8 Approval of the Biodiversity Gain Plan

Discharge of the Biodiversity Gain Condition is to happen in accordance with Schedule 7A of the 1990 Act rather than the usual procedure applicable to the discharge of a condition under article 27 of the TCP(DMP)O 2015.

The Local Planning Authority can only approve a Biodiversity Gain Plan where it:

(i) specifies the pre-development biodiversity value of the on-site habitat;

(ii) the post-development biodiversity value of the on-site habitat is at least the value specified in the Biodiversity Gain Plan;

(iii) if any registered Off-Site BNG is allocated to the development (including meeting any conditions that apply to the allocation), the register records the allocation at the value specified in the plan, if any biodiversity credits referred to in the plan have been purchased,

the biodiversity gain objective is met and any other requirements of Regulations (from time to time) have been met (para 15 Sch 7A 1990 Act).

In relation to phased development, see paragraph 2.4.3 above.

The latter requirements potentially involve expenditure of considerable sums of money by the applicant and so the applicant is likely to want to be sure that the Biodiversity Gain Plan will be sufficient to discharge the Biodiversity Gain Condition before committing to that expenditure. This is likely to entail the submission of a draft Biodiversity Gain Plan with the application, which as discussed at paragraph 1.18.3 above is recognised by the PPG. Local Planning Authorities are likely to be asked to approve that plan "in principle" at the application stage to enable developers to proceed with confidence.

In practice, there are likely to be a number of steps to the process for discharging the Biodiversity Gain Condition in a Habitat Bank scenario:

(i) Developer to find registered units and enter into an option to purchase them;

(ii) Approval of the draft Biodiversity Gain Plan by the Local Planning Authority in principle (cannot go further than this as units may not yet be allocated) – draft BGP may include a copy of the option for purchase;

(iii) The developer will then secure the units (i.e. by way of the completion of an allocation agreement);

(iv) BNG provider will apply to have units allocated to the development (this must be done by the person who is required to carry out and maintain the habitat enhancements and cannot be done by the Developer or Responsible Body);

(v) Natural England will confirm the allocation of the units to the development;

(vi) Developer will supply evidence of allocation to Local Planning Authority;

(vii) Local Planning Authority discharges the Biodiversity Gain Condition; and

(viii) Biodiversity Gain Site Register can be amended, including in the event that the Local Planning Authority does not discharge the condition

2.20.9 When should a Biodiversity Gain Plan not be approved?

Examples of when a Biodiversity Gain Plan should not be approved include:

(i) when it does not meet the requirements at paragraph 2.20.8 above;

(ii) when it does not account for degradation (see paragraph 1.8 above);

(iii) when the Biodiversity Hierarchy has not been followed without good reason;

(iv) when it does not achieve at least a 10% net gain – it will be necessary to interrogate the submitted Metric;

(v) when it does not meet with the requirements of a condition to require BNG to be delivered over and above the statutory requirement (unless this condition is varied or removed); or

(vi) when the Off-Site biodiversity value has not been adequately secured for 30 years.

2.20.10 Refusal of an application to discharge a Biodiversity Gain Condition

Where a Local Planning Authority decides not to approve a Biodiversity Gain Plan, full reasons must be given in the decision notice, specifying all elements of the Biodiversity Gain Plan which are relevant to the determination (article 37D(5) TCP(DMP)(E)O 2015).

2.20.11 Publication of the decision

A copy of all Biodiversity Gain Plans, decisions and further information will be published on the planning portal (article 40 TCP (DMP)(E)O 2015).

2.20.12 Appeal against refusal to discharge a Biodiversity Gain Condition

There is a right to appeal against a refusal to approve a Biodiversity Gain Plan under the 1990 Act. The procedure for such an appeal is set out in article 37E TCP (DMP)(E)O which is different for the right to appeal against a refusal to discharge any other condition. Such an appeal must be submitted within 6 months of the refusal or the date on which the decision should have been given.

The party submitting the appeal is required to send to the local planning authorities a copy of the completed appeal form and a full statement of case, including a statement as to the procedure by which the appeal should be determined (Article 37E TCP(DMP)(E)O).

The decision of the Planning Inspectorate can be challenged under section 288 of the 1990 Act within 6 weeks.

2.20.13 Non-determination of an application to discharge a Biodiversity Gain Condition

An appeal against non-determination may be submitted by the applicant if the Local Planning Authority does not determine an application to discharge a Biodiversity Gain Condition within 8 weeks or such longer period agreed (Section 78(2) 1990 Act). The procedure applies as in paragraph 2.20.12 of this Chapter.

Planning Inspectorate (PINS) has published Guidance (https://www.gov.uk/guidance/biodiversity-gain-plan-how-to-complete-your-appeal-form#:~:text=If%20you're%20appealing%20against,date%20you%20submitted%20the%20plan)).

This gives practical advice to those that have submitted Biodiversity Gain Plans for approval on the submission of appeals and the appeal process.

The local planning authority has a period of 8 weeks (starting the day after submission) to determine whether or not to approve a Biodiversity Gain Plan, unless a longer period has been agreed in writing between the local planning authority and the party that submitted the Plan. If an application is refused or has not been determined on time, then the party that submitted the Plan has 6 months in which to appeal.

The usual position applies in respect of costs on appeal and the appeal can be determined by written representations, hearing or inquiry.

Guidance from the Planning Inspectorate (https://www.gov.uk/guidance/biodiversity-gain-plan-how-to-complete-your-appeal-form#:~:text=If%20you're%20appealing%20against,date%20you%20submitted%20the%20plan)) recommends that the Statement of Case submitted in respect of the appeal demonstrates why the Biodiversity Gain Plan shows that the BNG Objective will be met for the development. The submission should also include the completed Biodiversity Metric and data compiled for the purpose of completing the Metric, as well as the information comprising the application to the local planning authority. It will be the responsibility of the appellant to ensure that they have submitted all of the correct information to PINS on time, in the usual way.

2.20.14 Securing BNG delivery in an appeal situation

A Planning Inspector in an appeal situation is likely to consider whether the Biodiversity Gain Condition is capable of being successfully discharged, although it will generally be inappropriate for them to refuse the appeal on the ground that the Biodiversity Objective will not be met. The Inspector will consider the position in the same manner as the Local Planning Authority (see paragraph 2.15 above).

2.21 An overview of the different approaches to securing BNG

Led by the approach of the Biodiversity Hierarchy (please see paragraph 1.4) there are a number of ways in which BNG can be secured, depending upon whether the provision is On-Site, Off-Site or via the purchase of Statutory Credits. Taking each in turn:

2.21.1 On-site BNG

If there is a 'significant on-site habitat enhancement' which the applicant relies upon to meet the Biodiversity Gain Objective then it needs to be secured by a planning condition, Section 106 Agreement or Conservation Covenant for a period of 30 years from the completion of the development (paragraph 9 Schedule 7A of the 1990 Act). This does not include the retention of existing habitat.

Completion of the development is not defined and the PPG encourages Local Planning Authorities to work with applicants to clearly establish the point of completion and to include the completion of any On-Site habitat enhancements, not just the buildings related to the development (paragraph 022 Reference ID: 74-022-20240214)

The DEFRA Guidance provides that: "*significant enhancements are areas of habitat enhancement which contribute significantly to the proposed development's BNG, relative to the biodiversity value before development.*"

Further examples are provided as to what counts as a significant enhancement, noting that this will vary according to the scale of development and existing habitat, but these would normally be:

(i) habitats of medium or higher distinctiveness in the biodiversity metric

(ii) habitats of low distinctiveness which create a large number of biodiversity units relative to the biodiversity value of the site before development

(iii) habitat creation or enhancement where distinctiveness is increased relative to the distinctiveness of the habitat before development

(iv) areas of habitat creation or enhancement which are significant in area relative to the size of the development

(v) enhancements to habitat condition, for example from poor or moderate to good

Other non-significant enhancements will be factored into the Biodiversity Metric calculations but will not need to be secured, for example, private gardens. There is no certainty that those aspects of the development will continue to deliver the gain that they have been attributed in the Biodiversity Metric calculation. As they are generally of low distinctiveness, they are not required to be secured.

Some local planning authorities have their own policies on what is considered significant (such as Birmingham and Maidenhead) and so local planning authorities may wish to consider their approach in this regard.

The Defra Guidance provides that you will also need a Section 106 Agreement or Conservation Covenant if on-site gains are not significant, but contribute to locally important species or ecological networks.

There is discretion as to whether to utilise a planning condition, planning obligation of Conservation Covenant to secure On-Site BNG. While it is possible to utilise a condition, it may be preferrable to enter into a planning obligation or Conservation Covenant to allow for more detailed provisions relating to the delivery and particularly if there are additional policy reasons for securing the BNG. The latter would also be preferrable in the event that the Local Planning Authority are to recover any contribution or costs in respect of monitoring. See further paragraph 1.10.2 above.

It will not always be possible or viable to deliver On-Site BNG and so Local Planning Authorities should be prepared to receive applications which provide for Off-Site BNG and this will be acceptable where the Biodiversity Hierarchy has been applied.

2.21.2 Off-site BNG

It is always necessary to secure any BNG delivery which is provided on land beyond the planning application red line boundary so as to ensure that the owner of the BNG land is obliged to provide or

create the habitat creation or enhancement and maintain it for 30 years. This will be by way of Section 106 Agreement or Conservation Covenant.

It should be apparent at an early stage in the design of a development as to whether it will be necessary to rely upon Off-Site BNG.

Whether or not it is appropriate to rely on On-Site or Off-Site BNG will depend upon a range of factors including, the scale of the scheme, the viability of the scheme, the nature of the scheme (for example, the amount of affordable housing) and the constraints of the site.

The Biodiversity Hierarchy (see paragraph 1.4) should be considered as to the appropriateness of Off-Site BNG.

2.21.2.1 Location of the Off-Site BNG

The Biodiversity Metric applies on the basis of distance. The Metric reduces the number of Biodiversity Units generated for off-site works outside of the boundary of the Local Planning Authority or National Character Area (NCA). Habitat units from neighbouring Local Planning Authorities or NCAs will be reduced by 25%. Biodiversity Units from outside neighbouring Local Planning Authorities or NCAs will be reduced by 50%. This is known as the 'Spatial Risk Multiplier' (SRM).

2.21.2.2 How can Off-Site BNG be obtained?

This will generally be by way of:

(i) negotiation with a known third party landowner; or

(ii) to rely upon land within the control of the applicant; or

(iii) by the purchase of BNG Units from a Habitat Bank.

This may include parcels of land of varying different sizes and uses. Given that there is a 'set up' costs associated with the provision of Off-Site BNG, typically it is not viable to being forward a relatively small site or a site on which the number of BNG Units is going to be low. This often means that agricultural land is a popular candidate for Off-Site BNG, although the interests of delivering BNG needs to be balanced against the interests of food production. The Local Planning Authority would not necessarily have any input into the location of the proposed BNG or the way in which it is to be

delivered, in this respect the Local Planning Authority would usually respond to the proposals presented to it.

There is a potentially significant part for local planning authorities to play in this respect, not only in terms of providing a local solution which will keep BNG within the area of the development that gives rise to the harm, but also in terms of 'added value' that BNG can deliver, for example; recreational opportunities, delivery of Sustainable Urban Drainage systems (if relevant given the particular site features and development proposed), access to nature, improvement to protected species/habitats, natural flood management, avoiding BMV land, placemaking and potentially to support other environmental agendas, e.g. carbon sequestration. In addition, Habitat Banking can be a circular economy.

2.21.2.3 Purchase of BNG Units

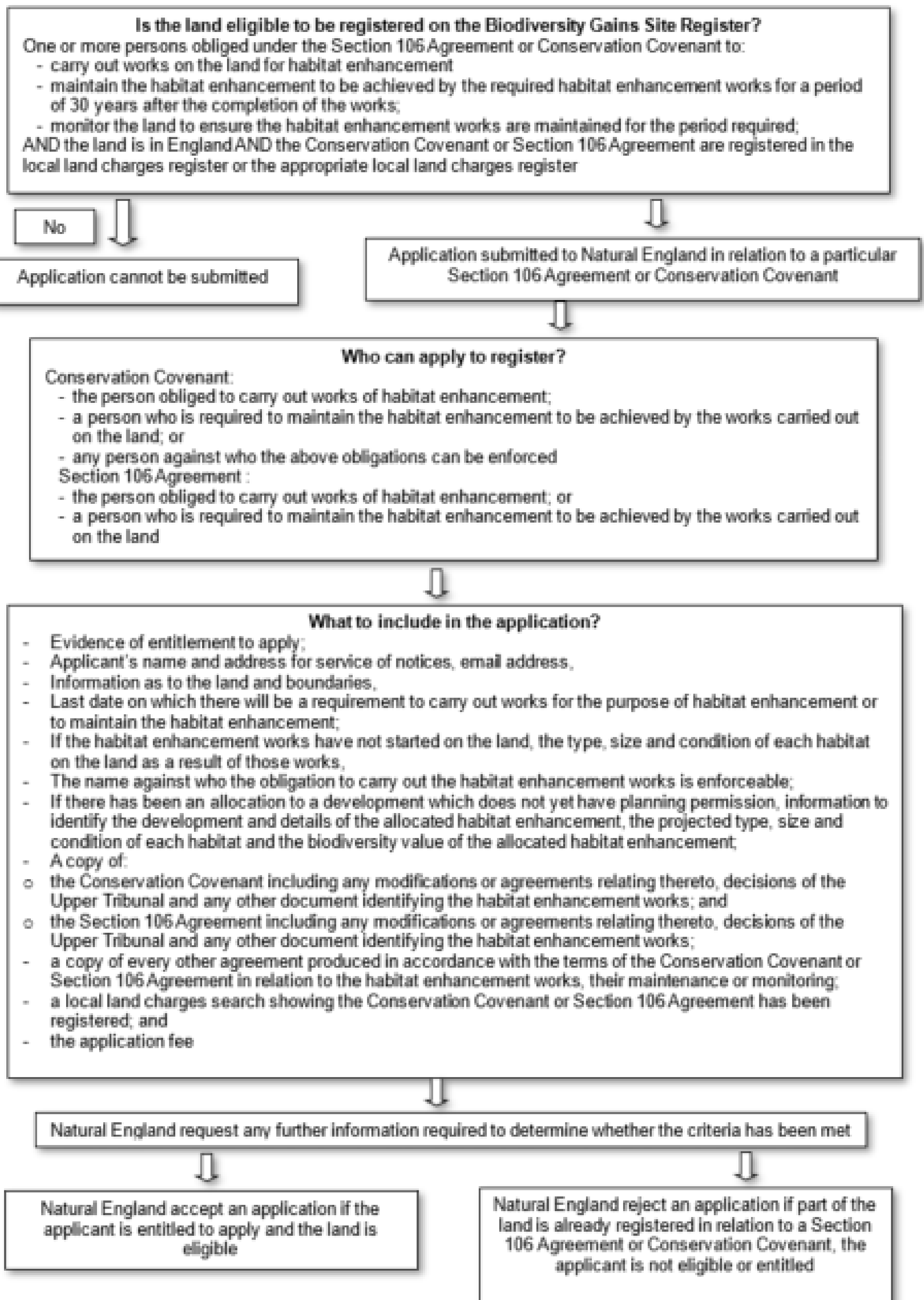
BNG Units are intentionally traded on the private market and DEFRA and Natural England will not intervene in this marketplace.

The price of BNG Units will therefore need to be agreed on commercial terms which will not be of concern to the Local Planning Authority. For this reason, it may be that some information is not provided to the Local Planning Authority or is shared on the basis that its commercial sensitivity is respected.

It will be for the Local Planning Authority to satisfy itself that the BNG Units have been acquired to the correct value, nature and condition.

As the purchase of BNG Units can represent a considerable investment for a developer, they will often not be purchased until the planning permission has been granted. This is so that the developer can be sure that their investment in BNG Units is necessary and so as not to tie up funds until they are needed or there is some certainty of a return.

Local Planning Authorities may therefore expect to see an option agreement approach to securing BNG Units. Following this approach developers can reserve the option to purchase the BNG Units upon receiving planning permission, by paying a non-refundable deposit or reserve to the seller which effectively rewards the landowner for reserving Units during the option period. The remainder is paid if the developer exercises the option. The option period would be a matter for negotiation and may need to deal with phased requirements. This means that when the developer successfully obtains their planning permission, they pay the remainder.



Is the land eligible to be registered on the Biodiversity Gains Site Register?
One or more persons obliged under the Section 106 Agreement or Conservation Covenant to:
- carry out works on the land for habitat enhancement
- maintain the habitat enhancement to be achieved by the required habitat enhancement works for a period of 30 years after the completion of the works;
- monitor the land to ensure the habitat enhancement works are maintained for the period required;
AND the land is in England AND the Conservation Covenant or Section 106 Agreement are registered in the local land charges register or the appropriate local land charges register
No
Application cannot be submitted
Application submitted to Natural England in relation to a particular Section 106 Agreement or Conservation Covenant
Who can apply to register?
Conservation Covenant:
- the person obliged to carry out works of habitat enhancement;
- a person who is required to maintain the habitat enhancement to be achieved by the works carried out on the land; or
- any person against who the above obligations can be enforced
Section 106 Agreement :
- the person obliged to carry out works of habitat enhancement; or
- a person who is required to maintain the habitat enhancement to be achieved by the works carried out on the land
What to include in the application?
- Evidence of entitlement to apply;
- Applicant's name and address for service of notices, email address,
- Information as to the land and boundaries,
- Last date on which there will be a requirement to carry out works for the purpose of habitat enhancement or to maintain the habitat enhancement;
- If the habitat enhancement works have not started on the land, the type, size and condition of each habitat on the land as a result of those works,
- The name against who the obligation to carry out the habitat enhancement works is enforceable;
- If there has been an allocation to a development which does not yet have planning permission, information to identify the development and details of the allocated habitat enhancement, the projected type, size and condition of each habitat and the biodiversity value of the allocated habitat enhancement;
- A copy of:
o the Conservation Covenant including any modifications or agreements relating thereto, decisions of the Upper Tribunal and any other document identifying the habitat enhancement works; and
o the Section 106 Agreement including any modifications or agreements relating thereto, decisions of the Upper Tribunal and any other document identifying the habitat enhancement works;
- a copy of every other agreement produced in accordance with the terms of the Conservation Covenant or Section 106 Agreement in relation to the habitat enhancement works, their maintenance or monitoring;
- a local land charges search showing the Conservation Covenant or Section 106 Agreement has been registered; and
- the application fee
Natural England request any further information required to determine whether the criteria has been met
Natural England accept an application if the applicant is entitled to apply and the land is eligible
Natural England reject an application if part of the land is already registered in relation to a Section 106 Agreement or Conservation Covenant, the applicant is not eligible or entitled

2.21.2.4 When will sites be registered on the Biodiversity Gain Site Register?

See also paragraph 2.26.1. The Biodiversity Gain Site Register is available to view on the link below:

https://www.gov.uk/guidance/search-the-biodiversity-gain-sites-register

A BNG site will only be registered once bound by a Conservation Covenant or Section 106 Agreement (regulation 5(1) Register Regulations). There is no reference to a Unilateral Undertaking so Off-Site BNG will not be able to be secured in that way. Land can only be registered once in relation to a particular Conservation Covenant or Section 106 Agreement, but there can be multiple entries in relation to multiple Conservation Covenants or a combination of Conservation Covenants and Section 106 Agreement in relation to the same land (and vice versa), providing the criteria for registration are met (regulation 5(4) and (5) Register Regulations).

It is possible to register the Section 106 Agreement or Conservation Covenant immediately following completion and before trading commences, or, to register the Section 106 Agreement or Conservation Covenant with the first allocation of BNG Units. In the latter case, the BNG site and the allocation of BNG Units would need to be registered. In that instance, there is a risk that the allocation will not be undertaken to satisfy the Local Planning Authority that BNG has been secured until both registrations have taken place. Therefore, this option may be less palatable to a developer as any delay in registration could lead to a delay to their development. However, it may be more appealing to the landowner as this approach is likely to delay their maintenance requirements.

The land must be eligible to be registered and an application must be made to and accepted by Natural England (regulation 5(3) Register Regulations).

To be eligible to be registered seven conditions must be complied with (regulation 6 Register Regulations), as follows:

1. One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement to carry out works on the land for habitat enhancement;

2. One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement to maintain the habitat enhancement to be achieved by the required habitat enhancement works (i.e. all of the works to be carried out on the land for the purposes of the habitat enhancement) for a period of 30 years after completion of those works;

3. One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement are obliged to monitor the land to ensure the habitat enhancement to be achieved by the habitat enhancement works on the land is maintained for the period required;

4. For the purposes of Schedule 7A of the 1990 Act (as amended), the required habitat enhancement works secured by the Conservation Covenant or Section 106 Agreement on the land are made available to be allocated conditionally or unconditionally and with or without the payment of consideration in accordance with the terms of the Conservation Covenant or Section 106 Agreement, to one or more development in respect of which planning permission is granted;

5. The land is in England;

6. The Conservation Covenant or the Section 106 Agreement are registered in the local land charges register or the appropriate local land charges register. Section 1 of the Local Land Charges Register Act 1975 provides that the Local Authority by whom the covenant or agreement is enforceable should apply to register the local land charge. Therefore, if the Local Planning Authority is relying on BNG secured by way of Section 106 Agreement or Conservation Covenant outside of its administrative area, it may not be secured as a local land charge by them. The functions of maintaining and updating the local land charges register are migrating to the Land Registry and so local land charges will need to be recorded via the Land Registry.

If the land is eligible then an application can be submitted to Natural England in relation to the particular Conservation Covenant or Section 106 Agreement (regulation 7(1) Register Regulations).

2.21.2.5 Who can apply to register a site on the Biodiversity Gain Site Register?

In relation to a Conservation Covenant, this application can only be made by (regulation 7(2) Register Regulations):

(i) the person obliged to carry out the works for habitat enhancement;

(ii) a person who is required to maintain the habitat enhancement to be achieved by the works to be carried out on the land; or

(iii) any person against who the obligations mentioned above are enforceable.

The Responsible Body is expressly excluded from the ability to apply to register a Conservation Covenant (regulation 7(3)).

In relation to a Section 106 Agreement, the application to register can only be made by:

(i) the person obliged to carry out the works for habitat enhancement;

(ii) a person who is required to maintain the habitat enhancement to be achieved by the works to be carried out on the land (regulation 7(4) Register Regulations).

The above provisions do not make express reference to successors in title/those deriving title from the original contracting party, but as that successor will be the person obliged to carry out the works/maintenance, it follows that such successors could make an application to register a Conservation Covenant or Section 106 Agreement.

2.21.2.6 Can an application to register a site on the Biodiversity Gain Site Register be withdrawn?

An application to register a Conservation Covenant or Section 106 Agreement on the Biodiversity Gain Site Register can be withdrawn but only before Natural England have decided whether to accept or reject the application (regulation 7(5) Register Regulations).

2.21.2.7 What must an application to register a site on the Biodiversity Gain Site Register include?

An application to register a BNG Site must include (Regulation 8 Register Regulations):

(i) evidence of entitlement to make the application;

(ii) information to include: the applicant's name; the address for service of notices under the Regulations; an email address to which notices may be sent; information as to the land and boundaries to be registered (on a map or otherwise); the last date on which there will be a requirement to carry out works for the purpose of habitat enhancement or to maintain the habitat enhancement to be achieved by the works on the land; if the requirement habitat enhancement works have not commenced on the land, the type, size and condition of each habitat on the land and the projected type, size and condition of each habitat on the land as a result of those works; the name of each person against whom the requirement to carry out the required habitat enhancement works is enforceable; the name of each person by whom the requirement to maintain any of the habitat enhancement to be achieved are enforceable; where the habitat enhancement has been allocated to a development which does not yet have the benefit of planning permission, information to

identify the development, in relation to allocated habitat enhancement the projected type, size and condition of each habitat as a result of the works to be carried out to achieve the habitat enhancement; and, the biodiversity value of the allocated habitat enhancement in relation to the development;

(iii) declaration – where the required habitat enhancement works have already commenced any consent, licence or other permission necessary for the purpose of carrying out those works has been obtained. Or, where the required habitat enhancement works have not commenced, any consent, licence or other permission necessary for the purpose of carrying out those works will be obtained before the works are commenced;

(iv) documents in respect of a Conservation Covenant:

- the Conservation Covenant in the form required by section 117 of the 2021 Act;
- any agreement discharging any of the land from the obligations under the Conservation Covenant;
- every agreement modifying the Conservation Covenant;
- every agreement appointing a person to replace a Responsible Body under the covenant;
- every order of the Upper Tribunal modifying or discharging an obligation under the covenant;
- every other decision of a court or tribunal about the effect of the covenant;
- every other document which describes any of the required enhancement works on the land and which has been produced in accordance with the terms of the Conservation Covenant;

(v) documents in respect of a Section 106 Agreement:

- the Section 106 Agreement in the form it was in when entered into under section 106 of the Town and Country Planning Act 1990;
- every agreement modifying or discharging a planning obligation in the Section 106 Agreement;

- every determination, notice or other instrument modifying or discharging the planning obligation in the Section 106 Agreement;

- every instrument by which the Section 106 Agreement has otherwise been amended;

- every decision of a court or tribunal about the effect of a planning obligation in the Section 106 Agreement;

- every other document which describes any of the required habitat enhancement works and has been produced in accordance with the terms of a planning obligation in the Section 106 Agreement;

(vi) a copy of every agreement or other document entered or produced pursuant to the terms of the Conservation Covenant or the Section 106 Agreement and which describes things to be done in relation to the land for the purposes of maintaining a habitat enhancement to be achieved by the carrying out of the required habitat enhancement works, or, monitoring habitats on the land to ensure that any habitat enhancement is maintained for the period for which it is to be maintained pursuant to the Conservation Covenant or Section 106 Agreement;

(vii) a copy of the local land charges search showing that the Conservation Covenant or Section 106 Agreement has been registered in the local land charges register or the appropriate local land charges register. See further paragraph 2.31.

An application must be submitted with the application fee or it will be rejected (regulation 9(2) Register Regulations). If so, Natural England must accept or reject the application (regulation 9(4) Register Regulations) unless the application has been withdrawn (regulation 9(12) Register Regulations).

2.21.2.8 How will Natural England consider the application?

Natural England must accept the application if it is satisfied that the applicant is eligible and entitled to make the application, as per the above criteria (Regulation 9(5) Register Regulations).

Information can be requested if needed by Natural England to determine whether the criteria are satisfied (regulation 9(6)). If information requested is not provided within 3 months of the expiry of the notice to provide information then the application will be rejected (regulation 9(10) Register Regulations).

The application must be rejected if the land or part of it is already registered in relation to the Conservation Covenant or Section 106 Agreement, if the applicant is not eligible or entitled to make the application and Natural England has decided not to request more information (regulation 9(8) Register Regulations).

2.21.2.9 What if Natural England consider that the application includes false or misleading information?

The application must be rejected if Natural England considers that false or misleading information has been provided as part of the application (regulation 9(8) Register Regulations).

If Natural England decide that it is necessary for the purposes of the application to investigate whether any part of the application is false or misleading notice must be given to the applicant notifying of this decision as soon as possible and to give notice of the conclusion as soon as possible after reaching the same, together with the date of the decision (regulation 9(9) Register Regulations).

If the application is rejected, notice of that decision must be issued giving reasons for the decision and information about the right to appeal (regulation 10 Register Regulations).

2.21.2.10 What if the application is accepted?

If the application is accepted, an entry will be created in the Biodiversity Gain Site Register in respect of the Conservation Covenant or Section 106 Agreement and a unique registration number will be allocated, as well as details of any allocations included within the application (regulation 11(2) Register Regulations).

2.21.2.11 What happens upon allocation?

Once the BNG Site has been registered the BNG Units can be traded by way of negotiations with developer. There will likely be commercial agreements relating to payment terms, etc. which it is likely that the parties would prefer to remain private due to commercial sensitivities.

Upon sale of BNG Units, the allocation will need to be registered on the Biodiversity Gain Site.

2.21.2.12 How to register an allocation?

Where land has been registered on the Biodiversity Gain Site Register and habitat enhancement has been allocated to a development then the allocation should be recorded on the Biodiversity Gain Site Register unless already recorded.

The application to record the allocation should include information as to the projected type, size and condition as a result of the required enhancement works includes the projected types, size and condition of habitat to which the allocation relates, then an application can be made to record the allocation of the habitat enhancement to the development in the entry in question (regulation 12(1) to (3) Register Regulations).

Such an application can only be made by a 'relevant person' or a person with the consent of every relevant person (regulation 12(4)). For these purposes a 'relevant person' is:

(i) in relation to a Conservation Covenant: a person who is required to carry out the required enhancement works or to maintain the enhancement works or a person against whom those requirements are enforceable, but not the Responsible Body (regulation 12(3) Register Regulations); and

(ii) in relation to a Section 106 Agreement: a person who is required to carry out the required enhancement works or is required to maintain the habitat enhancement (regulation 12(4) Register Regulations).

An application to record an allocation must include; the name of the applicant, evidence that the applicant is able to make an application, an address to which notices can be served, an email address to which notices can be sent, the registration number for the entry in the Register, information identifying the development, in relation to each habitat to which the allocation relates the project type, size and condition as a result of the habitat enhancement works to achieve the allocated habitat enhancement the covenant (in the case of a Conservation Covenant or the planning obligation (in the case of a Section 106 Agreement) and the biodiversity value of the allocated habitat enhancement for the purposes of the development (regulation 13 Register Regulations).

2.21.2.13 What happens upon Natural England's receipt of an application to register an allocation?

If Natural England has received a valid application and payment of the application fee then it must decide whether to accept or reject the application (regulation 14(1) to (4) Register Regulations).

Natural England must accept the application is the applicant is entitled to make the application and the above conditions have been satisfied (regulation 14(5) Register Regulations).

Natural England must reject the application if the application is not entitle to make the application, the conditions have not been satisfied, Natural England has decided not to make a request for information or considers that false or misleading information has been supplied (regulation 14(8) Register Regulations).

Investigations into false and misleading information, requests for information and notice of decision (regulation 15) apply in the same manner as false of misleading information in connection with the registration of a BNG site (see paragraph 2.21.2.9).

2.21.2.14 What happens where an application to register an allocation is accepted?

Where an application to record an allocation is accepted, Natural England will as soon as possible record the allocation against the BNG entry and include in the entry the information identifying the development, the habitat enhancement allocated and the biodiversity value of the allocated habitat enhancement in relation to the development (regulation 16 Register Regulations).

Natural England can ask for more information to determine whether to accept an application (regulation 14(6) Register Regulations).

2.21.2.15 What happened where an application to register an allocation is rejected?

Natural England will issue notice accordingly (with reasons) and the Biodiversity Gain Site Register will not be updated to record the allocation (Regulation 15(2) and (3) Register Regulations). If the application has been rejected on the basis that the application does not meet the criteria, then the applicant may wish to apply again.

The rejection of the application will not impact or remove the obligations contained in a Conservation Covenant or Section 106 Agreement, unless expressly provided. It may be appropriate for the Conservation Covenant or Section 106 Agreement to include provisions to deal with such a scenario such that the BNG provision does not continue to be subject to obligations where land has not or cannot be allocated.

2.22 Statutory Credits

There is the ability to purchase a credit from the Secretary of State to meet the Biodiversity Gain Objective under section 101 2021 Act (known as Statutory Credits).

The regime is run by Natural England for DEFRA and is intended to offer a last resort for developers that would otherwise not be able to find a BNG solution. DEFRA will publish the 'arrangements' relating to applications to purchase credits, the amount payable in respect of a credit of a given value, proof of purchase and reimbursement for credits purchased where development is not carried out (section 101(3).

The pricing under the arrangements must not discourage the registration of land in the biodiversity Gain Sites Register (section 101(4) 2021 Act). The use of income generated from the sale of Statutory Credits is prescribed together with annual reporting requirements, please see paragraph 1.13.4.

2.22.1 Statutory Credits - features to be aware of

To ensure Statutory Credits retain their character as an option of last resort there are a number of points to be aware of:

(i) Developers can only buy Statutory Credits once all other pre-commencement conditions have been discharged;

(ii) Developers have to have approached 3 Habitat Bank suppliers and show that there are no Off-Site BNG options available before they can be purchased and evidence will be required (see DEFRA Guidance);

(iii) Statutory Credits cannot be transferred/traded/sold back – they are registered to a site, not a developer;

(iv) Developers have to submit proof of purchase of Statutory Credits to get Biodiversity Gain Plan signed off to discharge the Biodiversity Gain Condition;

(v) There is a risk to developers as the Statutory Credit will need to be purchased before the Biodiversity Gain Condition is discharged;

(vi) The price will be reviewed every 6 months and 10 weeks' notice will be provided of a change in price

(vii) They are intentionally priced to be prohibitively expensive, e.g.

- Medium distinctiveness Grassland £42,000 per unit
- Medium distinctiveness Woodland £48,000 per unit

- Medium distinctiveness Ponds £125,000 per unit

[NB – prices at the time of publication – check for updates]

(viii) Plus the developer must buy 2 credits for every Biodiversity Unit needed to achieve the Biodiversity Objective

See also paragraph 1.13 above.

2.23 What are Habitat Banks?

A Habitat Bank is a piece of land used for habitat creation and enhancement that is then managed for 30 years. The land must be legally secured by way of a Conservation Covenant or planning obligation (Section 106 Agreement).

The land is then registered with Natural England as a Biodiversity Gain Site and the Biodiversity Units attributable to the habitat creation and enhancement can be sold to developers. A link to the Biodiversity Gain Register is included in paragraph 2.21.2.4. Developers will want to purchase Biodiversity Units in order to satisfy the Biodiversity Net Gain condition attached to any planning permission(s) they benefit from.

Habitat Banks differ from other Biodiversity Gain Sites in that the landowner begins habitat creation in advance of selling the corresponding Biodiversity Units. This can give rise to more Biodiversity Units, depending on how long the habitats have to develop. There are also economies of scale in terms of site set up and management costs than other more bespoke mitigation sites.

Habitat Banks may be operated by anyone, i.e. Wildlife Trusts, conservation charities, landowners and commercial operators. However, those with conservation knowhow/experience will be best placed to establish the Habitat Bank.

For completeness it is worth noting that only the Habitat Banks which are established and registered by Natural England will appear on the Biodiversity Gain Site Register. There will be other Habitat Banks which are not yet formally established (by way of planning obligation or Conservation Covenant) or have not yet been registered, which will not appear on the Biodiversity Gain Site Register. As a consequence, other local planning authorities and/or habitat bank brokers (many of which can be found by internet searches) may be able to assist in locating potentially BNG Units.

2.24 Securing BNG delivery

The delivery of on-site BNG can be secured by way of planning condition, planning obligation or Conservation Covenant.

The delivery of Off-Site BNG can be secured by way of Section 106 Agreement or Conservation Covenant.

2.24.1 Section 106 Agreements

See also paragraph 1.10.2 and 2.29.

The principles which ordinarily apply to Section 106 Agreements apply equally when entering into a Section 106 Agreement in relation to the delivery of BNG.

Namely that, regulation 122 of the CIL Regulations 2010 (as amended) applies to require that the obligations secured in the Section 106 Agreement are; necessary to make the development acceptable in planning terms, directly related to the development and fairly and reasonably related in scale and kind to the development.

It is anticipated that Section 106 Agreements will be the most common way of securing BNG due to their familiarity to developers, local planning authorities, funders and other interested third parties). The comments in the paragraphs comprising 2.24.1 are prepared on the basis of obligations to secure BNG but do not specifically refer to or consider any further obligations required in respect of a particular development. In this regard it is possible to enter into a Section 106 Agreement in respect of a particular development which also secures BNG, or, to secure the BNG only and independent of a planning application.

2.24.1.1 When can they be used to secure BNG?

Section 106 of the 1990 Act provides that any person interested in land in the area of a Local Planning Authority may, by agreement or otherwise, enter into an obligation:

(i) restricting the development or use of the land in any specified way;

(ii) requiring specified operations or activities to be carried out in, on, under or over the land;

(iii) requiring the land to be used in any specified way; or

(iv) requiring a sum or sums to be paid to the Local Authority on a specified date or dates or periodically.

In relation to BNG, there is no prescribed or standard template or precedent. It will be for each Local Planning Authority to determine what they want to include and how they want to approach BNG bearing in mind that the Local Planning Authority will be responsible for monitoring and enforcement of the same exclusively and without input from DEFRA or Natural England. Therefore it is important to ensure that the section 106 provisions reflect the monitoring arrangements proposed to be put in place by the Local Authority.

As a starting point, the Local Planning Authority in which the Habitat Bank is created will be required to approve the proposed maintenance and monitoring arrangements. The Local Planning Authority of any developer seeking to purchase the BNG Units may review the planning obligations that have been provided to create the Habitat Bank, this will be a matter for each Local Planning Authority to consider. There is a valid suggestion that the due diligence that needs to be undertaken by the Local Planning Authority for the development site need not be rigorous if the Habitat Bank is recorded on the Biodiversity Gain Site Register. This is because Natural England will scrutinise the maintenance and monitoring arrangements before registering a Habitat Bank on the Biodiversity Gain Site Register.

However, the Planning Advisory Service has published a suite of template Section 106 Agreements in respect of On-Site BNG, Off-Site BNG and Habitat Banking. These documents are a starting point and can be used by local planning authorities but local planning authorities have discretion to negotiate the agreements as they see fit. The PAS documents are available here: https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng

See our comments on these documents at paragraph 1.10.2, 2.17 and 2.24.1.6

2.24.1.2 What to include in the Heads of Terms for a Section 106 Agreement?

The Defra Guidance provides that your Section 106 Agreement will need to provide detailed information on the planned biodiversity habitat enhancements for the site (for example, create 2 hectares of neutral grassland in moderate condition). It may also include what specific actions will be taken to achieve the habitat enhancements (for example, sow a seed mix or carry out bi-annual cuts). It also needs to agree who is responsible for creating or enhancing the habitats, maintaining the habitats and monitoring the habitats. It can provide a detailed scheme of management and

monitoring in a HMMP. It will be necessary to agree how to allocate the enhancements (for example, to one or more developments), decide who will agree the allocation and it will need to identify the land where the habitat will be created or enhanced. It will need to agree:

- how to monitor the Biodiversity Gain Site, including a schedule and how to access the land;
- an end date that is at least 30 years from completion of the creation or enhancement of the habitat;
- any consent or licences that are needed;
- what actions the Local Planning Authority or Responsible Body can take if the obligations are not met;
- what actions need to be taken if the habitat enhancement does not go as planned ;
- how to make permitted changes or manage disputes;
- any funding arrangements (for example, for ongoing monitoring) and a payment schedule;
- the biodiversity value of the pre-enhancement habitat (calculated using the statutory biodiversity metric);
- If the habitat or enhancement is within the wildlife consultation area of an aerodrome, it must agree that it does not harm aircraft operations, as well as obtaining the agreement that the relevant aerodrome:
    - was notified of the proposed agreement;
    - had the opportunity to assess for potential hazards to aircraft operations; and
    - is satisfied with the risk to aviation safety.

When considering the Heads of Terms for a Section 106 Agreement it may be useful to consider:

(i) how to verify that the habitat enhancement/creation works have been completed properly;

(ii) the circumstances in which the BNG Units generated by the habitat enhancement/creation works will be recalculated;

(iii) notice and registration on the Biodiversity Gain Register;

(iv) notice and registration of allocations;

(v) dispute resolution provisions;

(vi) management and monitoring – how this will be undertaken?, by whom?, how often?, what if the land interests and parties involved change?. Does the Local Planning Authority have a say in who will continue the management and monitoring?, will ringfenced maintenance costs or a bond be required?

(vii) excess gains and how they can be used for other developments;

(viii) any costs that need to be recovered by the Local Planning Authority;

(ix) any reporting obligations that may be imposed – i.e. as to the condition of the habitat at defined intervals;

(x) any notice obligations that may be imposed – i.e. upon the transfer of the BNG land;

(xi) are these terms that will be secured prior to the commencement of development?

(xii) whether the Local Planning Authority will require step-in rights in the event of a failure to complete/maintain the works;

(xiii) whether to expressly require replacement in the event of failure and whether to require this is secured;

(xiv) to expressly prevent any use or activity on the land which would impact of frustrate the delivery of the BNG or compliance with the HMMP without the express consent in writing of the Local Planning Authority;

(xv) whether to require that adaptive management policies are agreed (if not already provided for in the HMMP);

(xvi) notice of changes in the interests in the site and as to progress with management and monitoring;

(xvii) access rights for the purpose of monitoring;

(xviii) force majeure provisions;

(xix) termination provisions – for example in the event of a change in law or policy or at the discretion of the landowner;

(xx) exemptions to liability – for example for statutory undertakers, plot purchasers and Registered Providers.

In addition, it is worth noting that the Local Planning Authority is not required to enter into a Section 106 Agreement, it will only enter into agreements where it considers it appropriate to do so.

Typically a Local Planning Authority would not be a party to a Section 106 Agreement which relates to land outside of its administrative boundary. That said, this may arise where the site is cross-boundary or Off-Site BNG is being provided within another Local Authority area.

There is the opportunity for Local Planning Authorities to enter into Section 106 Agreement in relation to land within the Local Planning Authority area on the basis that the landowning Authority enters as landowner and the other Local Planning Authority acts as the enforcing authority. This option is feasible and the possibility is discussed in paragraph 5.3.

2.24.1.3 Who will be bound?

A planning obligation is enforceable by the Local Authority identified as the enforcing Local Authority against (s106(3) 1990 Act):

- the person entering into the obligation; and
- any person deriving title from that person.

The Section 106 Agreement can (and usually will) provide that the obligations will be released upon the when a landowner parts with their interest in the land which is bound by the Section 106 Agreement save for prior breaches (s106(4) 1990 Act).

A Section 106 Agreement can therefore be used to impose obligations to enhance and maintain a habitat which are then enforceable by the Local Planning Authority against the owners of the land and any person deriving title from them.

2.24.1.4 How should Section 106 Agreements be used to secure BNG?

A Section 106 Agreement can be used to secure Off-Site BNG, and may also be used for significant On-Site gains in some circumstances. See paragraph 1.9.

The Agreement will identify the land where the habitat creation or enhancement works will be carried out and will need to last for at least 30 years in accordance with the details approved in the HMMP pursuant to the Biodiversity Gain Condition.

2.24.1.5 Nature of the Section 106 Agreement

See also paragraph 5.3.7.

The Section 106 Agreement will need to be entered into by the Local Planning Authority and the freehold landowner, or a leaseholder benefiting from a lease on the land that is for at least 30 years (also allowing for the time it takes to establish the habitat).

The Section 106 Agreement must be in writing and executed as a deed by all parties. The obligations will then run with the land and therefore pass to the new owner of the land in the case of a sale or to the leaseholder on the grant of a lease.

The Agreement will require the planned biodiversity habitat enhancements for the site, usually by reference to the implementation of the Habitat Management and Monitoring Plan. The Plan will also provide a detailed schedule of management and monitoring which the Agreement will require compliance with.

The Section 106 Agreement may provide for the habitat work to be sub-contracted to a third party, and they may also be party to the Agreement. This will be a matter for the applicant but the Local Planning Authority may want some input as to who does the works or to verify that they have been properly undertaken.

For Off-Site BNG, the 30 year maintenance period starts when you complete the habitat enhancement work.

For on-site BNG the 30 year maintenance period starts when you complete the development, it may be expected that the BNG come forward last with landscaping works.

The Section 106 Agreement can impose charges for inspection and can share the burden of review and reporting with the Local Planning Authority. Typically the Section 106 Agreement will impose an obligation in respect of monitoring and reporting, but it may also reserve an ability for the Local Planning Authority to attend site for inspections.

2.24.1.6 What examples are available?

PAS has some examples of conditions and Section 106s Agreements currently used by local authorities to secure BNG – https://www.local.gov.uk/pas/events/pas-past-events/biodiversity-net-gain-local-authorities/biodiversity-net-gain-0

PAS has also published a template Section 106 Agreement for the creation of Habitat Banks (https://www.local.gov.uk/pas/environment/biodiversity-net-gain-bng-local-planning-authorities/pas-biodiversity-net-gain-bng) on which we have the following observations:

2.24.1.6.1 Statement of Achievability

The template includes provision for a statement of achievability to be submitted when the Section 106 is entered into to assist the Local Planning Authority with their assessment as to whether the BNG works and maintenance are achievable. This is something that may be challenged by developers on the basis that the HMMP should be sufficient to demonstrate deliverability.

2.24.1.6.2 Timeframe for Completion of Works

The template requires the BNG works to be done within 12 months of registration of the Section 106, although it acknowledges that this is not a statutory requirement. It says that guidance indicates that this should be the case, but the guidance in fact says that the works should be done within 12 months of allocation. BNG providers are likely to resist a requirement to carry out works before the relevant units are allocated or committed for allocation. They may also want to adopt a phased approach to the completion of the works so as to limit their obligations until such time as units are allocated/committed for allocation (which is acknowledged in the template).

2.24.1.6.3 Certificate of Completion

The template includes a sign off process whereby the enforcing Local Authority must inspect the habitat creation works on completion of the initial habitat creation works and certify that they have been completed to their satisfaction. This may be objectionable for BNG providers in that they will be concerned about delays to the allocation process due to a failure/delay to inspect/issue the Certificate. A deemed approval provision may be appropriate by way of a compromise. This applies in addition to the ongoing monitoring considered in paragraph 2.24.1.6.4 below.

2.24.1.6.4 Notification of Allocation and Monitoring

The template requires the enforcing Local Authority to be notified when the land/units are first allocated and when the BNG Capacity has been fully allocated. It also prohibits any allocation unless there is sufficient remaining BNG capacity. However, a Local Planning Authority is unlikely to be able to scrutinise whether there is sufficient remaining BNG capacity where they have not been notified of every allocation. We would therefore recommend the inclusion of a requirement for the enforcing Local Authority to be notified of every allocation, together with a requirement for an accompanying Capacity Monitoring Report setting out each allocation and the quantum of the remaining capacity.

2.24.1.6.5 Monitoring by Enforcing Local Authority

The template imposes an obligation on the enforcing Local Authority to monitor the implementation of the HMMP by way of inspection of the site on an annual basis for the first 5 years and then every 5 years thereafter. Local authorities may prefer to impose monitoring requirements on the BNG provider and adopt more of an oversight role.

2.24.1.6.6 Monitoring Fee

The template provides for a monitoring fee to be paid annually for the full 30 year period. It may be more appropriate for the monitoring fee to be paid every 5 years after the first 5 years, but local authorities should consider what is required in each case with reference to the above monitoring requirements.

2.24.1.6.7 Access Rights

The template includes access rights for the Local Planning Authority to both the BNG land and neighbouring land in the same ownership. Landowners are likely to be concerned to ensure that nothing can be done to prevent or interrupt their use/activities on land beyond the designated BNG land.

2.24.1.6.8 Modification of HMMP

Whilst the template includes provision for modification of the HMMP, it is not clear enough that the BNG provider can instigate this process at any time. We believe this is something that will be required by most BNG providers.

2.24.1.6.9 Variation Events

The template includes a broad range of variation events that can give rise to amendments to the Section 106 Agreement. Specifically, there is provision for the Section 106 Agreement to be amended where there is a change to the Metric. Also, where the land becomes encumbered by any right that would be incompatible with BNG, such as designation as a new town, village green or the creation of public rights of way. Local Planning Authorities should consider limiting this to encumbrances which are not within the landowners' control, which is not the case in the template currently.

2.24.1.6.10 Modification Notice

The template includes provision for the service of a Modification Notice where the BNG provider wishes to release land from the Section 106 Agreement (where not allocated). This is likely to be an important provision for a Habitat Bank provider. However, the template drafting would appear to give the Local Planning Authority discretion as to whether or not to accept such a notice (or at least the drafting is unclear in this respect), and may therefore need tightening up to satisfy BNG providers that the drafting offers them sufficient autonomy in this respect.

2.24.1.6.11 Force Majeure

The template does not include a force majeure provision (i.e. a release where there is an act of god or other event outside the BNG provider's control which prevents compliance with the obligations in the Section 106 Agreement), and suggests that this can be dealt with in the HMMP. The inclusion of such a clause is often very important for a BNG provider and the scope of the clause can be contentious. In particular, climate change and arson/damage as a result of antisocial behaviour are key concerns for BNG providers. This is particularly the case for conservation charities who may have a limited pot of money for the works involved and may not have the resources to undertake remedial works.

2.24.1.6.12 Bond

The template includes provision for a bond to secure the obligations in the Section 106 Agreement, including the requirement to pay a monitoring contribution to the Local Planning Authority. The amount of the bond is reduced over time. Such a requirement may be opposed by BNG providers.

2.24.1.6.13 Financial Reporting

The template does not include any provision for financial reporting in terms of the income and expenditure relating to the BNG site. Provisions of this nature are usually resisted by the BNG

provider in any event and should not form part of the Section 106 Agreement obligations unless there are particular circumstances that make it necessary/appropriate.

2.24.1.6.14 Mortgagee's Clause

The template includes a standard mortgagee exclusion clause which provides that they will not be liable for the obligations in the Section 106 Agreement unless they go into possession of the land. Some mortgagees will also require the clause to exclude liability for any pre-existing breaches in the event that they go into possession (albeit that their successors will be bound). Local authorities will need to consider whether such drafting is acceptable to them.

Section 106 Agreements are a familiar mechanism and may be preferred option for developers for that reason. They are also helpfully not limited to use for the public good as per Conservation Covenants, but can only be entered into with the Local Planning Authority and must meet the regulation 122 and statutory tests.

2.24.2 Conservation Covenants

See also paragraph 1.14.

A Conservation Covenant is a new form of agreement created under Part 7 of the Environment Act 2021. While often referred to in the context of BNG, this is not the only purpose for which Conservation Covenant agreements may be entered and this will be important to keep in mind in the negotiation of Conservation Covenants. Conservation Covenants were in fact initially devised as a way of putting land into conservation with tax breaks.

2.24.2.1 What are the requirements to enter a Conservation Covenant?

Under section 117 of the 2021 Act a Conservation Covenant is an agreement executed by way of deed between a landowner and a Responsible Body which contains provision which:

- is of a qualifying kind – i.e. to require a landowner to do or not to so something on land in England in which the landowner holds a qualifying estate (this is fee simple absolute in possession or a leasehold interest of at least 7 years at the date of grant where some period remains unexpired, section 117(4) of the 2021 Act), or, to allow or require a Responsible Body to do something on such land – in other words, Conservation Covenants can include positive as well as restrictive elements;

- has a conservation purpose – to conserve the natural environment (including plants, animals, other living organisms, their habitats and its geological features, section 117(4) of the 2021 Act) of land or the natural resources of land, to conserve land as a place of archaeological, architectural, artistic , cultural or historic interest, to conserve the setting of land with a natural environment or natural resources or which is a place of archaeological, architectural, artistic , cultural or historic interest. In this context to 'conserve' includes to protect, restore or enhance;

- is intended by the parties to be for the public good – the agreement must benefit the public in some way. As to what that means, the DEFRA Guidance on Conservation Covenants states that the covenant must benefit the public in some way and gives an example of public good which is "to conserve as a place of archaeological, architectural, artistic, cultural or historic interest that the public can enjoy". It is of note that it is not a requirement that the public must be permitted to access the land affected by the covenant.

and the parties intend to create a Conservation Covenant.

A Conservation Covenant agreement will have statutory effect as a Conservation Covenant to the extent that the above requirements are met, together with any ancillary provisions (including provision for public access to the land, inspections to review progress or payments to cover maintenance costs).

2.24.2.2 What is a Responsible Body?

Section 119(1) of the 2021 Act provides for the designation of Responsible Bodies by the Secretary of State (on application of a Local Planning Authority or other body), and the Secretary of State themselves are such a Responsible Body.

The list of designated Responsible Bodies is available via the following link:

https://www.gov.uk/government/publications/conservation-covenant-agreements-designated-responsible-bodies/conservation-covenants-list-of-designated-responsible-bodies

Local Planning Authorities can also be Responsible Bodies (s119(2) 2021 Act).

- In order to designate a Responsible Body the Secretary of State must be satisfied that it is suitable (section 119(4) 2021 Act): and in the case of a public body or charity, at least some of its main purposes or functions relate to conservation (s119(5)(s) 2021 Act), or

- in any other case, at least some of the body’s main activities relate to conservation (s119(5)(b) 2021 Act).

The Secretary of State can revoked a designation on application from the Responsible Body, or where they cease to meet the required criteria (s119(6) 2021 Act).

The Secretary of State must publish the criteria used to determine whether a body is suitable to be designated as a Responsible Body and a list of the bodies so designated (s119(8) 2021 Act).

See further paragraph 2.25 in relation to Responsible Bodies.

2.24.2.3 What are the implications of entering into a Conservation Covenant?

A Conservation Covenant agreement is registrable as a local land charge by the Responsible Body (s120 2021 Act) – see further paragraph 2.31.

Section 122 of the 2021 Act addressed the difficulties of the general law regarding freehold covenants and secures that the benefit and burden of the Conservation Covenant binds both the landowner under the covenant and any person who becomes a successor in title of, or derives title from, the landowner (s122 2021 Act). This will apply where part of the land is sold, and also where a periodic tenancy of the whole or part of the land is granted after the covenant was entered into, so that that tenant is deemed “a successor” and will be bound by the covenant.

There are exceptions to the rule so that a successor tenant will not be bound by a positive obligation (s122(5)(a) 2021 Act). Accordingly, where a freeholder creates a Conservation Covenant which is registered as a local land charge and then grants a periodic tenancy, the lease will be bound by the negative obligations in the Conservation Covenant, but not the positive ones. It is important to note that the positive obligations, and any related ancillary obligations will, however, continue to be binding on the landlord (see DEFRA Guidance on Conservation Covenants).

Section 122(4) of the 2021 Act provides that landowners are released from the covenant on disposal of their interest in the land.

An obligation of the Responsible Body is owed to the landowner under the covenant and any person who becomes a successor in title or, or derived title from, the landowner (s123(1) 2021 Act). The Responsible Body is released from its obligations to a landowner on disposal of their interest in the land (s123(3) 2021 Act).

See further paragraph 2.24.2.12 below.

2.24.2.4 How to approach a negotiation to enter a Conservation Covenant?

The DEFRA Guidance on Conservation Covenants stated that a landowner and Responsible Body should consider the following before entering into a Conservation Covenant:

(i) Decide on the conservation outcome that is for the public good that is trying to be achieved.

(ii) Agree the terms of the Conservation Covenant – note that there is not a fixed time period and so in relation to BNG this would need to be specified as at least 30 years (also allowing for the time it takes to establish the habitat).

(iii) Register as a local land charge – this is critical to the binding effect of the Conservation Covenant and to ensure that successors in title are bound. DEFRA has published Guidance for Responsible Bodies on how to go about registering local land charges. See further paragraph 2.31.

(iv) Before completing the Conservation Covenant, to consider: engaging with the local representative of Natural England, the Local Nature Partnership and other stakeholders (such as WMCA) to understand the local conservation priorities;

(v) Review existing strategies and local policies on the conservation priorities of the land; and

(vi) Design the Conservation Covenant to work with other relevant local conservation schemes.

2.24.2.5 How is a Conservation Covenant enforced?

Section 125 of the 2021 Act provides that the following remedies are available in relation to the enforcement of an obligation under a Conservation Covenant agreement in the courts:

(i) specific performance – this is an order from the court to compel a party to adhere to their contractual obligations;

(ii) injunction – this is an order of the court to require a party to carry out a particular action (a mandatory injunction) or to require the party not to do something (a prohibitory injunction);

(iii) damages (to which contract principles apply) – payment of a sum of money; and

(iv) order for payment of an amount due under the obligation.

A court must take into account any public interest in the performance of the obligation concerned in awarding the above remedies.

It is a defence to proceedings for breach of a Conservation Covenant that the breach was beyond the defendant's control or resulted from doing, or not doing, something in an emergency in order to prevent loss of life or injury to any person, or where the land is designated for a public purpose and compliance with the obligation would involve a breach of statutory control (s126 of the 2021 Act).

Enforcement proceedings can be stayed in the event that the landowner applies makes an application to the Upper Tribunal pursuant to Schedule 18 (see further paragraph 2.24.8 below) (s130 2021 Act).

2.24.2.6 How to bring to an end a Conservation Covenant?

Section 127 and 128 of the 2021 Act provide for the discharge of Conservation Covenants by agreement (executed as a deed) between the Responsible Body and landowner.

The drafting of the Conservation Covenant agreement may include termination provisions to specify the circumstances in which the Conservation Covenant will cease to apply. Otherwise, on freehold land, the Conservation Covenant will last indefinitely (s121(2) 2021 Act). This might be less palatable to a freehold landowner, and calls into question the impact of a Conservation Covenant of indefinite length on the value of the land. Where the qualifying estate is a tenancy, the default period is a period corresponding in length to the remaining period left before expiry of the fixed term (s121(2)(b) 2021 Act). There is an interesting point as to whether the default period can be extended by a surrender and regrant of the tenancy by the original covenanting parties or only successors.

A Conservation Covenant used for BNG must run for a period of at least 30 years which will need to be provided for in the agreement.

Input should be sought from Legal Services as to the drafting of a Conservation Covenant. At present there is no standard template form of agreement and so there is not currently any consistency in drafting adopted by Local Planning Authorities across England.

2.24.2.7 How to modify a Conservation Covenant?

Section 129 of the 2021 Act provides for the modification of Conservation Covenants by agreement (executed as a deed) between the Responsible Body and landowner.

Section 131 of the 2021 Act provides for a Responsible Body to appoint another Responsible Body in its place for the purposes of a Conservation Covenant and section 132 of the 2021 Act provides for the Secretary of State to become custodian of the covenant where a Responsible Body ceases to be a designated body until such time as another body is appointed.

2.24.2.8 Is there any other way in which a Conservation Covenant can be modified or discharged?

Schedule 18 of the 2021 Act makes provision about the discharge or modification of an obligation under a Conservation Covenant on application by the landowner or Responsible Body to the Upper Tribunal.

The Upper Tribunal may exercise its power to discharge or modify the Conservation Covenant if it considers it reasonable to do so in all the circumstances of the case having regard to whether there has been any material change of circumstance since making the original agreement, whether the obligation serves any conservation purpose and whether the obligation serves the public good.

The Upper Tribunal may include in an order modifying or discharging the Conservation Covenant provision requiring the applicant to pay compensation in respect of loss of benefit resulting from the order.

2.24.2.9 Other features of a Conservation Covenant

A Conservation Covenant can relate to land or the setting of the land and may be entered regardless of whether the land has a statutory designation or pre-existing rights binding it. However, the Conservation Covenant does not override the existing rights/designation so the Conservation Covenant will need to work with the existing rights or restrictions on the land.

The content is flexible as a Conservation Covenant is a private agreement, so they can be used to secure income funding for conservation activities and can ensure conservation commitments are passed on to successors in title.

A Conservation Covenant can be a standalone agreement, but may have also have a related:

(i) management agreement to deal with the management of the Habitat Bank without needing to modify the Conservation Covenant (as per DEFRA Guidance Conservation Covenants); and/or

(ii) agreements between the landowner and developers in relation to the trading of BNG Units. They will be private agreements.

The above agreements would not be constrained in the same way as the Conservation Covenant so changes can be agreed in terms of the management of the land. This would be legally binding between the parties but may not necessarily bind successors in title. They would be a private agreement but can only include those provisions which are not required to sit within the Conservation Covenant to make it comply with the legislation.

There is no requirement that the land subject to the Conservation Covenant is available for use by the public, but this can be included within the covenant. However, that is likely to impact on the conservation activities.

2.24.2.10 When can Conservation Covenants be used to secure BNG?

Conservation Covenants can be used where the above requirements set out in paragraph 2.24.2.1 have been met and there is a landowner or lessee with a sufficient interest in land that is willing to enter into such an agreement with a Responsible Body (and vice versa).

In order to enter into a Conservation Covenant, a party needs to have a freehold interest in the land or a lease of at least 7 years with time unexpired (s117(4) 2021 At). A tenant under a periodic tenancy cannot enter into a Conservation Covenant. Thus a tenant under a farm business tenancy of a fixed term of less than seven years; a tenant under a farm business tenancy which has expired and has continued as a periodic tenancy under section 5(1) of the Agricultural Tenancies Act 1995, and a tenant under a periodic tenancy governed by the Agricultural Holdings Act 1986 will not qualify. In the event that only the lessee enters into the Conservation Covenant it will only bind the leasehold interest and not the underlying freehold title.

2.24.2.11 How should Conservation Covenants be used to secure BNG?

The DEFRA Guidance on Conservation Covenant provides that Conservation Covenants can include obligations on:

(i) How land is managed;

(ii) The improvement of a habitat which is a priority for conservation ;

(iii) Secure income and funding for conservation activities, i.e. it is possible for a conservation charity to pay a landowner to maintain land in a certain way to achieve long-term conservation results; and

(iv) Can pay for ecosystem services, such as BNG.

Conservation Covenants can be used for a host of different reasons and are not limited to BNG but it was anticipated that Conservation Covenants would be an important tool to the delivery of BNG.

Conservation Covenants can include positive and negative obligations. For example, to require positive steps (i.e. to carry out planting) to be taken or to prevent activities being undertaken (i.e. not to use fertiliser). However, that positive obligations will only continue to bind where the Conservation Covenant binds the land. The negative obligations will always bind.

A landowner should also be prepared for the Responsible Body to carry out activities on the land, the Responsible Body is able to ask for this, i.e. a step-in right. There is no automatic step-in applicable as there is in relation to Section 106 Agreements in the 1990 Act. Generally speaking, there is no certainty as to how Conservation Covenants will be enforced and therefore it would be prudent to include a dispute resolution clause so that disputes can be resolved without recourse to the Courts.

Conservation Covenants can include ancillary obligations and provisions as this is a private agreement, they would be a matter for negotiation between the parties. It would be recommended that those additional obligations include a mechanism for inspection or review of the compliance with the obligations (including access), the duration of the Conservation Covenant, details of any payments between the parties, how to end the Conservation Covenant early, how to make permitted changes to the Conservation Covenant (a deed would be required and the revised covenant would still need to be for the public good) and dispute resolution provisions.

Parties will need to be satisfied that they can fund the operation of their covenant. There will be no direct funding as they are private agreements.

2.24.2.12 What /who is bound?

See also paragraph 2.24.2.3 above.

The obligations in a Conservation Covenant will bind the landowner that enters into the Conservation Covenant and any successor in title (i.e. person with a qualifying estate or an interest derived from the qualifying estate after the Conservation Covenant was entered into) (section 122(2) 2021 Act).

A freehold interest will be bound indefinitely by the terms of the Conservation Covenant unless it expressly comes to an end sooner (s121 2021 Act). Therefore an express termination provision would need to be included to prevent liability under the Conservation Covenant running on indefinitely and binding multiple successors in title.

A leasehold interest will be bound by the Conservation Covenant until the lease ends (s121(2)(b) 2021 Act). One way to terminate the requirements of a Conservation Covenant would, therefore, be to bring a lease to an end.   Successor tenants will not be bound by a positive obligation (s.122(5)(a)). Therefore, whilst a new lessee would be bound by negative obligations in the Conservation Covenant, they will not be bound by the positive ones. The positive obligations would, however, continue to be enforceable against the freeholder.

If the land is rented then the Responsible Body should be mindful of engaging with the landowner to ensure that the tenant has consented to the Conservation Covenant being entered into or agreed to enter into it

In the event of a deemed surrender and re-grant of a leasehold interest in respect of a qualifying estate, the period after the deemed surrender are to be read as included within the term of years granted (section 134 2021 Act).

The Conservation Covenant will continue to bind even if the Responsible Body becomes the owner of the land which is bound by the covenant. The parties may want to provide for this eventuality, for instance by including a mechanism to require that a new Responsible Body is appointed.

A Conservation Covenant agreement will have statutory effect as a Conservation Covenant to the extent that the above requirements are met, together with any ancillary provisions (including provision for public access to the land).

2.24.3 How to register a site on the Biodiversity Gain Site Register?

In relation to a Conservation Covenant, the application to register the off-site gain on the Biodiversity Gain Site Register can only be made by:

(i) the person obliged to carry out the works for habitat enhancement;

(ii) a person who is required to maintain the habitat enhancement to be achieved by the works to be carried out on the land; or

(iii) any person against who the obligations mentioned above are enforceable (regulation 7(2) Register Regulations).

2.24.4 Duration of the obligation

An obligation in a Conservation Covenant will have effect for the default period unless expressly provided. This is infinite in the case of a qualifying estate in fee simple absolute in possession and for the remainder of the period unexpired under a terms of years absolute (section 121 2021 Act). Therefore the lease must be long enough to endure that the BNG is delivered and managed/maintained for the requisite 30 years.

2.24.5 What examples of Conservation Covenants are available?

There are very limited examples of Conservation Covenants as they are so new.

There are a number of points to consider when considering a Conservation Covenant:

(i) Conservation Covenants do not overring pre-existing statutory rights, obligations, private property rights or planning restrictions. For example, public rights of way, common land, private rights (as per the evidence of title) or any Government-funded environmental schemes that the landowner or tenant has entered into. It will be necessary to design the scheme to work with all of the above.

(ii) There is also no impact on any existing statutory designations, so it is necessary to consider at the outset whether the land can achieve the mitigation proposed in view of the designation, as well as whether the entry into the Conservation Covenant would have any impact upon the ability to adhere to the existing designations.

(iii) Statutory designations are SSSI, local nature reserves, listed buildings and scheduled monuments. It will be necessary to carry out due diligence to identify whether any of these apply.

(iv) If it is determined that the designation is consistent with the Conservation Covenant and an agreement is completed, then the Responsible Body should keep in mind that there is a defence for non-compliance on the basis of inconsistency with a statutory designation (s126(1)(c) 2021 Act).

(v) It will be necessary to Investigate title to ensure that the freeholder and the tenant can enter into the agreement and also to consider whether there are other interests that need to be notified. Chargees need to be included as a party to a Conservation Covenant to ensure that they are bound as a successor in title if they were to go into possession of the land.

(vi) If the land is common land then the commoners would need to be joined as a party or consent will need to be obtained, as appropriate.

(vii) DEFRA initially indicated that it would provide advice on the tax implications of Conservation Covenants but has since indicated that this will be a matter for advice to be taken from a financial advisor (see EFRA Guidance on Conservation Covenants). This may have an impact upon the availability of inheritance tax relief and so is likely to be a particular concern of landowners on that basis.

2.24.6 Provisions with statutory effect as a Conservation Covenant

The provisions of the Conservation Covenant which are of a qualifying kind, have a conservation purpose and are intended for the public good (as required by s117(1)(a) of the 2021 Act) and provisions ancillary to those provisions have statutory effect as a Conservation Covenant (section 118(2) 2021 Act).

If the agreement includes provision for public access to land, then the public access shall be considered as ancillary and so will also have statutory effect as a Conservation Covenant (section 118(3) 2021 Act).

2.24.7 Breach

If either party fails to comply with the terms of a Conservation Covenant, and it is not possible to resolve the problem informally, proceedings for enforcement can be brought in the Courts. The options for enforcement are set out in paragraph 2.24.2.5.

Incoming landowners will inherit liability from their successors in title and so at the point of obtaining an interest in the land, any existing or past breaches will become enforceable against the new landowner. This liability could be dealt with by way of a Deed of Indemnity if necessary.

Negative obligations will be breached by doing something which is prohibited or permitting or suffering someone else to do such a thing and positive obligations will be breached by not performing an obligation (section 124 2021 Act).

A Conservation Covenant is a local land charge (section 120(1) 2021 Act). For the purposes of the Local Land Charges Act 1975, the originating Local Authority is the person by whom an obligation of the landowner under the Covenant is enforceable (section 120(2) 2021 Act). See further paragraph 2.31.

2.24.8 Remedies available

The remedies available to a Responsible Body are set out in section 125 of the 2021 Act, as follows:

(i) Specific performance – in deciding whether to grant this remedy the Court must consider what remedy is appropriate taking into account the public interest in the performance of the obligation in question;

(ii) Injunction – in deciding whether to grant this remedy the Court must consider what remedy is appropriate taking into account the public interest in the performance of the obligation in question;

(iii) Damages – contract principles apply, but can be awarded on exemplary basis in respect of a landowner breach as the Court thinks fit; and

(iv) Order to pay an amount due under an obligation

For limitation purposes, an action in respect of an obligation in a Conservation Covenant is to be treated as if found on a simple contract (s125(5) 2021 Act).

There is no automatic or statutory right of entry for a Responsible Body, they would need to include a right in the Conservation Covenant which could be enforced through the courts.

In enforcement proceedings, it will be a defence to show that:

(i) the breach occurred as a result of a matter beyond the defendant's control (s126(1)(a) 2021 Act);

(ii) the breach occurred as a result of doing or not doing something in an emergency in circumstances where it was necessary for that to be done or not done in order to prevent the loss of life or injury to any person (s126(1)(b) 2021 Act);

(iii) at the time of the breach, the land was designated for a public purpose and compliance would have involved a breach of statutory control applying as a result of the designation (s126(1)(c) 2021 Act). Save where this was caused by the defendant's failure to take reasonable steps to obtain authorisation and where the designation was in place before/at the time when the Conservation Covenant was created (s126(2) 2021 Act); and

(iv) defence of statutory Local Authority (section 126(4) 2021 Act) applies in relation to the infringement of rights such as easements by a person acting under statutory Local Authority.

2.24.9 Discharge of obligations by landowner and by Responsible Body

It is possible to discharge an obligation secured by the Conservation Covenant by agreement between the Responsible Body and the person who holds the qualifying estate in the land at the time of the proposed modification. This ability is preserved for the landowner and the Responsible Body respectively in accordance with sections 127 and 128 of the 2021 Act.

The agreement to discharge the obligation should be entered by deed, specify the obligation to which it relates, the land to which it relates and the estate in land by virtue of which the agreement is being entered into.

The Conservation Covenant may also be discharged on application to the Upper Tribunal (section 130 and Schedule 18 2021 Act). Section 84(2) of the Law of Property Act 1925 does not apply in relation to Conservation Covenants.

2.24.10 Modification of obligation by agreement

The terms of a Conservation Covenant agreement may be modified by a person bound by or entitled to the benefit of a Conservation Covenant by agreement with the Responsible Body (s129 2021 Act). That said, it is not possible to make changes which would have prevented the agreement from being entered as a Conservation Covenant in the first place. In other words, the modifications to the Conservation Covenant agreement would still need to qualify as a Conservation Covenant by way of compliance with the requirements of section 117(1) 2021 Act.

An agreement must be entered by way of a deed and identify the obligation to be modified and the estate in land by which the power is exercisable (s129(3) 2021 Act). A modification will bind the parties to the agreement and their successors (s129(4) 2021 Act).

The modifications cannot result in someone who is not an owner or tenant of the land being joined as a party to the agreement.

Before completing an agreement, it would be necessary to check that the information on the local land charges register and register of title remains up-to-date.

If the changes cannot be agreed then there is an ability to refer to the Lands Chamber of the Upper Tribunal as a last resort (section 130 and Schedule 18 2021 Act), Section 84(1) of the Law of Property Act 1925 does not apply in relation to Conservation Covenant agreements.

A Conservation Covenant can be transferred to another Responsible Body under s131 of the 2021 Act. The Conservation Covenant agreement can specify the type of Responsible Body that it could be transferred to, or indeed provide that is cannot be transferred. The transfer will be voluntary and both Responsible Bodies must agree to the transfer. It must relate to all of the obligations of the Responsible Body and be entered by way of deed. Notice is to be given to the Local Planning Authority or Land Registry (following the migration of local land charge functions) as appropriate and the local land charges register would need to be updated. The incoming Responsible Body must notify all parties with obligations under the Conservation Covenant agreement of the change.

It is not possible to partially transfer obligations to another Responsible Body, but if there are multiple Responsible Bodies then it is possible for them to transfer all of their obligations to another Responsible Body in the manner mentioned above (see DEFRA Guidance on Conservation Covenants).

2.24.11 Release of a Conservation Covenant

The obligations in a Conservation Covenant agreements will be released where the land ceases to be land to which the obligations in the Conservation Covenant agreement relate and where the landowner or successor ceases to hold a qualifying estate in the land (section 122(4) 2021 Act).

The same applies in respect of the release of a Responsible Body, namely that an obligation owed by a Responsible Body to a landowner will cease to apply when the land ceases to be land to which the obligation relates or the landowner or their successor ceases to have a qualifying estate in the land (section 123(3) 2021 Act).

2.24.12 Declarations about obligations

An application can be made to the Upper Tribunal by any person interested to declare whether anything purporting to be a Conservation Covenant is a Conservation Covenant, whether any land is the land to which an obligation in a Conservation Covenant applies, whether any person is bound by or entitled to the benefit of an obligation and if so, in respect of what land and the nature of an obligation upon its true construction by means of a Conservation Covenant whether or not modified

(s135 2021 Act). Section 84(2) of the Law of Property Act 1925 does not apply in relation to Conservation Covenant agreements.

2.25 Responsible Bodies

2.25.1 Who can be a Responsible Body?

See also paragraph 2.24.2.2.

The Secretary of State has the power to designate a Local Authority (as defined in section 119(9) 2021 Act) or other body as a Responsible Body. To be designed, the Secretary of State must be satisfied that:

(i) the Local Authority (as defined in section 119(9) 2021 Act) is suitable to be a Responsible Body (s119(3) 2021 Act); or

(ii) the body (which is not a Local Authority) is a public body or charity (under the Charities Act 2011 or an exempt charity, section 119(9) 2021 Act) where at least some of its main purposes or functions relate to conservation or at least some of its main activities relate to conservation and is suitable to be a Responsible Body (s119(5) 2021 Act).

The Responsible Body under a Conservation Covenant agreement must ensure the obligations are appropriate to be secured by way of a Conservation Covenant agreement and to monitor everything that the landowner has agreed to in the Conservation Covenant agreement, so that they can make sure that the landowner is carrying out the Conservation Covenant (see DEFRA Guidance on Conservation Covenants).

There is no role for public or third party monitoring of Conservation Covenants as they are private agreements, unlike in the case of Section 106 Agreements and other breaches of planning requirements.

Whereas it may be possible that Special Purpose Vehicles ("SPVs") may be incorporated as Responsible Bodies, there is specific criteria for becoming, and remaining, a responsible body which cover eligibility, financial security, operational capacity and capability, and ongoing suitability as set out in the DEFRA Guidance on Conservation Covenants. In addition, the Responsible Body is under a duty to complete an annual return to the Secretary of State (s136 2021 Act), and its designation is liable to revocation (s119(6) 2021 Act) – see further paragraph 2.25.3. Thus, whilst Conservation

Covenant agreements are private agreements, Responsible Bodies are dependent on the Secretary of State for its existence and survival.

DEFRA's Guidance on Conservation Covenants provides that the financial security of the proposed Responsible Body will be scrutinised and in particular to consider whether the organisation has previously received any Government funding, grant funding allocations, how it has used any such grant, whether financial reporting requirements at Companies House have been adhered to, if the organisation is in any financial difficulty pending or in the last 5 years (for example, administration, liquidation and any other insolvency proceedings). For charities, DEFRA will check whether there have been any Charity Commission inquiries in the last 3 years.

The Cabinet Office automated tool, Spotlight, may be utilised in carrying out due diligence checks.

Ongoing suitability issues must be reported to DEFRA in particular, any disputes with the landowners, new criminal prosecutions, civil sanctions, fraud or insolvency, new Charity Commission inquiry, new conflicts of interest.

Save in the event that the above issues are notified to it, DEFRA has a limited oversight. While annual reports will need to be submitted, they will be limited.

See further paragraph 2.25.1.

2.25.2 How to find a Responsible Body?

See also paragraph 5.1.1. There is a list to the list of designated Responsible Bodies in paragraph 2.24.2.2.

Section 119 of the 2021 Act provides that the Secretary of State is a Responsible Body and so are any bodies designated by the Secretary of State under section 119 of the 2021 Act.

The Secretary of State will decide the criteria for suitability and publish the same together with a list of the responsible bodies (s119(8) 2021 Act).

This can include organisations which make a profit which will be accepted as long as they meet the other criteria discussed above.

The DEFRA Guidance on Conservation Covenants provides that the Responsible Body must have the resources, skills and expertise needed (including for monitoring and enforcing agreements), ensure the landowners are aware of the long-term implications of entering into the Conservation Covenant

agreement and have sought legal advice before doing so, have contingency arrangements in the event that unplanned changes could affect its ability to manage Conservation Covenants a comply with other legislation and guidance.

2.25.3 Revocation of Responsible Body status

According to the DEFRA Guidance on Conservation Covenants, DEFRA can revoke Responsible Body status if they are:

(i) no longer operating, in which case DEFRA may consult the organisation as to its potential successor;

(ii) the Responsible Body requests revocation of its Responsible Body status (see also s119(6)(a) 2021 Act) – before taking this step, DEFRA may seek information as to the performance of the Responsible Body, how it plans to improve performance and whether any of its functions are being carried out by another Responsible Body. If an acceptable response is not returned within one month or no response is returned at all, then if concerns remain then DEFRA will consider whether the organisation continues to meet the criteria for a Responsible Body on the basis of the same criteria that applied at the outset. DEFRA will conclude its assessment within 12 weeks and notify the organisation; or

(iii) it no longer meets the criteria of a Responsible Body (see paragraph 2.25.1 above). This would be confirmed by DEFRA and the list of designated Responsible Bodies would be updated.

If Responsible Body status is revoked then the Secretary of State will become the custodian of the Conservation Covenant and will either carry out the role itself or look to appoint another Responsible Body. As a custodian, the Secretary of State will be able to enforce the obligations of the landowner, agree to vary or end the obligations of the landowner, exercise any powers of the Responsible Body but will not be liable for any failure to comply with the obligations of the Responsible Body.

The landowner will be notified and the local land charges register will be updated accordingly.

2.25.4 Replacement Responsible Body

A Responsible Body may appoint another Responsible Body to take their place unless the covenant expressly provides otherwise (s131(1) 2021 Act). This power is exercisable by agreement entered as

a deed by the appointer and the appointee (s131(2)). In order for such an agreement to be effective, the appointor must supply details to the Chief Land Registrar to amend the local land charges register (s131(3)).

Upon the appointment of a replacement, the benefit of every obligation of the landowner transfers to the appointee, as does the burden of every obligation of the Responsible Body (s131(5)). However, no liability is transferred in respect of an existing breach (s131(6)).

The appointee must notify every person bound by an obligation of the landowner under the covenant of its appointment (s131(7)).

2.25.5 Ceasing to be a Responsible Body

The Secretary of State will become the custodian of the obligations of the Responsible Body if the Responsible Body ceases to be a designated body and so ceases to be a Responsible Body under the Conservation Covenant (section 132 2021 Act). The Secretary of State will remain the custodian until a replacement Responsible Body is appointed or the Secretary of State elects to be the Responsible Body. During any period as custodian, the Secretary of State will have no liability as to performance of any obligation of the Responsible Body under the covenant.

If the Responsible Body acquires an interest in the land to which the covenant relates, then the acquisition does not extinguish the obligation, the Responsible Body may become a successor in title (as per section 122(2)(b) 2021 Act) and the obligations under the covenant continue to bind the Responsible Body (section 133 2021 Act).

2.25.6 Annual reporting by Responsible Bodies

Section 136 of the 2021 Act requires Responsible Bodies to make an annual return to the Secretary of State stating the number of Conservation Covenant agreements they have entered into and the areas of land to which they relate. The Secretary of State may make secondary legislation about annual returns, in particular in relation to the information to be included and the date by which the annual return is to be made.

2.26 Biodiversity Gain Site Register

The Biodiversity Gain Site Register Regulations 2024 (“the Register Regulations”) require Natural England to establish and maintain the Biodiversity Gain Site Register which will be available in the public domain (regulations 3 and 4 Register Regulations).

The Biodiversity Gain Site Register will record Off-Site BNG only.

A Biodiversity Gain Site is land where a person is required under a Conservation Covenant agreement or planning obligation in a Section 106 Agreement which is registered as a local land charge to carry out works for habitat enhancement, that person or another person is required to maintain the enhancement for at least 30 years from the completion of those works, and (for the purposes of Schedule 7A of the 1990 Act the enhancement is made available to be allocated (conditionally or unconditionally, with or without consideration) in accordance with the terms of the Conservation Covenant agreement or obligation to one or more developments for which planning permission is granted (Regulation 6 of the Register Regulations).

The Biodiversity Gain Site Register is to be a public register (section 100(3) 2021 Act).

The Secretary of State will keep under review the supply of land for registration in the Biodiversity Gain Register and whether the 30 year maintenance period can be increased without adversely affecting supply (s100(10) 2021 Act).

2.26.1 How to get a site onto the Biodiversity Gain Site Register?

See also paragraph 2.21.2.4 – 2.21.2.15.

The Register Regulations provide that land may be registered in the BNG site register In relation to a Conservation Covenant agreement or a Section 106 Agreement (regulation 5(1) Register Regulations 2024). The land will not be registered if it is already registered (regulation 5(2) Register Regulations 2024).

There can be multiple entries in relation to multiple Conservation Covenants or a combination of Conservation Covenants and Section 106 Agreement in relation to the same land (and vice versa), providing the criteria for registration are met (regulation 5(4) and (5) Register Regulations).

In order to be registered, the land must be eligible and an application must be made to and accepted by Natural England (regulation 5(3) Register Regulations).

To be eligible to be registered seven conditions must be complied with (regulation 6 Register Regulations), as follows:

(i) One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement to carry out works on the land for habitat enhancement;

(ii) One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement to maintain the habitat enhancement to be achieved by the required habitat enhancement works (i.e. all of the works to be carried out on the land for the purposes of the habitat enhancement) for a period of 30 years after completion of those works;

(iii) One or more persons must be obliged under the Conservation Covenant or Section 106 Agreement are obliged to monitor the land to ensure the habitat enhancement to be achieved by the habitat enhancement works on the land is maintained for the period required;

(iv) For the purposes of Schedule 7A of the 1990 Act, the required habitat enhancement works secured by the Conservation Covenant or Section 106 Agreement on the land are made available to be allocated conditionally or unconditionally and with or without the payment of consideration in accordance with the terms of the Conservation Covenant or Section 106 Agreement, to one or more development in respect of which planning permission is granted;

(v) The land is in England;

(vi) The Conservation Covenant or the Section 106 Agreement are registered in the local land charges register or the appropriate local land charges register. See further paragraph 2.31.

If the land is eligible then an application can be submitted to Natural England in relation to the particular Conservation Covenant or Section 106 Agreement (regulation 7(1) Register Regulations).

The Responsible Body is expressly excluded from the ability to apply to register a Conservation Covenant agreement (regulation 7(3) Register Regulations).

An application to register a Conservation Covenant or Section 106 Agreement on the Biodiversity Gain Site Register can be withdrawn but only before Natural England have decided whether to accept or reject the application (regulation 7(5) Register Regulations.

An application to register must include (regulation 8 Register Regulations):

(i) evidence of entitlement to make the application;

(ii) information to include: the applicant's name; the address for service of notices under the Regulations; an email address to which notices may be sent; information as to the land and boundaries to be registered (on a map or otherwise); the last date on which there will be

a requirement to carry out works for the purpose of habitat enhancement or to maintain the habitat enhancement to be achieved by the works on the land; if the requirement habitat enhancement works have not commenced on the land, the type, size and condition of each habitat on the land and the projected type, size and condition of each habitat on the land as a result of those works; the name of each person against whom the requirement to carry out the required habitat enhancement works is enforceable; the name of each person by whom the requirement to maintain any of the habitat enhancement to be achieved are enforceable; where the habitat enhancement has been allocated to a development which does not yet have the benefit of planning permission, information to identify the development, in relation to allocated habitat enhancement the projected type, size and condition of each habitat as a result of the works to be carried out to achieve the habitat enhancement; and, the biodiversity value of the allocated habitat enhancement in relation to the development;

(iii) declaration – where the required habitat enhancement works have already commenced any consent, licence or other permission necessary for the purpose of carrying out those works has been obtained. Or, where the required habitat enhancement works have not commenced, any consent, licence or other permission necessary for the purpose of carrying out those works will be obtained before the works are commenced;

(iv) documents in respect of a Conservation Covenant:

(a) the Conservation Covenant in the form required by section 117 of the 2021 Act;

(b) any agreement discharging any of the land from the obligations under the Conservation Covenant;

(c) every agreement modifying the Conservation Covenant;

(d) every agreement appointing a person to replace a Responsible Body under the covenant;

(e) every order of the Upper Tribunal modifying or discharging an obligation under the covenant;

(f) every other decision of a court or tribunal about the effect of the Covenant;

(g) every other document which describes any of the required enhancement works on the land and which has been produced in accordance with the terms of the Conservation Covenant;

An application must be submitted with the application fee or it will be rejected (regulation 9(2) Register Regulations). If so, Natural England must accept or reject the application (regulation 9(4)) unless the application has been withdrawn (regulation 9(12)).

Natural England must accept the application if it is satisfied that the applicant is eligible and entitled to make the application. Information can be requested if needed to determine whether these criteria are satisfied (regulation 9(6)). If information requested is not provided within 3 months of the expiry of the notice to provide information then the application will be rejected (regulation 9(10)).

The application must be rejected if the land or part of it is already registered in relation to the Conservation Covenant or Section 106 Agreement, if the applicant is not eligible or entitled to make the application and Natural England has decided not to request more information, or, Natural England considers that false or misleading information has been provided as part of the application (regulation 9(8) Register Regulations 2024).

If Natural England decide that it is necessary for the purposes of the application to investigate whether any part of the application is false or misleading notice must be given to the applicant notifying of this decision as soon as possible and to give notice of the conclusion as soon as possible after reaching the same, together with the date of the decision (regulation 9(9) Register Regulations 2024).

If the application is rejected, notice of that decision must be issues giving reasons for the decision and information about the right to appeal (regulation 10 Register Regulations 2024).

If the application is accepted, an entry will be created in the Biodiversity Gain Site Register in respect of the Conservation Covenant or Section 106 Agreement and a unique registration number will be allocated, as well as details of any allocations included within the application (regulation 11(2) Register Regulations 2024).

2.26.2 Registration of allocations

Where land has been registered and habitat enhancement has been allocated and the allocation has not already been recorded on the Biodiversity Gain Register and the information as to the projected type, size and condition as a result of the required enhancement works includes the projected types, size and condition of habitat to which the allocation relates, then an application can be made to record the allocation of the habitat enhancement to the development in the entry in question (regulation 12(1) to (3) Register Regulations).

Such an application can only be made by a ‘relevant person’ or a person with the consent of every relevant person (regulation 12(4) Register Regulations).

Where the registered entry relates to a Conservation Covenant agreement, a relevant person is: a person who is required to carry out the required enhancement works or to maintain the enhancement works or a person against whom those requirements are enforceable, but not the Responsible Body (regulation 12(3) Register Regulations).

An application to record an allocation must include; the name of the applicant, evidence that the applicant is able to make an application, an address to which notices can be served, an email address to which notices can be sent, the registration number for the entry in the Register, information identifying the development, in relation to each habitat to which the allocation relates the project type, size and condition as a result of the habitat enhancement works to achieve the allocated habitat enhancement the covenant (in the case of a Conservation Covenant or the planning obligation (in the case of a Section 106 Agreement) and the biodiversity value of the allocated habitat enhancement for the purposes of the development (regulation 13 Register Regulations).

If Natural England has received a valid application and payment of the application fee then it must decide whether to accept or reject the application (regulation 14(1) to (4) Register Regulations).

Natural England must accept the application is the applicant is entitled to make the application and the above conditions have been satisfied (regulation 14(5) Register Regulations).

Natural England must reject the application is the application is not entitle to make the application, the conditions have not been satisfied, Natural England has decided not to make a request for information or considers that false or misleading information has been supplied (regulation 14(8) Register Regulations).

Investigations into false and misleading information, requests for information and notice of decision (regulation 15 Register Regulations) apply in the same manner as above (see paragraph 2.26.1).

Where an application to record an allocation is accepted, Natural England will as soon as possible record the allocation against the entry and include in the entry the information identifying the development, the habitat enhancement allocated and the biodiversity value of the allocated habitat enhancement in relation to the development (regulation 16 Register Regulations).

Natural England can ask for more information to determine whether to accept an application (regulation 14(6) Register Regulations).

2.26.3 Amendment to an entry in the Biodiversity Site Gain Register

2.26.3.1 Is it possible to amend an entry in the Biodiversity Gain Site Register?

The grounds for seeking an amendment to an entry in the Biodiversity Gain Site Register are detailed in regulation 17(2) of the Register Regulations, as follows:

(i) the information contained in the entry in relation to: the last date to works for the habitat enhancement or to maintain the habitat enhancement to be achieved by the works pursuant to the Conservation Covenant or Section 106 Agreement; where the required enhancement works had not commenced, the type, size and condition of each habitat on the land and the projected type, size and condition of each habitat as a result of the works; where the required enhancement works had commenced, the type, size and condition of each habitat prior to the commencement of development the projected type, size and condition of each habitat as a result of the works; the name of each person by whom the requirement to carry out the required enhancement works is enforceable and the name of each person by whom the requirement to maintain the habitat enhancement is enforceable; is incomplete or inaccurate as a result of a relevant modification to the Conservation Covenant or Section 106 Agreement after it was recorded or for any other reason (as defined in regulation 17(3) and (4);

(ii) the information contained in the entry in relation to the allocation of any habitat enhancement to a development needs to be removed because the habitat enhancement wholly ceased to be allocated to the development; and

(iii) the information contained in the entry in relation to the allocation of any habitat enhancement to a development is inaccurate because the habitat enhancement partly ceased to be allocated to the development.

The eligibility of the land to be registered (under regulation 6 Register Regulation) is not relevant to and will not be considered as part of an application to modify an entry (regulation 17(6) Register Regulations). Natural England are therefore only considering the proposed modification. This highlights the importance of ensuring the original registration process is completed properly.

2.26.3.2 Who can make an application to modify an entry on the register?

An application to amend an entry on the register can only be made by a ‘relevant person’ (as defined in regulation 17(9)). For these purposes, a ‘relevant person’ is:

(i) in relation to a Conservation Covenant: a person who is required under the covenant to carry out habitat enhancement works on the land, a person who is required to maintain habitat enhancement on the land or a person by whom a requirement to carry out or maintain habitat enhancement works is enforceable but not the Responsible Body (Regulation 17(9)(a));

(ii) in relation to a Section 106 Agreement: a person who is required under the covenant to carry out habitat enhancement works on the land or a person who is required to maintain habitat enhancement on the land (regulation 17(9)(b)).

2.26.3.3 What must the application to modify an entry include?

The application to modify an entry in the register must include; the name of the application, evidence that the applicant is entitled to make the application; an address to which notices under the Regulations can be sent; an email address to which notices can be sent; the register entry number, specify the grounds for the amendment and how those grounds are met; to specify the amendments which need to be made; and, where the application is made on the basis that the information in the entry is inaccurate or incomplete, a copy of the agreement, determination, notice or decision in relation to the Conservation Covenant or Section 106 Agreement, with which the application is concerned (regulation 18(10) Register Regulations).

An application can be withdrawn at any time before Natural England has decided whether to accept or reject the application (regulation 17(11) Register Regulations 2024).

2.26.3.4 How will Natural England consider the application to modify the entry?

Natural England must reject the application if the fee has not been paid (regulation 18(2) Register Regulations).

Natural England must accept the application if the application meets the above requirements and included the documents required, Natural England is satisfied that the applicant is entitled to make the application and that the grounds are met and the amendments sought are necessary to ensure the entry is complete and accurate (as appropriate) (regulation 18(5) Register Regulations).

Natural England can request information (regulation 18(6) Register Regulations) and if this information is not provided within 3 months of the expiry of the request then the application must be rejected (regulation 18(8)).

Equivalent provisions apply in respect of false or misleading information as are detailed at paragraph 2.26.1 above (regulation 18(10)).

Natural England must give notice of their decision to accept or reject the application as soon as possible (regulation 19(1) Register Regulations).

In the event that the application is rejected, notice must be given to the applicant as soon as possible with the reasons for the decision and information about the right to appeal (regulation 19(2) Register Regulations).

In the event that the application is accepted, but not all aspects of the application need to be made, the notice must include details of those aspects in respect of which Natural England is not satisfied need to be made, to explain the reasons for this and to contain information as to the right to appeal (regulation 19(3) Register Regulations).

2.26.3.5 What happens if an entry is incomplete or inaccurate?

Regulation 20 of the Register Regulations allows Natural England to amend an entry in the Biodiversity Gain Site Register where the information in the entry is incomplete or inaccurate. This situation will arise where the register records an allocation but the habitat enhancement is made available to be allocated otherwise than in accordance with the Conservation Covenant or Section 106 Agreement.

In this instance, the amendment may be to remove the record of the allocation, unless an application to amend the entry has already been submitted.

Before exercising this discretion, Natural England are required to issue a notice of intent in accordance with regulation 21 Register Regulations, the recipients of which will have 28 days to return representations in accordance with regulation 22. Following which Natural England will decide whether to make the amendment in accordance with regulation 23.

2.26.4 Removing land from the Biodiversity Gain Site Register

This is only possible where there have not been any allocations in respect of an Off-Site BNG site entry (regulation 24(1) Register Regulations).

2.26.4.1 Who can apply to remove land from the Biodiversity Gain Site Register?

Such an application may be made by a relevant person or a person who has the consent of a relevant person (regulation 24 Register Regulations). For these purposes, a 'relevant person' is:

(i) in relation to a Conservation Covenant: a person who is required under the covenant to carry out habitat enhancement works on the land, a person who is required to maintain habitat enhancement on the land or a person by whom a requirement to carry out or maintain habitat enhancement works is enforceable but not the Responsible Body (regulation 24(4)(b) Register Regulations);

(ii) in relation to a Section 106 Agreement: a person who is required under the covenant to carry out habitat enhancement works on the land or a person who is required to maintain habitat enhancement on the land (regulation 24(4)(b) Register Regulations).

2.26.4.2 What must an application include?

The application must include: the name of the applicant and evidence of their entitlement to make the application; an address to which they can be sent post under the Regulations; an email address to which notices may be sent; and, the registration number assigned to the entry to which the application relates (regulation 24(5) Register Regulations).

The application may be withdrawn only before Natural England has issued notice of its decision of whether to accept or reject the application. (regulation 24(6) Register Regulations).

2.26.4.3 How will Natural England determine an application to withdraw a site from the Biodiversity Gain Site Register?

Natural England must reject the application if the relevant fee has not been paid (regulation 25(2) Register Regulations).

If the fee has been paid then Natural England must consider the application and decide whether to accept or reject it (regulation 25(3) Register Regulations).

Natural England must accept the application if the application meets the above requirements, it is satisfied that the applicant is entitled to make the application and the conditions for them doing so are met (regulation 25(5) Register Regulations).

Natural England may request by notice, additional information that it needs to accept the application (regulation 25(6) Register Regulations). If the requested information is not provided within 3 months, then it may reject the application (regulation 25(10) Register Regulations).

The application must be rejected if the application does not meet the above requirements or the applicant is not eligible to make the application and Natural England has decided not to request further information or false and misleading application has been supplied in connection with the application (regulation 25(7) and (8) Register Regulations).

Where Natural England decide in the course of considering the application that it is necessary to investigate whether any information supplied may be false or misleading, it must give notice to the applicant as soon as it has decided and as soon as practicable give notice to the applicant that it has concluded its investigation, such notice to state how the investigation concluded (regulation 25(9) Register Regulations).

Where an application is accepted, Natural England will as soon as practicable remove the entry from the Biodiversity Gain Site Register and remove any document placed on the register when the land to which the entry relates was registered (regulation 25(12) Register Regulations).

Whether the application is accepted or rejected, Natural England must give written notice including the reasons for is decision and information as to the right to appeal (regulation 25(13) and (14) Register Regulations).

2.26.4.4 Can Natural England remove land from the Biodiversity Gain Site Register of its own volition?

Natural England also has powers to remove land from the Biodiversity Gain Register of its own volition in accordance with regulation 26 Register Regulations. This discretion is available where Natural England considers that: every obligation relating to the habitat enhancement works or maintenance of the habitat enhancement under the Conservation Covenant or Section 106 Agreement has been complied with, the Conservation Covenant or Section 106 Agreement is no longer in force, the conditions relating to the registration of the Conservation Covenant or Section 106 Agreement on the Biodiversity Gain Site Register (as above) are no longer met or misleading information was supplied in connection with the application to register the land pursuant to the Conservation Covenant or Section 106 Agreement.

Before exercising this power, Natural England are required to issue a notice of intent (regulation 27 Register Regulations), the recipients of which have an opportunity to make representations within 28 days (regulation 28 Register Regulations), following which Natural England will determine the application in accordance with regulation 29 Register Regulations.

2.26.5 Appeals

There is an opportunity to appeal to the First Tier Tribunal in respect of the decisions taken by Natural England (regulation 30 Register Regulations).

If the appeal is successful, the Tribunal will either direct Natural England to accept the application or to reconsider the application in light of its ruling.

An appeal must be made on the grounds that: Natural England was based wholly or partly on the basis of an error of fact; was wrong in law; (in some instances) the decision to accept the application was unfair or unreasonable for any reason; or, (in some instances) the decision to reject the application was unfair or unreasonable.

Regulations 32 and 33 Register Regulations 2024 provide for the determination of appeals against Natural England's decision not to make amendments to an entry or to accept amendments to an entry.

In accordance with regulation 34 Register Regulations, when Natural England is directed to accept an application, it must do so. Regulation 35 Register Regulations deals with the situation in which Natural England is directed to reconsider an application, which it must do as if the application had never been rejected.

2.26.6 What are the fees payable in connection with applications to Natural England?

Fees are payable within 28 days of submission of an application to Natural England, unless the application is withdrawn (regulation 12(3) to (4) of the Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 ("the Fees Regulations")). The fees payable are as follows:

Natural England application fees		
(1) Fee number	**(2) Application for which fee is payable**	**(3) Amount of the fee**
1	Application referred to in regulation 7(1) of the Biodiversity Gain Site Register Regulations 2024 (application to register land in the biodiversity gain site register)	£639

2	Application referred to in regulation 12(2) of the Biodiversity Gain Site Register Regulations 2024 (application to record the allocation of habitat enhancement to a development in the biodiversity gain site register)	£45
3	Application referred to in regulation 17(1) of the Biodiversity Gain Site Register Regulations 2024 made on the grounds in regulation 17(2)(a) of those Regulations (application to amend information in the biodiversity gain site register which is incomplete or inaccurate as a result of modification of a Conservation Covenant or section 106 agreement)	£639
4	Application referred to in regulation 17(1) of the Biodiversity Gain Site Register Regulations 2024 made on the grounds in regulation 17(2)(b) or (c) of those Regulations (application to amend information in the biodiversity gain site register because habitat enhancement has ceased wholly or partly to be allocated to a development)	£45
5	Application referred to in regulation 17(1) of the Biodiversity Gain Site Register Regulations 2024 made on the grounds in regulation 17(2)(d) (application to amend information in the biodiversity gain site register which is incomplete or inaccurate for any reason not mentioned in regulation 17(2)(a), (b) or (c))	£639
6	Application referred to in regulation 24(2) of the Biodiversity Gain Site Register Regulations 2024 (application to have an entry removed from the biodiversity gain site register)	£89
Fees are subject to change but can be found in the Annex to the Guidance available on the link below: https://www.gov.uk/guidance/biodiversity-gain-sites-register-terms-and-conditions		

Regulation 13 requires the Secretary of State to carry out a review of these provisions every 5 years.

2.26.7 Financial Penalties

Natural England can impose a financial penalty of up to £5,000 where it is satisfied on the balance of probabilities that false or misleading information was supplied in the context of an application to register an off-site gain site on the register (regulation 3 of the Fees Regulations). Before imposing a financial penalty, Natural England will issue a notice of intent to advise of the conclusion reached by Natural England, identify the false or misleading information, identify the application in relation to which this information was supplied, inform of the intention to impose a financial penalty and give details of the right to object (regulation 4 Fees Regulations).

The recipient of the notice of intent has 28 days from the day after the notice was given within which to object in writing. That may be on the basis that the information was not false or misleading or there are compelling reasons why not to impose a penalty, evidence should be included (regulation 5 Fees Regulations).

Natural England can then decide whether or not to impose a financial penalty and must do so within 56 days of the date an objection is received or if no objections are received, within 56 days from the day after the period in the notice of intent ended (regulation 6(1) Fees Regulations).

A Financial Penalty Notice must be given in writing to inform of the decision to impose a penalty and to require payment, it will state that the financial penalty is £5,000, the reasons for imposing the Notice, the period for payment, the consequences if the penalty is not paid on time (i.e. recovery as a civil debt, regulation 9 Fees Regulations), details on how to pay and information on the right to appeal the Notice. The payment must be made within 28 days beginning with the day after the Financial Penalty Notice was given (regulations 6(2) to (3) Fees Regulations).

Natural England can withdraw a Financial Penalty Notice at any time by notice in writing (regulation 7 Fees Regulations).

A Financial Penalty Notice can be appealed to the First-Tier Tribunal (regulation 8 Fees Regulations).

Natural England are required to pay financial penalties into the Consolidated Fund (regulation 10 Fees Regulations).

2.26.7.1 In what circumstances can Natural England impose a financial penalty?

The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024 (“the Fees Regulations”) allow Natural England to impose a financial penalty of up to £5,000 where it is satisfied

on the balance of probabilities that false or misleading information was supplied in the context of an application to register an off-site gain site on the register (regulation 3 Fees Regulations). Before imposing a financial penalty, Natural England will issue a notice of intent to advise of the conclusion reached by Natural England, identify the false or misleading information, identify the application in relation to which this information was supplied, inform of the intention to impose a financial penalty and give details of the right to object (regulation 4 Fees Regulations).

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Natural England can withdraw a Financial Penalty Notice at any time by notice in writing (regulation 7 Fees Regulations).

A Financial Penalty Notice can be appealed to the First-Tier Tribunal (regulation 8 Fees Regulations).

Natural England are required to pay financial penalties into the Consolidated Fund (regulation 10 Fees Regulations).

2.27 BNG implementation – enforcement

2.27.1 Breach of planning permission

Failure to comply with the Biodiversity Gain Condition prior to commencing development without approval of the Biodiversity Gain Plan is a breach of planning control. It will be for the Local Planning

Authority to consider the enforcement powers available and taking the enforcement action that may be necessary in the public interest in their area.

The PPG encourages local planning authorities to update their local enforcement plans to reflect biodiversity net gain in terms of the initial delivery as well as ongoing management and maintenance mechanisms to assist the monitoring of gains in the longer term (Paragraph 007 Reference 74-007-20240214).

2.27.2 Failure to comply with the Biodiversity Gain Condition

As stated in the PPG (Paragraph: 011 Reference ID: 17b-011-20140306), enforcement action should be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so.

The usual enforcement policies would need to be complied with and those policies that have been updated specifically in relation to BNG. The Local Planning Authority would need to show expediency and in the public interest to enforce.

As recommended by the PPG (Paragraph: 010 Reference ID: 17b-010-20140306), it can often be quicker and more cost effective to address breaches of planning control without formal enforcement action. Local Planning Authorities should engage in a dialogue prior to enforcement action so that the landowner has had the opportunity to address the concerns that have been raised before they are served with formal enforcement action. A Planning Contravention Notice under s171C of the 1990 Act or notice under s330 of the 1990 Act could be used to gather more information as to the potential breach.

In the event that the Local Planning Authority consider that it is necessary and expedient to resort to formal enforcement action, a Breach of Condition Notice under s187A of the 1990 Act or Enforcement Notice under s172 of the 1990 Act are available. The Local Planning Authority should consider the merits of each approach and the steps that would be required to be taken under each Notice.

2.27.3 Failure to comply with the Biodiversity Gain Plan

Where there is a failure to comply with the Biodiversity Gain Plan, the considerations discussed at paragraph 2.27.2 above will also apply.

It would be advisable for the Local Planning Authority to encourage amendment of the approved details in the event that it is no longer possible to comply with them and to seek approval of alternative arrangements that will be achievable and also meet the requirements of the Biodiversity Gain Condition. If agreed, that may necessitate an amendment to the HMMP and/or the legal agreement that secures the BNG.

This would be particularly appropriate where there are circumstances beyond the parties control which have prevented compliance, for example, an act of god.

Again, the usual enforcement policies would need to be complied with and those policies that have been updated specifically in relation to BNG. The Local Planning Authority would need to show expediency and in the public interest to enforce.

As recommended by the PPG (Paragraph: 010 Reference ID: 17b-010-20140306), it can often be quicker and more cost effective to address breaches of planning control without formal enforcement action. Local Planning Authorities should engage in a dialogue prior to enforcement action so that the landowner has had the opportunity to address the concerns that have been raised before they are served with formal enforcement action. A Planning Contravention Notice under s171C of the 1990 Act or notice under s330 of the 1990 Act could be used to gather more information as to the potential breach.

In the event that the Local Planning Authority consider that it is necessary and expedient to resort to formal enforcement action, a Breach of Condition Notice under s187A of the 1990 Act or Enforcement Notice under s172 of the 1990 Act are available. The Local Planning Authority should consider the merits of each approach and the steps that would be required to be taken under each Notice.

2.27.4 Breach of Section 106 Agreement

See also paragraph 5.3.20.

Where there is a breach of a provision of the Section 106 Agreement that secures the BNG, the Local Planning Authority Council seek to enforce that provision. This may be in conjunction with enforcement of any breach of condition. However, in reality, Section 106 Agreement are very rarely enforced.

Where there is a failure to comply with the Section 106 Agreement, the considerations discussed at paragraph 2.27.2 above will also apply.

It would be advisable for the Local Planning Authority to encourage amendment of the approved details in the event that it is no longer possible to comply with them and to seek approval of alternative arrangements that will be achievable and also meet the requirements of the Section 106 Agreement. If agreed, that may necessitate an amendment to the HMMP and/or the Section 106 Agreement.

This would be particularly appropriate where there are circumstances beyond the parties control which have prevented compliance, for example, an act of god.

The Section 106 Agreement may include dispute resolution provisions providing for expert determination, or mediation, in the case of a dispute.

Only the Local Planning Authority identified in the Section 106 Agreement as entitled to enforce it will have the power to do so (s106(3)).

There are two principal methods of enforcement set out in the 1990 Act:

1. by injunction (mandatory or prohibitory) (s106(5) 1990 Act); and

2. entry upon land and recovery of costs (s106(6) 1990 Act).

The enforcement of a Section 106 Agreement is a matter for the discretion of the Local Planning Authority who cannot be compelled to act.

2.27.5 Who will be the party to pursue?

Any enforcement action could be brought against the original contracting party or their successors in title. However, any party that has disposed of its interest in the BNG site will have been released and so not action can be taken against them, save for in relation to any breaches that occurred before they disposed of their interest. Therefore, it is always a good idea to include a provision in the Section 106 Agreement requiring the landowner to notify the Local Planning Authority of any disposal or lease of the relevant land.

The Local Planning Authority may well be enforcing against a successor in title who may not be wholly familiar with the BNG arrangements or what was agreed pursuant to the Biodiversity Gain Condition.

The Section 106 Agreement may include a carve out for plot purchasers, meaning that the obligations cannot be enforced against those parties. There may also be other carve outs of liability

under the agreement which could reduce the potential pool of parties that can be enforced against, such as a carve out for Registered Providers, statutory undertakers, and others with a more limited interest in the site.

The Local Planning Authority should be aware of liability passing to a management company or other third party who may have limited covenant strength, particularly if they are an Special Purpose Vehicle ("SPV"). Therefore, the Local Planning Authority may want to consider whether to impose obligations in the Section 106 Agreement so that it is notified of potential changes in ownership and has an ability to approve the party who will be responsible for maintaining the habitat enhancement works and/or to ensure that there are financial resources set aside or available to maintain the habitat enhancement in the manner required in the Section 106 Agreement (i.e. a bond or other security).

2.27.6 Breach of Conservation Covenant

It will be the responsibility of the Responsible Body to enforce the provisions of the Conservation Covenant agreement. This is not a process that the Local Planning Authority will be involved with unless the Local Planning Authority has obtained Responsible Body status and entered the Conservation Covenant agreement in this capacity. This is because Conservation Covenants are private agreements.

As Conservation Covenants are a new creation, it is not yet clear to see how frequently or not they will be enforced or how different Responsible Bodies approach this role.

It would be expected that there would be a dispute resolution provision in the Conservation Covenant agreement providing for expert determination or mediation, which will have an impact upon enforcement.

Section 125 of the 2021 Act provides that the following remedies are available on application to the courts in relation to the enforcement of an obligation under a Conservation Covenant agreement:

(i) specific performance;

(ii) injunction;

(iii) damages (to which contract principles apply); and

(iv) order for payment of an amount due under the obligation.

A court must take into account any public interest in the performance of the obligation concerned in awarding the above remedies.

It is a defence to proceedings for breach of a Conservation Covenant agreement that the breach was beyond the defendant's control or resulted from doing, or not doing, something in an emergency in order to prevent loss of life or injury to any person, or where the land is designated for a public purpose and compliance with the obligation would involve a breach of statutory control (s126 of the 2021 Act).

Responsible Bodies should take legal advice before proceeding with the above. As proceedings would involve the enforcement of a private agreement, they would not be in the public domain and privilege would apply. The usual principles would apply in relation to costs so unsuccessful court proceedings could result in an award of costs again the Responsible Body.

Responsible Bodies should consider whether enforcement is the best use of resources or whether there are alternative powers available, such as the enforcement of planning conditions. It may be that the Responsible Body has a power of step-in in the Conservation Covenant agreement which it would be more appropriate to exercise in place of court proceedings.

The courts will not be familiar with dealing with the enforcement of Conservation Covenants as they are a new concept.

2.27.7 LPA approach to enforcement

Where there is a failure to comply with a Conservation Covenant agreement which is enforceable by a Local Authority as Responsible body, the considerations discussed at paragraph 2.27.2 above will also apply.

The enforcement of Conservation Covenants should be in line with usual enforcement policies, but it may be that the Local Planning Authority wishes to update those policies to account for the intricacies of enforcing in respect of Conservation Covenants.

Where the Local Planning Authority is not the Responsible Body, it will not have any direct involvement in the enforcement process and may not be aware that enforcement action is underway. If the Local Planning Authority become aware of a breach it can lobby the Responsible Body to enforce but has no power to require the Responsible Body to enforce. That is unless the Local Planning Authority is also the Responsible Body, in which case the Local Authority will need to determine whether it is appropriate to enforce in its capacity as Local Planning Authority or

Responsible Body. This will depend upon the nature of the breach and the relevant policies and procedures pertaining to each method of enforcement would need to be adhered to.

2.28 Monitoring of On-Site BNG

The way in which On-site BNG is to be monitored will be approved as part of the discharge of the Biodiversity Gain Condition.

The approved details will then need to be secured either by way of planning condition, planning obligation (Section 106 Agreement or Unilateral Undertaking) or Conservation Covenant. The method chosen to secure the on-site delivery will also need to provide for the way in which the BNG needs to be monitored. See further paragraph 2.17.

This will in part depend upon the nature of the habitat, but also the Local Planning Authority's approach to monitoring, what is required by way of reporting and whether the Local Planning Authority would like to inspect, carry out further surveys, etc.

As the monitoring requirements are provided for on-site, the applicant will typically have/procure an interest in the land to allow the development to come forward and should therefore be in a position to agree to such requirements as the Local Planning Authority may reasonably require and to secure the same against the land, as appropriate. This can include by way of Section 106 Agreement, which would also bind successors in title. However, the Local Planning Authority may wish to consider who is likely to inherit those monitoring obligations, particularly in relation to a residential development where the plot purchasers are likely to be excluded from liability. In this instance, it is likely that the on-site BNG will be passed to a management company for maintenance, potentially with other green space or play areas comprising the development. The management company may not have the expertise to maintain the habitat to the standard required and they are also unlikely to have considerable assets, in the event that it is necessary to enforce against them in the future.

For this reason, the planning condition may be a more preferrable option in terms of management and monitoring as there is the opportunity to serve a Breach of Condition Notice or Enforcement Notice to require the habitat to be maintained. However, a planning condition does not grant the Local Planning Authority any ability to step-in or to recover costs associated with monitoring. It is possible to seek both a planning condition and a Section 106 Agreement, but the PPG advises against duplication of planning conditions and planning obligations, unless both are required. Therefore the content of each would need to be considered.

It is possible to use a Conservation Covenant agreement in respect of On-Site BNG, but this is unlikely to be cost/time effective given that it would otherwise be unnecessary to involve but would be unlikely as it is otherwise not necessary to involve a Responsible Body as a third party in this situation and doing so is likely to incur additional time and cost.

2.29 Monitoring of Off-Site BNG

It is not possible to effectively impose ongoing obligations in relation to Off-Site BNG by way of a planning condition. Therefore any obligations in relation to the management and monitoring of Off-Site BNG will need to be imposed by way of a Conservation Covenant or Section 106 Agreement. See further paragraph 1.10.2, 2.24.1 and 2.24.2.

it is not possible to rely upon a Unilateral Undertaking for these purposes, as the Off-Site BNG would need to be registered on the Biodiversity Gain Site Register. The Register Regulations only allow for the registration of bilateral Section 106 Agreements (regulation 5 Register Regulations).

The Section 106 Agreement would be entered into directly with the Local Planning Authority and so the Local Planning Authority would have oversight of compliance with the planning conditions as well as the Section 106 Agreement. The Local Planning Authority would require that the Section 106 Agreement secures the arrangements approved pursuant to the HMMP which has been approved to discharge the Biodiversity Gain Condition. This is likely to include obligations as to: the verification of completion of the habitat enhancement or creation works, ongoing reporting, access, step-in rights, notice of change in ownership and control over who maintains the BNG. These points and the nature of monitoring required will depend upon the complexity of the habitat, difficulty to establish the same and the risk of failure.

The Section 106 Agreement would need to bind the development site as well as the Off-Site BNG site in order to ensure that the respective obligations can be forced against the land to which they relate save where BNG Units have been acquired from a Habitat Bank, where the development site only will be bound (as the Habitat Bank is already bound by Section 106 Agreement to allow trading). It may that liability is expressly carved out so as to bind respective parcels of land, for clarity. The principle of binding land that falls outside of the planning red line boundary is not uncommon for Section 106 Agreements, providing the obligations are secured. This means that the owner of the Off-Site BNG land would need to be joined as a party to the Section 106 Agreement.

There is no reason why the Section 106 Agreement cannot include any other obligations relating to the grant of planning permission, for example, to pay contributions or deliver affordable housing.

However, it may be preferable for the BNG obligations to be included in a separate schedule of the Section 106 Agreement. It will also need to be made clear that the owner of the BNG land is only liable for the obligations in relation to that land, and the owner of the development site is only liable for the obligations in relation to that land. Alternatively, it may be preferable for a separate Section 106 Agreement to be entered into, particularly as it would need to be recorded on the Biodiversity Gain Site Register.

A Conservation Covenant agreement would be entered with a Responsible Body who would be responsible to enforce distinct from and without engagement with the Local Planning Authority. The requirements discussed at paragraph 2.24.2 above would need to be observed in respect of the preparation and procedure to enter into the Conservation Covenant agreement.

The Local Planning Authority would not play a part in the enforcement of a Conservation Covenant unless they are also the Responsible Body. Therefore, the Local Planning Authority will need to be sure that the Off-Site BNG secured by the Conservation Covenant and the allocation to the development has been recorded on the Biodiversity Gain Register.

There is limited further due diligence that the Local Planning Authority can undertake in respect of a Conservation Covenant agreement and ultimately, the responsibility for enforcement will lie with the Responsible Body. The nature of Responsible Bodies, and how they approach their role, is uncertain generally. They have limited accountability and they are able to change their nature and approach without recourse to the Local Authority or the BNG provider.

For this reason and in view of the uncertainty as to the willingness of Responsible Bodies to enforce breaches of the Conservation Covenants, it is likely to be preferrable to rely upon a Section 106 Agreement.

2.30 Monitoring BNG Units secured outside of the LPA area

The BNG regime allows for Off-Site BNG to be located anywhere in England but the Biodiversity Metric will require that more BNG is delivered in respect of Off-Site gains which are located further away from the development site (pursuant to the Spatial Risk Multiplier – see further paragraph 2.21.2.1). This is in the interests of encouraging that the mitigation offered by Off-Site BNG is delivered in the location of the impact where possible.

If the Local Planning Authority is asked to approve a Biodiversity Gain Plan on the basis of an off-site location which is some distance away from the development site, then the Local Planning Authority

should consider whether there is any need for the BNG to be located away from the development site.

This assessment should be undertaken particularly in light of the Biodiversity Hierarchy (See further paragraph 1.4) and so the Biodiversity Gain Plan is unlikely to be approved if the Biodiversity Hierarchy has not been applied.

If there is a reason for this, then the Off-Site BNG would need to be secured by way of Section 106 Agreement or Conservation Covenant.

In the event that a Conservation Covenant agreement is entered into then the responsibility for enforcement will lie with the Responsible Body in any event. Therefore the input of the Local Planning Authority will be limited.

If the Off-Site BNG is to be secured by way of a Section 106 Agreement, then the Local Planning Authority will need to consider whether it has Local Authority to enforce the obligations in question on the basis that it is not the Local Planning Authority with jurisdiction for the Local Authority in which the Off-Site BNG is located. There is not a power under section 106 TCPA 1990 which would allow a Local Authority to enforce obligations in another Local Planning Authority area. However, if the agreement has been entered under other statutory powers then those would also need to be considered (See further paragraph 5.4 below). As a matter of principle it would appear very unlikely that obligations could be enforced in another jurisdiction.

This begs the question of whether there is any need to collaborate with the Local Planning Authority for the area of the Off-Site BNG site. This could, for example, be by way of a tripartite Section 106 Agreement with the Local Planning Authority in the area of the Off-Site BNG site as well as the Local Planning Authority for the development site. This would be in the interests of ensuring that there are mechanisms in place to secure local monitoring and enforcement of BNG, as appropriate. However, this option may not be palatable to developers because it would require the approval of multiple Local Authorities and for the costs of each Local Authority to be met.

This may be a consideration in deciding whether to discharge the Biodiversity Gain Condition but is unlikely to be a valid basis to refuse an application which would otherwise be acceptable, providing the BNG has been satisfactorily secured. The key being that the Local Planning Authority will need to be content that the BNG has been properly secured. This is on the basis that the Local Planning Authority could not defend such a decision at appeal.

Alternatively, it may be that there are distinct Section 106 Agreements entered with the Local Planning Authority for the development site and the Local Planning Authority for the BNG site respectively. Each of which would be enforceable by the Local Planning Authority with which they have been entered.

2.31 Local Land Charge Registration

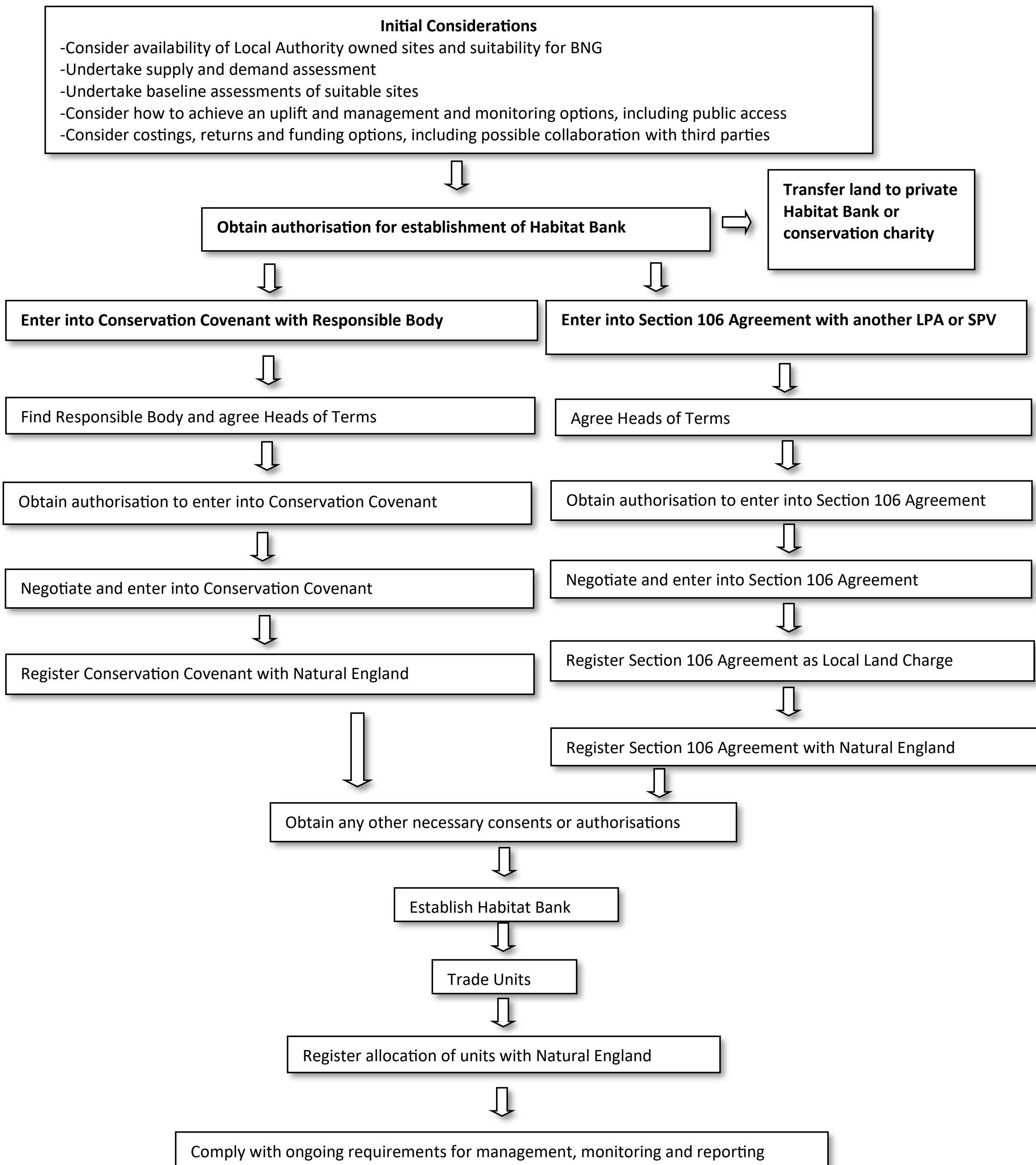
Section 106(11) of the 1990 Act provides that a planning obligation will be a local land charge.

Section 1 of the Local Land Charges Register Act 1975 provides that the Local Authority by whom the covenant or agreement is enforceable should apply to register the local land charge. Therefore, if the Local Planning Authority is relying on BNG secured by way of Section 106 Agreement or Conservation Covenant outside of its administrative area, it may not be secured as a local land charge by them. Under the Infrastructure Act 2015, the functions of maintaining and updating the local land charges register are migrating to the Land Registry and so local land charges will need to be recorded via the Land Registry.

A Conservation Covenant agreement is also a local land charge and must be registered in order to have binding effect on future landowners or a successor Responsible Body (unlike a Section 106 Agreement which automatically runs with the land). The originating Local Authority for the purposes of a Conservation Covenant is the person by whom an obligation of the landowner under the covenant is enforceable (s120(2)). The Local Land Charges (Amendment) Rules 2022 amend the Local Land Charges Rules 2018 to make a specific provision for Conservation Covenants to ensure that the obligations for variation and cancellation of local land charges are on the Responsible Body or Secretary of State (rather than the person by whom the charge is enforceable, which could include the landowner).

Some commentators are of the view that a Conservation Covenant should also be registered on the title for the land bound.

3. HABITAT BANKS ON LOCAL AUTHORITY-OWNED LAND



There are a number of points to consider as a prerequisite to the appraisal of options for Habitat Banking on Local Authority-owned land, as follows:

3.1 Consideration of potential Local Authority-owned sites

The first step will be to consider what land the Local Authority own which could be used for Habitat Banking. Local Authorities should consider land which is in the Local Authority's ownership, which may or may not be accessible to the public. It can be all types and sizes of land; Local Authorities may wish to consider smaller sites within urban areas as well as larger green field parcels of land.

A range of land will be useful as different parcels of land will have different characteristics and potentially enable the creation of different types of habitat. This is positive for the delivery of Biodiversity Net Gain, as the Biodiversity Metric will identify the types of habitat which would be impacted by development and requires that any offsetting relates to the same type of habitat that would otherwise be lost.

This will mean that the wider the spread of habitat available, the more likely it is that the Local Authority will have a solution to offer to developers. However, there is likely to be a greater cost associated with the establishment of some habitats and so the Local Authority will need to decide whether it is willing to invest more at the outset to potentially recoup more, albeit with greater risk for the Local Authority. The Local Authority should also keep in mind the requirement to adhere to the trading rules. This task may be difficult if the Local Authority does not have a habitat mapping tool to assess the habitats in their area.

Another point to consider is whether there is merit in devising a scheme which will allows for more BNG Units to be traded at a later stage once the habitat that has been created has matured. Indeed, a scheme which features some BNG Units which are available soon after delivery and others which are not available until they have reached a more mature state could be useful to give a more steady flow of BNG Units for trading and a better return on investment.

The Local Authority would also need to be confident that there will be a demand for the more costly habitat units, so that there is some comfort that the BNG Units will be sold and the expense of creating the same will be recouped.

3.2 Supply and demand assessment

It will also be necessary to assess the BNG Units available in the local market place. If the market place is crowded then there is a risk that the BNG Units will not sell.

It will also be necessary to assess the BNG Units available nationally. There is an ability to purchase BNG Units that have been created anywhere across the country, although, the greater the distance from the development site, the more of a penalty that will be applied in the Biodiversity Metric (see further paragraph 2.21.2.1). This means that the further the BNG Units from the development site, the more BNG Units will need to be purchased.

It will also be important to bear in mind that statutory credits are available as a last resort and so they are also an option for developers trying to source BNG Units.

It will also be necessary to assess the local demand for BNG Units. It will not be possible to define this with any certainty as it will depend upon the schemes that come forward, the extent to which they incorporate on-site BNG or obtain BNG Units from a third party and more generally. BNG Units cannot be used to disincentivise on-site BNG as per the Biodiversity Hierarchy (see paragraph 1.4). Reference to the Local Plan may assist with assessing demand, as well as engagement with developers and agents in the area.

This should give a steer on the supply of, and demand for, Off-Site BNG Units in the local marketplace and in particular will help to identify where supply/demand is at the extremes, i.e. whether the market is saturated with private Habitat Banks or there are very limited options available.

It will often be more difficult to build a business case if the supply and demand is not at the extremes mentioned above and is somewhere in the middle. It may be that engagement with the local community, developers and agents would help to flush out any uncertainty.

If the Local Authority is not currently considering Habitat Banking, then it may be worth keeping a record of the sources from which applicants have obtained Off-Site BNG so that the Local Authority has visibility on any market trends, key players, etc. This can assist to build a picture of the marketplace and any potential gaps in it.

If there are existing Habitat Banks in the area that are operating, it is worth keeping in mind that their capacity will be limited and so, they are unlikely to offer a permanent solution. The timing of the availability of BNG Units could therefore be important.

Local Authorities may have a number of sites available to them which may be suitable for BNG delivery. While it would be prudent to assess all of the sites available to identify the site most appropriate for habitat banking, it may not be beneficial to have multiple sites coming forward as a Habitat Bank at the same time. This is because of the associated costs (of delivery and maintenance) which would need to be borne regardless of whether BNG units have been sold.

3.3 Identifying potential sites

Once the land within the ownership of the Local Authority has been identified, it will be appropriate to consider the parcels of land which might be suitable for BNG.

In this regard, it will be worth contemplating:

(i) the use to which those parcels of land are currently put;

(ii) whether a baseline assessment has been conducted;

(iii) whether any works have been carried out on site since 30 January 2020;

(iv) whether the habitat sits within a significant strategic location due to connectivity with other habitats;

(v) whether the Local Authority would be content to place that land into a scheme which will bind for 30 years;

(vi) whether the land has been earmarked for any potential future use or development or is likely to come forward in the coming years;

(vii) whether the land is designated for a particular purpose;

(viii) whether the land is/could form part of any other environmental schemes, including a Local Nature Recovery Strategy ("LNRS") and if there is not a LNRS published then to review the local plan, neighbourhood plan, local ecological networks, tree strategies, AONB management plans, biodiversity action plans, species conservation and protected sites strategies, woodland strategies, GI strategies, river basin management plans, catchment plans, estuary strategies and shoreline management plans;

(ix) whether the land is located such that it would be sensible to co-ordinate with neighbouring landowners;

(x) what the current habitat type and condition of the site is and how easy/difficult would it be to create a gain;

(xi) review the title to establish whether there are any underlying interests or potential issues;

(xii) whether the site includes an appropriate mix of habitats that are likely to be needed for development in the area under the BNG trading rules; and

(xiii) whether the site includes any public interests or rights which would need to be factored in.

3.4 Baseline assessments

A baseline assessment is key to understanding the current biodiversity value of the land. This may be helpful for a range of reasons but in particular to show how difficult or not it is likely to be to generate a gain to generate BNG Units. Generally this requires an increase in the distinctiveness of a habitat in order to make a project viable.

The baseline will need to be sufficient to inform the Biodiversity Metric to avoid the need to carry out multiple assessments.

The baseline may assist to identify whether there is any land management which it might be appropriate to undertake until such time as the Local Authority is ready to advance a Habitat Bank.

3.5 How to achieve an uplift

There will be a range of ways in which to achieve a Biodiversity Net Gain which involve varying levels of cost, risk to establishment, ongoing management responsibility and initial establishment works.

It will often be useful to consider a range of options available and to cost those options to determine which is the most appropriate approach in the circumstances. Ecology input will therefore be key throughout this process.

For example, in many instances a large investment to take a habitat in moderate condition and to convert the same to a good condition. However, a much lower investment would be required to convert a low quality habitat and this is likely to achieve a much more significant number of BNG Units and so to attract greater value. However, ecology advice would be required in each case.

3.6 Options appraisal

Please note that this is a generic overview and each Local Authority should consider whether this is appropriate in their case and in light of their own processes and approach. We would be more than happy to discuss, if that would be useful.

An options appraisal will involve drawing together the options available and deciding which to rule out and which to consider further. It may seek to address numerous parcels of land or a single parcel of land on a trial basis or with sufficient BNG Units to justify engaging in this process and incurring the level of resource that goes along with this.

The Local Authority's decision-making process will be subject to legal challenge in relation to Habitat Banking in the same way as any other discretion that is exercised by the Local Authority, therefore it will be important to have records to demonstrate the information gathered, how this was considered and the conclusions reached.

The Local Authority will need to progress the respective stages of the process of establishing a Habitat Bank and members will require evidence of the options considered and the likely impact and outcomes associated with those options in order to decide which to explore further or take forward.

The Local Authority may wish to consult upon the options available internally or externally. In the event that the Local Authority is considering external consultation then it would be appropriate to consider the stage at which information is shared outside the Local Authority and the extent to which the Local Authority will invite comments on proposals from the public or identified consultees. The Local Authority will be subject to the Freedom of Information Act and Environmental Information Regulations and so will need to be prepared to share information, if requested, subject to the usual exemptions that apply pursuant to those regimes. For that reason, the Local Authority may wish to agree a Communications Plan.

Consideration of the options available would also help the Local Authority to gauge the level of resource demanded by the respective options. This can include resource in terms of finance and the timing of that finance, as well as personnel. While this is likely to be at a very high level initially, it will help to identify the likely level of need so that arrangements can be put in place, as appropriate.

3.7 Management and monitoring options

The various different options for the way in which BNG can be delivered on different landholdings will carry varying levels of management and monitoring responsibility and cost.

The establishment of the Habitat Bank will commit the Local Authority to manage the Habitat Bank for a period of 30 years in accordance with an approved plan, as well as to monitor the performance of the Habitat Bank to ensure that it is establishing in the manner anticipated at the outset. Importantly, the Habitat Bank will need to maintain the BNG throughout the period for which its BNG Units are meeting a development's BNG requirement. This means that if there is a delay in selling the BNG Units, the maintenance period will still need to be 30 years by reference to the point of sale of the BNG Units. This could mean maintenance costs need to be met for a much longer period.

The level of management and monitoring required will also have an impact upon the likely level of cost associated with the delivery of the BNG and so will have an impact on pricing on the sale of BNG Units. It will also impact on the risk to the Local Authority of seeing a return on their investment.

If the Local Authority has been maintaining the site in any event then it may be that the costs of the maintenance of the Habitat Bank can be offset against the existing cost of maintaining the site.

3.8 Public access

Access by the general public will be an important consideration when considering the options available for the delivery of BNG.

Allowing public access is likely to be a notable spin-off benefit of the creation of a Habitat Bank, adding a social element to the clear environmental benefits that would derive from a scheme.

However, the use by the public could in some cases have an impact upon the number of BNG Units that can be generated for the Habitat Bank due to the potential impact of people, pets and all the paraphernalia associated with them on the establishing habitat.

This will most likely reduce the BNG Units generated but may also create a risk of failure or damage to the habitat and so, could also represent a potential future cost in connection with reinstatement or remedial works.

There will therefore be a balance to struck and it may well be that the scheme is designed so as to reduce the extent of access by the public to areas which are the most vulnerable or to require that dogs are kept on leads, for example.

On-site green spaces can offer multi-functional areas to comply with planning policy requirements and in doing so, may contribute to the BNG to be delivered, but where this is not the primary

function then the BNG may be minimal. For example, recreational space, natural flood management or SuDS. However, it may be possible to design the scheme in such a way as to locate all or part of the BNG away from regular public access, proximity to urban development, lighting and other impacts in order to meet the gain.

3.9 Costings and returns

BNG Units will need to be carefully costed to ensure that the Local Authority's costs in delivering the BNG Units have been covered.

Depending upon the way in which the Habitat Bank is established it may or may not be that the Local Authority is permitted to make a profit upon the sale of BNG Units. The financial projections should therefore seek to identify the point at which the scheme will break-even.

In some instances, it may be appropriate to generate a profit providing the profit is recycled for use in other environmental projects within the Local Authority's area.

An accurate costing will allow the Local Authority to forecast the likely returns based on assumptions as to the number of sales, the stage at which they will occur, the value of the BNG Units at the point of sale, etc. The Local Authority may have resource in-house to advise upon these considerations, but if not, then there may be resource and assistance available from the WMCA through the Local Investment in Natural Capital (LINC) programme and consultants. One example is the UK Nature Accelerator, which offers a technical assistance programme..

There may also be grants or other public funding available from time to time.

The availability of funding or not to assist with the BNG proposal may or may not be clear or fixed at the point the Local Authority is deciding whether to proceed with the Habitat Bank. Therefore it may be prudent not to provision for this income and instead to consider whether there are any other methods of increasing the income generated by the scheme or expanding the offering, for example to include Environmental Social Governance (ESG) or carbon credits. Subject to compliance with the principle of additionality and identifying a suitable gain for the respective regimes, therefore it is recommended that up-to-date legal and expert advice is obtained in this regard.

At present, there is not an established industry standard model or calculator in respect of ESG and so this would likely need to be led by a requirement for ESG and the accompanying approved/agreed mechanism for calculation.

There are a number of verification options in respect of carbon, but the PAS advises that: *"You cannot stack carbon and BNG on the same land and for the same activity (i.e. planting a woodland). You can only stack on top of carbon if you can further enhance the habitat and it does not affect the carbon value"* (https://www.local.gov.uk/pas/events/pas-past-events/biodiversity-net-gain-local-authorities/biodiversity-net-gain-faqs).

The principle of stacking BNG with nutrient mitigation is accepted, as per the Government Guidance 'Combining environment payments: biodiversity net gain (BNG) and nutrient mitigation) available here: https://www.gov.uk/guidance/combining-environmental-payments-biodiversity-net-gain-bng-and-nutrient-mitigation. However this option is not currently available in the WMCA area as there is no requirement for nutrient mitigation and such mitigation is catchment sensitive.

If the BNG Units are going to be priced at a high-level due to the costs involved in establishing and operating the Habitat Bank it will be necessary to consider whether they will sell. Local Authorities should consider whether it is worth the risk of not being able to sell the BNG Units. The Local Authority would then have to absorb all of the costs and may remain committed to providing the scheme as proposed and secured under the Section 106 Agreement or Conservation Covenant.

Biodiversity Units UK published a report called "Pricing and Key Insights" in July which provides an analysis of current pricing trends and market insights in the BNG sector – https://biodiversity-units.uk/bng-news/the-bng-report-pricing-amp-key-insights-july-2024. This indicates prices per unit of between £27,825 and £55,125, depending on habitat type and location. However, the market has yet to fully establish and so this is likely to change and will include habitat and regional variations.

Depending upon the habitat in question, the scale of the Local Authority's responsibilities in relation to the Habitat Bank will change. Compliance with those responsibilities in the long-term may or may not be within the remit and skills/resource of Local Authority officers. In the event that third parties are going to need to be resorted to then the Local Authority will need to factor in the ongoing obligation to secure that input and fund the same over the 30 year period and allow for that when pricing the Biodiversity Units.

3.10 Wider strategic aims

3.10.1 Achieving best value and pricing

The pricing strategy should factor in the risk that the BNG Units may not sell, as well as the information gathered on costing and returns (including maintenance over the required 30 year period), the risks with establishing the Habitat Bank, etc.

It may be that information as to the 'going rate' for particular BNG Units in the area can be established (see further paragraph 3.2). Indeed the Local Authority may be privy to information along these lines when acting in its capacity as Local Planning Authority, but information along these lines cannot be requested in order to formulate the Local Authority's own pricing strategy. Please see paragraph 5.3.13.

The Local Authority will be subject to the Best Value Duty. This requires the Local Authority to *"make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness"*. In doing so, the Local Authority is to consider overall value including economic, environmental and social value. There is a Duty to Consult before exercising the Duty of Best Value – see Best Value Statutory Guidance, September 2011
https://assets.publishing.service.gov.uk/media/5a7968ab40f0b63d72fc591f/1976926.pdf

In theory, a Habitat Bank which is accessible to the public would appear to provide the economic, environmental and social value if properly constituted, costed and operated. However, this would need to be carefully considered in light of the particular circumstances.

The Local Authority may be content to agree that favourable pricing is appropriate when certain criteria are met in the interests of favouring particular values under the Best Value Duty. For example, to allow a reduced price or discount on the sale of BNG Units for affordable housing schemes in order to assist with viability. In this instance, the criteria would need to be defined, made clear and to operate fairly on the basis of a genuine and identified positive outcome. The Local Authority would need to document and be transparent as to the criteria that has been set in the interests of reducing the risk of legal challenge. In addition, the Local Authority would still need to ensure that they recover their costs and so there is a limited reduction that could be offered, in any event.

More generally, it will be possible for the Local Authority to impose criteria as a prerequisite to the sale of BNG Units from the Local Authority Habitat Bank. However, the Local Authority will need to ensure that the basis for the sale criteria has been documented, has an evidence base or respond to a need and can be justified accordingly. The procedure or mechanism for deciding whether the

criteria have been satisfied will need to be identified and publicised. The Local Authority cannot overlap any such criteria with its planning functions.

In setting criteria the Local Authority should be mindful of distinguishing its planning function and its function as the owner and operator of a BNG Habitat Bank. The operation of the latter and availability or not of BNG Units to a particular developer or application pursuant to it, should not be a response to the exercise of discretion under the former. To do otherwise would risk the suggestion that the Local Authority is operating the Habitat Bank so as to impact the ability or not of development to come forward. This is potentially an abuse of process and a basis for complaint and/or legal challenge.

While the creation of the Habitat Bank is intended to maximise the value in the land through the generation of capital receipts, it would appear likely that the underlying land value would diminish in view of the burden of the BNG obligations to preserve the bank. Although, it is anticipated that BNG schemes are only likely to be advanced on sites which do not have development potential based on current and expected changes to policy. There is no established mechanism of valuation at this time and the impact of any reduction in value (if identified) may be offset from the capital receipts from the sale of BNG Units.

3.10.2 Consenting, procurement and constraints

The Local Authority's investigation as to the land available for Habitat Banking will consider the points raised at paragraph 3.1 above.

The works to establish the Habitat Bank will vary according to the nature of the scheme proposed, but in most cases it is unlikely that any works to establish the Habitat Bank would require planning permission. This is on the basis that if there is no development to be carried out (by way of operational development or a change of use of the land), the land is currently used for public recreation and if planning permission is in place, there are no conditions which would prevent a change of use of the land for Habitat Banking.

However, it will be necessary to consider other factors, such as:

(i) whether planning permission is required to remove any existing built-form from the site, to carry out any operational development relating to the Habitat Bank or other aspects relating to the public access or for a change of use of the land – this will need to factor in the overall package of development proposed, for example, to include any signage or

information boards or other facilities for the general public in conjunction with their access, parking or fencing or the creation of paths and footways;

(ii) whether there any entries on the title for the land which would prevent the use of the land as a Habitat Bank;

(iii) whether there are restrictions or designations relating to the land which require that it remains (in whole or part) accessible to the public;

(iv) whether the transaction engages the Public Contracts Regulations 2015 or Procurement Act 2023;

(v) whether the Best Value Duty has been considered;

(vi) whether there any protected trees within the site to be aware of; and

(vii) whether there any public rights of way or easements over the land which need to be factored into the design of the scheme.

3.10.3 Justification

As a public body reaching a decision as to how to use its land, the Local Authority will need to consider the options available and make a case for the proposed approach to be considered by officers and members in accordance with the Local Authority's Scheme of Delegation. The approach which is proposed will need to be authorised accordingly.

All options would need to be considered and their consideration documented, together with the reasons for not advancing some options.

The decisions taken by the Local Authority will be subject to legal challenge by way of judicial review. Therefore, the way in which the decision has been taken will need to be evidenced in order that the Local Authority can show that the Local Authority has acted lawfully and reasonably, has followed procedure and complied with relevant legislative and policy requirements.

If a Habitat Bank is established then the bank will be bound to operate for a period of at least 30 years (plus the time it takes to establish the habitat) and so this will be an arrangement and restriction on land which impacts involve successive officers and members of the Local Authority. It will therefore be important to ensure that the future impact of the proposals is understood. The decision, process and operation will therefore need to be documented to assist those successors;

this may also assist in the event that the Local Authority's Audit Committee reviews the Habitat Bank.

In reality, the Habitat Bank is likely to operate for more than 30 years to allow for the habitat enhancement or creation works to be undertaken and to establish, if required.

3.11 Legal mechanisms

There are numerous ways to approach the creation of a Habitat Bank and these are considered in turn in Chapter 4 below.

3.12 Other points to consider

Documents and systems to administer and adhere to Habitat Bank obligations, will need to span across different departments within the Local Authority and any other key stakeholders. There will be a resourcing point to consider in this regard, in terms of time and money.

3.12.1 Collaboration with third parties

Depending upon the location of the Habitat Bank, it may be that collaboration with neighbouring landowners or local conservation charities would achieve a more favourable output. It may be worth exploring the opportunity to collaborate with those parties.

Such a collaboration would have an impact upon the legal mechanisms available to establish the Habitat Bank, responsibility and liability would need to be carefully defined and allocated between the parties, succession arrangements would need to be in place and income-sharing terms would need to be agreed.

It would be prudent to carry out careful due diligence on the identity of any potential collaborating party before entering into any negotiations.

According to the outcome of due diligence and negotiations, it may become apparent that the better option would be to assemble the ownership of the land by transfer to one of the landowners involved or to establish a new entity which will establish and operate the Habitat Bank. This would be a matter to consider in light of the particular circumstances.

3.12.2 Other consultation

The Local Authority may wish to go about consulting on the proposal formally or informally. On the latter, the close relationships with applicants and local professionals is likely to assist.

The Local Authority may have a policy on community engagement which would need to be complied with.

The Local Authority should consider the stages at which it is appropriate to consult locally and potentially with other key stakeholders, including those who may be interested in view of the nature or location of the land.

There may be additional consultation requirements in connection with the designations or restrictions on the land and any legal processes to follow to resolve any such issues.

3.12.3 Stacking and bundling opportunities

Stacking is overlapping ecosystem services produced on a parcel of land whereby each ecosystem service is traded individually to buyers who pay for the respective service that they are looking to acquire.

Bundling is when a range of ecosystem services are rolled up into a single package on a parcel of land and one payment is received for the aggregated services provided within that bundle.

The Local Authority may wish to consider the opportunity to stack or bundle in the context of Habitat Banking. In the circumstances, stacking is likely to be more relevant as the primary aim is to provide a local source for the purchase of Off-Site BNG Units. In the event that there is an opportunity to stack then that would need to be considered in light of the particular opportunity available and the regulatory regime pertaining to it.

It is clear that developers and landowners who will also be operating in the Local Authority's area and potentially by way of Habitat Banking, will also be considering this opportunity and so the Local Authority will need to be prepared to approve (or not) proposals that are received in respect of such environmental schemes.

In this regard it is worth noting that an Environmental Impact Assessment EIA) and Habitats Regulations Assessment (HRA)may be required. It may be possible to co-ordinate these requirements with Biodiversity Gain Plan, but there will not be a total overlap in the information that is required.

If stacking is to be considered it is recommended that up-to-date legal and expert advice is obtained in this regard. The principle of additionality would need to be adhered to, as would the respective regimes. It is accepted that certain regimes can be overlapped in this way, but not for others. In any event, the respective markets are in their infancy, as is the ability to stack those markets. Therefore, careful consideration should be had and advice taken.

At present, there is not an established industry standard model or calculator in respect of ESG and so this would likely need to be led by a requirement for ESG and the accompanying approved/agreed mechanism for calculation.

There are a number of verification options in respect of carbon, but the PAS advises that: *"You cannot stack carbon and BNG on the same land and for the same activity (i.e. planting a woodland). You can only stack on top of carbon if you can further enhance the habitat and it does not affect the carbon value"* (https://www.local.gov.uk/pas/events/pas-past-events/biodiversity-net-gain-local-authorities/biodiversity-net-gain-faqs). It is possible for mitigation measures to generate (where appropriate, but currently not within the WMCA region currently) an output under the BNG and Nutrient Neutrality regime, i.e. to allow BNG Units and nutrient credits to be traded. There is specific DEFRA Guidance available on this point and how to couple with environmental payments (https://www.gov.uk/guidance/combining-environmental-payments-biodiversity-net-gain-bng-and-nutrient-mitigation). However this option is not currently available in the WMCA area as there is no requirement for nutrient mitigation and such mitigation is catchment sensitive.

Environmental Land Management Schemes (ELMS) is a collective term for Government funding and subsidies paid to farmers or agricultural landowners in relation to environment, animal welfare and animal health. ELMS currently comprise a number of funding streams including, Sustainable Farming Incentive (SFI), Countryside Stewardship and Landscape Recovery Schemes. Depending upon the type of ELMS involved, there will be a differing requirement, contract length and value attributable. ELMS replace the former area-based payments to farmers and agricultural landowners known as Basic Payment Scheme which is currently being tapered down and will be removed entirely by 2027. If land is entered into ELMS then it may not be possible to utilise the same land for a BNG scheme or at least until the ELMS contract has expired. It is possible that land that has been in ELMS will have a higher biodiversity baseline value by virtue of being utilised and managed in accordance with ELMS. There is some debate as to whether land can be included in ELMS at the same time as delivering a BNG scheme. Given the current uncertainty, it would be prudent to enquire with landowners looking to enter into BNG schemes as to whether they are in receipt of ELMS in order that this point can be specifically considered, as appropriate.

In relation to Suitable Alternative Natural Green Space (SANGS) the principle of stacking is accepted by the Government in part. Please see the Government Guidance 'What can count towards a development's biodiversity net gain' (available here: https://www.gov.uk/guidance/what-you-can-count-towards-a-developments-biodiversity-net-gain-bng).

Any additional habitat created or enhanced on the same land beyond what is already being delivered for non-BNG outcomes can count towards no-net loss but cannot take the units into positive net gain. Additionality is the key for compliance with the trading rules and specific regard should be had in each case to whether the Trading Rules have been complied with.

4. ESTABLISHMENT OF A HABITAT BANK

4.1 Local Authority

The Local Authority will need to have authorisation for its consideration of the prospect of Habitat Banking, investigations relating to the same and committing to bringing about a Habitat Bank. Regardless of the nature of the Habitat Banking vehicle there are a number of processes that will need to be followed or considered.

These have been summarised below and should be considered in light of the particular proposals:

- Create the internal team
- Supply and demand assessment
- Gauge level of member support for initial investigations
- Constitution and Scheme of Delegation
- Authorisation for initial investigations and carrying out a baseline survey
- Stage at which to consult and who to consult
- Ecological advice as to the options and outputs available
- Preparation of indicative costings, returns and pricing
- Report on findings and make recommendations as to the next steps
- Choosing sites – multiple or one?, to align with LNRS priorities or other strategic requirements around new developments for example
- Business case for taking forward or considering options – supply and demand

Please note that these processes do not apply in a linear fashion, therefore it can be necessary to repeat stages in the process or to revisit points or plans considered previously.

4.2 Site investigations and title

If the overall principle is well received and the initial investigations show that there are potentially viable options for Habitat Banking then further investigations will be needed, this will include consideration of the following points:

- Consider the landholdings available to use to this effect
- Are there any constraints over those parcels of land?
- Have those parcels of land been appropriated for any other purpose?
- Is a Habitat Bank going to be the most beneficial use of this land? i.e. Is it going to be needed in the future for major infrastructure, housing, other uses?
- Consider purchase of additional land - is this justifiable? Has the land been identified? Can it be obtained at best value and what is the security of the return? Where is the land?
- Public access – to permit or not, if so, on what basis?
- Consider Best Value Duty
- Health and safety, insurance, public liability concerns?
- As this will result in a liability which binds the land, consideration will need to be given to the potential for failure and how any such failure can be mitigated, units can be replaced or the risk can be insured against?
- Ecology input will be required at this stage to understand the baseline condition of sites under consideration and the options available so as to generate BNG Units.

4.3 Funding

If there are potential sites available for Habitat Banking then it is recommended that further investigations into costing and funding are undertaken. See further paragraph 3.9.

4.3.1 Current maintenance costs

If the site is currently in the ownership of the Local Authority then there will be a cost associated with its maintenance, even if this is for relatively simple maintenance such as grass cutting.

The costs of maintenance of any BNG scheme coming forward should therefore offset against the current maintenance costs. There will also be an opportunity to recoup this cost as part of the sale of BNG Units.

4.3.2 Likely returns

There will be different options for habitat enhancement and creation which will generate varying levels of BNG Units. There will be a cost associated with deliver of all/any BNG options available, each of which will carry a differing level of risk, investment, likely return, etc. In particular we would highlight the following:

4.3.3 Costings

The question of how to price BNG Units is not straightforward as the market has not been established for long and the statutory credits are priced at a level which is intentionally high.

Consideration should be given to whether it is possible to recycle the surplus to enable other environmental schemes within the Local Authority area to be brought forward. This could align LNRS objectives to further nature recovery as part of the justification for BNG.

It may be appropriate to have some Habitat Banking and some Land Banking so that there is an opportunity to generate the most income possible from the bank. Research has indicated that the same outlay of costs can lead to a higher yield of BNG Units if they are realised and sold over time rather than all at the outset before the habitat in question has had the opportunity to establish.

A Habitat Bank is a more risky approach as the demand will not be certain at the stage at which costs are incurred in habitat creation. There may also be a very considerable delay between the outlay and return. A land banking/habitat to order approach prevents costs being incurred before the units are required, so the cost can be offset. This approach is less cost-effective and is likely to have a greater administrative burden, but there may be a lag between the habitat creation off-site and the habitat loss on-site. Therefore a hybrid approach is likely to be the most beneficial.

We would recommend that financial advice is taken in relation to these points.

4.3.4 Stacking and other options

The sale of BNG Units would be the primary driver for progressing a Habitat Bank scheme, but it may be that the scheme can deliver on other strategic outcomes and provide additionality which can be traded in another guise.

4.3.5 Value?

There is a question as to whether Habitat Banking is worth consideration in view of the level of resource (time, internal work and cost)?

There is a limited ability to reduce the cost involved in Habitat Banking and so the Local Authority would need to be well versed in the likely costs incurred, apply a factor for risk, etc. to ensure the scheme remains on track.

In this regard it may also be helpful to compare the position with other Local Authorities that have established Habitat Banks and to ask how they have gone about this. Please refer to Appendix A for a summary of the operational Habitat Banks which are already in existence.

4.3.6 What further funding or initiatives are available?

The following further funding or initiatives are potentially available:

- The WMCA LINC programme may in some cases be able to help assist habitat bank projects towards becoming an investable proposition
- Project development advice through the UK Nature Accelerator
- Specialist investors that may have a focus on this market
- Traditional bank finance – green book method of valuation hasn't yet established.
- Investment/input from conservation charities and wildlife trusts
- Habitat bank organisations that may have initiatives aimed at local authority sites

4.3.7 Wider Value

It will be for the Local Authority to weigh up the ways in which value can be attributed to bringing forward a Habitat Bank. Those values will not be purely financial, but will also draw upon considerations such as providing a local solution to sourcing of BNG Units, the societal as well as environmental benefits that go alongside this and the objectives that can be met.

It may be that views of third parties and stakeholders need to be taken into account to determine how important this is the for the local area and to assist the Local Authority in deciding how to

proceed, particularly in view of the accountability of the Local Authority to exercise its public functions and to spend public money.

Those competing priorities will assist the Local Authority in deciding how much of a priority Habitat Banking is for the Local Authority in question.

4.3.8 Trial run

It may or may not be possible to carry out a trial run. This will largely depend upon the way in which the Local Authority intends to go about Habitat Banking. Given the amount of investment required up-front with a number of the options available, it may not be possible to advance a scheme without the risk of a considerable financial loss if the BNG Units do not sell or the Local Authority decides not to proceed past the 'pilot project'. This has some advantages, as the Local Authority will have 'given it a go' and decided whether or not to proceed with Habitat Banking before it has committed a higher level of resource. However, all expenditure will be at risk and the Local Authority will be accountable for that. There is also then a reputational risk in the event that a pilot project is not successful, unless the Local Authority is willing to consider alternatives at that point.

5. LEGAL MECHANISMS FOR THE ESTABLISHMENT OF A HABITAT BANK ON LOCAL AUTHORITY-OWNED LAND

This section considers the ways in which Local Authorities may wish to consider if they would like to operate a Habitat Bank on their land and preliminary investigations have indicated that this is a viable opportunity:

5.1 Enter into a Conservation Covenant with a Responsible Body

This entails entering into a Conservation Covenant agreement with a Responsible Body in relation to the Local Authority land upon which the Habitat Bank is to be created.

The Local Authority would need to have devised a scheme, with ecology input, for habitat enhancement or creation which would need to be approved by the Responsible Body, together with such other information that the Responsible Body may require for approval of the scheme and entry into a Conservation Covenant agreement.

5.1.1 Finding a Responsible Body

See also paragraph 2.25.

A list of the Responsible Bodies is available online (https://www.gov.uk/government/publications/conservation-covenant-agreements-designated-responsible-bodies/conservation-covenants-list-of-designated-responsible-bodies). There are currently seventeen Responsible Bodies, including Barnsley Metropolitan Borough Council, Bracknell Forest Council, Buckinghamshire Council, City of Doncaster Council, Greater Manchester Environment Trust, Harry Ferguson Holdings, Natural England, Northumberland County Council, RSK Biocensus, South Tyneside Council, Staffordshire Wildlife Trust Limited, Swindon Borough Council, The Land Trust, The Lifespan Project Limited, Warwickshire County Council, Westcountry Rivers Trust and Westmorland and Furness Council. The relatively low number of Responsible Bodies is no doubt attributable, in part, to the concept of Conservation Covenants being relatively new and indeed untested in England.

While the link above may allow the identity of Responsible Bodies to be found, it would be a case of engaging with the respective Responsible Bodies as to the basis upon which they would be willing to enter into a Conservation Covenant agreement in relation to a particular scheme, or not, as the case may be. There is no guarantee that a Responsible Body will be willing to enter into a Conservation Covenant agreement as they are not compelled to do this; it will be a matter for their discretion.

5.1.2 What are the legal requirements?

The first step will be to agree terms with a Responsible Body who is designated by DEFRA. This will include consideration of the requirements to enter into a Conservation Covenant agreement, due diligence on the part of the Responsible Body as to the proposed scheme and the proposals of the Local Authority in bringing this forward, as well as settling Heads of Terms as to how the Habitat Bank will operate, including the obligations of the parties.

Once those points have been agreed, it would be necessary to enter into a Conservation Covenant agreement. There is no standard form and so this would need to be negotiated. There are no guarantees that all landowners entering into Conservation Covenants will do so on the same basis and it is likely that these documents will remain, at least in part private, due to their private and voluntary nature. Local Authorities should however keep in mind that public bodies entering into contracts of this nature will be subject to either the provisions of the Freedom of Information Act and/or the Environmental Information Regulations. In the event of a request for disclosure under either FOIA or EIR, disclosure can only be withheld in certain defined circumstances.

Throughout this process it will be necessary for the parties to ensure that the Conservation Covenant agreement meets the legal requirements, if not, then the Habitat Bank will not be capable of being registered on the Natural England maintained registers. Similarly, issues could arise on the sale of BNG Units from the Habitat Bank after the Conservation Covenant agreement has been entered into and the bank has been established.

It may be that throughout the course of negotiating the Conservation Covenant agreement that other issues arise to be determined, such as the need for financial security for the ongoing maintenance of the scheme which may in turn caused third parties to become involved in the negotiations.

Finally, there are likely to be separate agreements to be entered into in connection with the operation of the Habitat Bank. Such as, maintenance agreements whereby third party/ies are responsible for maintaining the scheme or allocation agreements in relation to the trading of BNG Units, as well as potentially others depending upon the particular circumstances. While these drafts may not be progressed at the same time as the negotiation of the Conservation Covenant agreement, regard would need to be had to those further aspects of the Habitat Banking process to ensure that the Conservation Covenant agreement allows for the practicalities of the operation of the Habitat Bank or does not unduly restrict that.

If the Local Authority is looking to create a Habitat Bank on its own land, it will need to follow its internal processes and procedures governing the purchase of services relating to the setting up and/or maintenance of the Habitat Bank. In addition, the Local Authority will need to consider the extent to which the Public Contracts Regulations 2015 or the Procurement Act 2023 are engaged.

The Public Contracts Regulations (and, when it comes into force, the Procurement Act) apply to contracts for the purchase of goods, services and works by public bodies to the extent the value of the relevant contract exceeds certain financial thresholds. The main thresholds are currently: (1) supplies and services (Central Government): £139,688; (2) supplies and services (Other Bodies): £214,904; (3) works: £5,372,609.

To the extent that the contract(s) for the establishment and/or maintenance of the Habitat Bank engage the Public Contracts Regulations and/or Procurement Act, the Local Authority will be required to procure the contracts in accordance with the requirements set out therein. Time will need to be factored into the process of creating the Habitat Bank to allow the Local Authority to discharge its obligations under the Public Contracts Regulations.

By way of an example, the maintenance agreements whereby third parties are responsible for maintaining the scheme have the appearance of being services contracts. That is to say, the third parties are providing maintenance services to the Local Authority in exchange for financial consideration. If those contracts are for a value above the relevant thresholds, then the Public Contracts Regulations/Procurement Act will be engaged.

In the event the Public Contracts Regulations are engaged, the Local Authority will need to procure the services by following one of the procedures permitted by the Public Contracts Regulations/Procurement Act. Those procedures will be subject to minimum time limits for the receipt of tenders. If, for example, the Local Authority wished to use the Open Procedure, it would need to provide bidders with 35 days to submit bids from the date the contract notice was sent. It would also be prudent for authorities to build contingency periods into their plans in the event that the award of the contract is subsequently delayed by a challenge to the procedure.

Authorities should also keep in mind that obligations also exist in respect of below threshold contracts. For example, there is currently an obligation to publish information about the opportunity on Contracts Finder, as well as publishing information on Contracts Finder about any contracts entered into. There will continue to be below threshold obligations under the Procurement Act.

5.1.3 Governance considerations

Authorisation would be needed for a Local Authority to enter into a Conservation Covenant with a Responsible Body. A business case is likely to be needed to show the options considered, the risks and benefits of each and how the decision has been taken to take this approach. Seeking that authorisation could initially allow the negotiation and completion of the terms and an updated consent could be sought as and when all aspects of the Habitat Banking and trading process have been finalised.

The Local Authority would need to agree the Heads of Terms with the Responsible Body, including the maintenance and monitoring costs. It is not immediately apparent how to go about entering into such discussions as the Responsible Bodies do not publicise how to commence the process on their websites.

There are a number of local authorities which have now achieved Responsible Body status. If a Local Authority is minded to enter into a Conservation Covenant with a Responsible Body that is also a nearby Local Authority then it would be worth considering any potential unintended consequences by virtue of that proximity and relying upon a nearby Local Authority in an enforcing capacity in respect of land use. In some instances, where there are particular links between authorities, i.e. a District Council entering into a Conservation Covenant with a County Council that is also a Responsible Body, could lead to a conflict of interest. The Responsible Body would have a duty to enforce the Conservation Covenant and would need to adhere to those duties, while also potentially separating their functions as a Responsible Body from their other Authority functions.

Local Authorities should consider carefully which Responsible Body to approach on the basis that the Responsible Body will be responsible for enforcing the Conservation Covenant agreement. Given that Conservation Covenants are at such an early stage, there is no anecdotal track record for the negotiation or enforcement or Conservation Covenants by the respective Responsible Bodies. We know that DEFRA is testing relatively rigorously the Responsible Bodies before awarding them designated status, to ensure that they have the necessary procedures in place to take on this role. However, how they go about exercising their enforcement powers in particular, will be a matter for the discretion of the particular Responsible Body.

There will of course be a reputational risk for the Responsible Body and the Habitat Bank operator in respect of breaches of the obligations in the Conservation Covenant agreement, particularly to the extent that this would cause a delay to the sale of BNG Units. This in itself may be a motivator to

ensure that the terms are complied with or if they cannot be complied with, that alternative arrangements are agreed.

5.1.4 Agreeing the terms

There is no standard approach to the negotiation of Conservation Covenants and we do not have any specific BNG related templates or precedents in this regard. It should be noted that Conservation Covenants were not created for the purposes of BNG and so, as and when templates are available, it may be that they are not specifically tailored for BNG in any event.

The Local Authority would need to negotiate the terms of the Conservation Covenant agreement with the Responsible Body. As they all operate in their own manner there is no consistency or visibility on the approach of different Responsible Bodies as yet. As Conservation Covenants are private agreements they can be entered into on commercial terms and may not be available for inspection in the public domain (in whole or part).

The Local Authority would need to seek details of the offering on a case-by-case basis, it may be that the offering of respective Responsible Bodies is different and this will become more apparent as time moves along and some schemes have come forward to 'test the water'. For the 'early adopters' this could mean that more time and cost needs to be incurred in considering the options, negotiating, taking advice, etc.

5.1.5 Entering a Conservation Covenant

See further paragraph 2.24.2.

There is no standard precedent for Conservation Covenant agreements so they will need to be negotiated on a case-by-case basis. In time, it may well be that a more standardised approach and format for Conservation Covenant agreements is arrived at, but this is likely to take some time.

Conservation Covenants were expected by DEFRA to be much more heavily relied upon than they have been to date.

The Conservation Covenant will only take effect pursuant to the terms on which it has been entered into. There is an ability to modify the Conservation Covenant agreement in certain circumstances but this would need to be agreed (see further paragraph 2.24.2.7). Therefore the Conservation Covenant agreement will need to be carefully negotiated from the outset to achieve the purposes of the legislation and the parties.

In particular, the Responsible Bodies would need to be remunerated in respect of their role as the enforcing and regulating body, but the income to be derived from the trading of the BNG Units would need to remain with the landowner. The latter may not be recorded on the face of the Conservation Covenant agreement due to the requirements of the legislation, however, this would need to be clear or at least not prevented by the terms of the Conservation Covenant agreement.

The Conservation Covenant agreement will be scrutinised by the parties throughout its negotiation but the acceptability of the form will also need to be considered in light of the transactions to be undertaken in relation to the Habitat Bank further down the line, for example, in relation to its maintenance, trading of BNG Units, satisfying funders in relation to the Habitat Bank or BNG Units purchasers and satisfying Local Planning Authorities within the jurisdiction of BNG Units purchasers, etc.

Local Authorities should allow time and cost of negotiation, especially as they are not familiar territory for any of the parties involved.

Local Authorities should be prepared for it to be a 'take it or leave it' offer from the Responsible Body which may or may not be acceptable to the Local Authority.

None of the Responsible Bodies have a track record as yet in terms of how they approach their role in monitoring and enforcing. This will be the sole responsibility of the Responsible Body and will not be a task that DEFRA, DHCLG or Natural England become involved with (see National Audit Office Report).

5.1.6 Natural England compliance on creation

See also paragraph 2.24.3

The Conservation Covenant agreement needs to be registered in order to enable trading of Biodiversity Units and so will need to meet Natural England requirements and to meet the costs associated with this.

The Responsible Body is not permitted to register the Conservation Covenant with Natural England (Regulation 7(2)) Register Regulations); this responsibility will fall to the landowner. The landowner will in turn be incentivised to register the Habitat Bank in order that they can commence trading the BNG Units.

There will be delay and additional cost if Natural England are not happy to register the site, so it is worthwhile ensuring that the Conservation Covenant agreement meets the necessary requirements in the first instance.

Once the Habitat Bank has been created and is on the register it is only possible to remove it where no Biodiversity Units have been allocated (regulation 24 Register Regulations – see further paragraph 2.26.4).

5.1.7 Establishing the Habitat Bank

The Local Authority would need to agree the deal with the Responsible Body and implement the works to establish the Habitat Bank in the manner that has been approved and provided for in the Conservation Covenant agreement. This may include, for example, a right for the Responsible Body to inspect the habitat enhancement or creation works and sign off the works.

If any additional consent or authorisations are needed then they would need to be in place before the works to establish the Habitat Bank commence, such as, planning permission, any consents for works to trees within a conservation area or subject to a Tree Preservation Order, etc. See further paragraph 3.10.2.

If any rights over third party land are needed then they would need to be secured before the establishment works commence. This would include in relation to the carrying out the habitat enhancement or creation works, which may in turn necessitate access to third party land.

In the event that there are any additional legal agreements pertaining to the credit bank or trading from it, then they may need to be complied with prior to works commencing.

5.1.8 Likely timescales

The timescale for establishing a Habitat Bank is uncertain. It would be worth trying to agree a timeframe with the Responsible Body at the outset but this is unlikely to be binding. As there is a commercial element then it would be in the interests of the parties to progress without delay.

The likely timescale for the negotiation of a Conservation Covenant agreement is yet to be seen and will likely depend upon the parties involved, etc. The Responsible Body may also want to carry out due diligence on the landowner and the habitat enhancement or creation scheme. Those processes may be carried out more quickly in relation to a Local Authority landowner due to their expertise and familiarity in this area. However, it is likely that the Responsible Body will have particular

requirements in this regard, which are likely to be undertaken early in the process so as to reduce abortive time and costs for both parties.

It is worth noting that when acting as Local Planning Authority approving the discharge of Biodiversity Gain Conditions reliant upon the purchase of BNG Units from a Habitat Bank secured by a Conservation Covenant, the Local Planning Authority would of course want to be able to rely upon the due diligence carried out by the Responsible Body in this regard.

The timescales for a response from Natural England on registering a Conservation Covenant agreement are prescribed, which gives some certainty. See further paragraph 2.24.2.

When trading can commence in relation to the completion of the Conservation Covenant agreement and the establishment works will depend on the individual circumstances. This will need to be after the Habitat Bank has been registered on the Biodiversity Gain Site Register and will depend upon the composition of the Habitat Bank and when the BNG Units arising from it have been calculated as being available for trading. Some may be ready immediately but others may require further establishment works such that they will be available at a later date to allow for a more steady income but may entail a greater risk.

5.1.9 Biodiversity Metric

See further paragraph 1.6.

The Biodiversity Metric will be the method by which the parties will calculate the BNG Units to be derived from the habitat enhancement or creation works comprising the scheme. If a planning application is needed in respect of this scheme, then the Local Authority will need to consider the same, noting its interest in the site. However, the Habitat Bank planning application would not be subject to a BNG requirement in its own right (regulations 7 of the Exemption Regulations). The Metric would only therefore need to be considered in respect of negotiations with the Responsible Body. It is also likely to be a useful tool in designing the scheme to understand how best to generate BNG Units on the land.

In negotiations with the Responsible Body, it is likely that the Biodiversity Metric will be interrogated to ensure the scheme will deliver the BNG Units proposed by the landowner.

It is anticipated that the Responsible Body will go about this in a similar manner to a Local Planning Authority being asked to enter into a Section 106 Agreement to secure BNG, including to check points such as degradation, other risks in connection with the scheme (to the extent that these are

not factored into within the Metric anyway), public access, etc. (see considerations at paragraph 2.24.1.2).

5.1.10 How to trade BNG Units?

See also paragraph 5.3.11.

It will be for the Local Authority to operate the Habitat Bank as it sees fit and the Responsible Body will not be involved in this part of the process as the Responsible Body has assumed the position of the regulating and enforcing body.

Therefore, the Local Authority will need to have in place processes and strategies for the marketing and trading of the BNG Units in a manner which is consistent with its public duties.

In doing so, the Local Authority may wish to consider the capabilities of the existing processes and software available to the Local Authority and whether there is a need to introduce new processes or equipment to ensure that the Local Authority can comply with the terms that it agrees to with the Responsible Body and also purchasers of BNG Units and the local authorities and funders relating to those transactions.

The Local Authority can offer and market its own units but must allow the private market to operate. The Local Authority should be cautious about imposing any requirements or conditions upon the sale of BNG Units and, in particular, should separate this from their development control role. For instance, a policy to only sell units in the event that they are recommending approval of an application is unlikely to be lawful.

5.1.11 Will any criteria be applied to the sale of BNG Units?

See also paragraph 5.3.12.

Whether any criteria will be applies to the sale of BNG Units will be a matter for the Local Authority to consider in light of the marketing and trading processes that it intends to put in place following the establishment of the Habitat Bank.

It will be a point to consider carefully, particularly in view of Government commentary in relation to the intervention of Statutory Credits in the BNG marketplace, which has firmly favoured the retention of a private market. While there is nothing to prevent local authorities participating in that market and indeed that is likely to be a positive contribution to the marketplace, local authorities will still need to consider and adhere to their other public law duties in this regard.

Therefore, any criteria which the Local Authority do intend to impose should be justified, look to address a particular risk or concern and would require consideration in light of the BNG process as a whole which will involve scrutiny from a number of stakeholders. The Local Authority will also want to ensure that the criteria does not act as a barrier to trading units, given that this is the intention of Habitat Banking. It may for example be appropriate to favour local developers and schemes, providing the marketing materials document this and the criteria have been considered and approved internally, potentially consulted upon (formally or informally) and may ultimately require Cabinet approval.

By comparison, in relation to the trading of credits in areas where nutrient neutrality is required (pursuant to the Conservation of Habitats and Species Regulations 2017), some authorities that have established nutrient credit banks have devised and operate on the basis of criteria to allow the purchase of credits.

5.1.12 Competition considerations

See also paragraph 5.3.13.

Local authorities should not seek to persuade developers who are applying for planning permission to favour the Local Authority BNG Units from its own Habitat Bank. The Local Authority must act in manner which preserves the private marketplace. While this does not prevent the ability to market the BNG Units, it will mean that the Local Authority cannot treat more favourably applications which will rely upon the purchase of Local Authority BNG Units.

That said, it may be that planning applications which rely upon Local Authority BNG Units proceed more quickly than applications which rely upon BNG Units from another source as the Local Authority is likely to be aware of the position so the process of establishing and verifying the BNG delivery could happen more quickly.

The Local Authority should carefully consider their place within the local market. This will happen as a precursor to the establishment of the Habitat Bank (see further paragraph 3.2) but it would be recommended that supply and demand are monitored on an ongoing basis to ensure that the Local Authority is remaining live to any issues with the pipeline of BNG Units in their area, the need for the same and whether this presents an opportunity or risk in respect of current or potential future Local Authority Habitat Banks.

5.1.13 Marketing

See also paragraph 5.3.14.

This will be a matter for the Local Authority to consider in light of their arrangements for trading, the number of BNG Units that they have to offer, whether the Local Authority has its own requirement for BNG Units, etc.

The Local Authority may call upon support from third parties for marketing, but it may be that the Local Authority's own website and communications on the point would suffice, particularly given its regular interface with developers.

5.1.14 Does the Local Authority have a requirement for BNG Units for its own development?

See also paragraph 5.3.15.

Local Authorities should be sure to hold back any units that the Local Authority may require for developments that it is looking to advance. Otherwise it may be required to spend higher unit prices to buy them from other Habitat Banks on the private market or to resort to statutory credits.

It will be necessary to look into the future with this and reach a view on the basis of the timescales, likely costs, etc.

5.1.15 Natural England compliance on trading

See also paragraph 5.3.16.

There will be requirements to register the establishment of the Habitat Bank and allocations from it on the Biodiversity Gain Site Register. This responsibility will sit with the landowner and not the Responsible Body. See paragraphs 2.21.2.4 and 2.21.2.12.

5.1.16 Management, monitoring and reporting

See further paragraph 2.29.

This will be regulated by the terms of the Conservation Covenant agreement and those terms will need to be adhered to throughout. If this is not possible for any reason, then legal and ecology advice should be taken.

The resource and mechanisms will need to be in place to allow for this. There will be a reputational risk if the Local Authority fail to comply with these obligations and is enforced against.

As trading commences, it may come to light that there are practical issues on the trading and allocation of units. Commercial considerations will not be a basis to modify the Conservation Covenant agreement alone and the Local Authority and Responsible Body would need to ensure that the legal requirements to enter a Conservation Covenant are still met upon modifying the same. See further paragraph 2.24.2.7.

5.1.17 How a Conservation Covenant will be enforced by a Responsible Body

See further paragraph 2.24.2.5.

The Responsible Body has statutory powers in relation to the enforcement of the Conservation Covenant agreement. It may be that the negotiations with the Responsible Body in entering into the Conservation Covenant has provided some clarity on the likely approach of the Responsible Body to those statutory powers and any other obligations that they may require under the terms of the Conservation Covenant agreement.

As Conservation Covenants are a new agreement, we do not have any visibility on how Responsible Bodies are likely to approach their enforcement. There is of course a reputational risk for all parties in connection with breaches and because of that, we would anticipate breaches to be addressed at an early stage by way of a dialogue and for enforcement action to be reserved for the instances in which a resolution has not been achieved informally or before a material breach arises. However, we cannot be sure of this.

The National Audit Office Report has confirmed that there will be no ongoing involvement of Natural England or DEFRA in relation to the enforcement of Conservation Covenant agreements, unless the marketplace does not progress as DEFRA would like it to.

5.1.18 What to do with receipts - accounting and reporting measures

The Local Authority would be subject to its usual standards on reporting and accounting in terms of the Conservation Covenant agreements that it enters into, the money that is spends, the income that it receives and how it uses its assets, i.e. land.

The Local Authority would need to have procedures in place to allow for this and to record the transactions relating to land and the expenditure and income associated with Habitat Banking.

The financial records in particular will be important in terms of the transparency requirements, but also in terms of repaying any debt or ringfencing (as necessary) funds for the maintenance of the BNG scheme for the 30 year period and recycling any surplus, as per the proposals agreed.

Such reporting may record that the costs incurred in connection with the Habitat Banks offset previous maintenance costs associated with the land in question.

5.1.19 Advantages and Disadvantages

Entering into a Conservation Covenant with a Responsible Body is one of the mechanisms recommended by Government by which Habitat Banks can operate, it has been provided for by the legislation and so the legal requirements in respect of this mechanism are set out in law. However, as this is a new legal instrument, which is not tailored for BNG and there are no legal precedents, then it is not yet clear what Conservation Covenant agreements will look like, how Responsible Bodies will act in relation to them and how other stakeholders in the marketplace will approach or receive them. This means that while they are a legal concept, they are still not a familiar one and the marketplace has shown some initial trepidation towards them.

While the clarity of the legal requirements relating to Conservation Covenants is useful, it is clear that there are environmental motivations behind the reason for entering into Conservation Covenant agreements into which the 'public good' plays a part. As it stands this does not impair the ability of landowners to generate an income from the environmental schemes that they are operating, but this is potentially at odds with the principle of 'public good' (see further paragraph 2.24.2.3). It may therefore be that this influences the manner in which Conservation Covenant agreements are entered into and it may be that this is a part of the law which is revisited in the future. There is uncertainty on this point, which could therefore have an impact in the future.

The nature of Responsible Bodies, and how they approach their role, is uncertain generally. They have limited accountability and they are able to change their nature and approach without recourse to the Local Authority.

That said, as it stands, a Conservation Covenant allows a Local Authority to commit its own land for Habitat Banking without the need for a Section 106 Agreement or necessarily the involvement of another Local Authority (save where the Responsible Body is also a Local Planning Authority). This means that the Local Authority retains control over the scheme and how they wish to go about trading BNG Units, subject to the approval of the Responsible Body. This would also potentially represent a burden to the Local Authority that it may wish to seek some assistance with; any such

assistance may require a tender process and would of course reduce the income generated from the Habitat Bank.

In going about Habitat Banking in this way it would still be necessary to enter into a series of legal agreements and to adhere to other public law duties when doing so.

There is potential for a lack of consistency as neither Conservation Covenants nor the approach of Responsible Bodies to their offer are yet familiar. Therefore negotiations would be required which may incur more time and cost at an early stage than when the market place has settled and more Conservation Covenant agreements have come forward.

There are also currently relatively few Responsible Bodies and it is unclear how the Responsible Bodies will approach enforcement.

More generally, this is unknown territory and it is unclear how other stakeholders in the planning process will respond to them and in particular whether this will influence the willingness of applicants to purchase BNG Units created in this way and for their funders to lend on the same.

5.2 Become a Responsible Body and look to another Responsible Body in relation to Local Authority-owned Habitat Banks

This option involves the opportunity for local planning authorities to obtain Responsible Body status in order that they can reciprocate acting in Responsible Body capacity to allow each other to bring forward Habitat Banks.

This necessarily involves obtaining designated status as a Responsible Body (see further paragraphs 2.25.1 and 5.2.2) and even if that is done, each Conservation Covenant agreement would need to be negotiated, although this may be easier as the relationship and familiarity with the operating models of the respective Responsible Bodies develops.

This model is therefore potentially well suited to operating a number of smaller Habitat Banks or trial projects to see how the process would work and whether/how the Local Authority might refine its approach.

Once Responsible Body status has been obtained there will also be an opportunity to enter into Conservation Covenant agreements with third party landowners if the Responsible Body was minded and had capacity to do so.

This model would in theory remain available in respect of cross-border sites providing the Responsible Body does not have an interest in the site. This may necessitate the involvement of more Local Authorities to reciprocate in the role of landowner and Responsible Body.

In this regard it might be worth noting that Warwickshire County Council has already obtained Responsible Body status.

5.2.1 Duties of a Responsible Body

A Local Authority would need to meet the criteria (see paragraphs 2.25.1 and 5.2.2) and be prepared to fulfil this role – the Local Authority does not receive any distinct treatment in this regard. This means that the Local Authority would need to ensure that the proposals put to them represent a genuine Conservation Covenant, i.e. they are qualifying in kind, have a conservation purpose and are intended to be for the public good (see paragraph 2.24.2.1).

These will be matters for the Responsible Body to verify before entering into a Conservation Covenant agreement which will require that the Responsible Body has an understanding of the scheme, the way in which habitat enhancement or creation works are going to be carried out, how

they will be maintained, how that maintenance will be secured, what will happen if things go wrong, etc.

These factors will allow the Responsible Body to adhere to their duties on entry into Conservation Covenant agreements but also in terms of their ongoing monitoring and enforcing obligations (see further paragraph 2.9). In this regard, it is likely that the Responsible Body will want to reserve themselves a right to inspect and potentially step-in, as well as to require landowners to report to them under the terms of the Conservation Covenant agreement.

Therefore if a Habitat Bank is set up in this way, then the Local Authority will need to consider how it is to conduct its Habitat Bank and satisfy the Responsible Body that the legislative requirements are met as well as the practicalities in relation to the operation of the Habitat Bank allow them to regulate the same. But also, to be sure that the Local Authority is in a position to carry out that regulatory and enforcing function in relation to another Local Authority or landowner's Habitat Bank. The reciprocity of those roles may make the task simpler as consistent approaches could be agreed.

5.2.2 Process and requirements for registration as a Responsible Body

This requires an application to be submitted to DEFRA and to show that the relevant criteria are met based on eligibility, financial security and operational capacity and capability.

DEFRA has published Guidance entitled 'Conservation Covenants: criteria for being a Responsible Body' (https://www.gov.uk/government/publications/conservation-covenants-apply-to-become-a-responsible-body/conservation-covenants-criteria-for-being-a-responsible-body). This details the checks that DEFRA will carry out on receipt of an application to become a Responsible Body.

If a Local Authority is successful in obtaining designated status then it is subject to an ongoing duty to meet these standards as DEFRA can revoke designated status (see paragraph 2.25.3). There is clearly a reputational risk here and we are yet to see how DEFRA will approach the policing of these requirements.

If and when designated status is obtained, DEFRA will send newly designated Responsible Bodies guidance on how to register their Conservation Covenants as a local land charge.

The benefit of Responsible Body status is that it allows Conservation Covenants to come forward as a mechanism to secure Off-Site BNG and for the creation of Habitat Banks.

The burden of Responsible Body status is that the Local Authority is required to take on additional monitoring and enforcement obligations over a period of over 30 years.

We do not yet know what support there will be for Responsible Bodies, save for Guidance from DEFRA. It may be that this develops as time moves along.

To be clear, the purpose of obtaining Responsible Body status would be to allow the Local Authority to reciprocate in entering into Conservation Covenant agreements with another Local Authority which has also obtained Responsible Body status. It would not be motivated by income generation, however, the approach overall would be intended to generate income from the trading of BNG Units as well as achieving environmental and social objectives.

In this context, there is a possibility that a Local Authority would need to enforce against one of its neighbours in the event of a breach of Conservation Covenant agreements. While this would be necessary in the capacity as a Responsible Body it would of course impact relations with other authorities which may be damaging.

5.2.3 Governance considerations

Internal authorisations would need to be obtained to allow Responsible Body status to be sought. This is an additional statutory responsibility and so the Local Authority would need to be sure that it can effectively carry out this role alongside its other functions.

The Local Authority would also need to consider and ensure that its functions as a Responsible Body (if designated) can be sufficiently distinguished and to ensure that this is recorded accordingly. This is particularly important on the basis that there is scope for those respective duties and the interests arising from the activities of the Local Authority to conflict.

Given the very apparent risk that aLocal Authority will be acting as Local Planning Authority and Responsible Body in the same area it would be prudent to allow for that and decide how those roles will operate alongside each other.

5.2.4 Conservation Covenants – how to prepare them?

The Local Authority may wish to develop a precedent Conservation Covenant agreement and it is recommended that legal advice is sought in this regard. There is not currently an accepted form.

This is likely to incur resource and there may not be an ability to recover the same depending upon the stage which this work is undertaken. There is a risk that the resource incurred in obtaining Responsible Body status will not be recoverable.

As Conservation Covenants are such a new creation there is very limited comparable data as to how other Responsible Bodies go about this, but this is likely to change as time moves on. DEFRA and Natural England have indicated that they will not play an ongoing role unless DEFRA have concerns.

It should be noted that there will be additional agreements to be entered in connection with trading BNG Units and so the Local Authority will need to consider those, how they will operate and seek to ensure that this is consistent with the Conservation Covenant as far as possible. Again, a reciprocal approach may assist with this.

Before Conservation Covenant agreements are entered into, it will be the responsibility of the Responsible Body to be sure that the legal requirements are met to enter into a Conservation Covenant (see further paragraph 2.24.2.1). The Responsible Body will be accountable in respect of this discretion and so it is a matter to consider carefully and to ensure that all appropriate due diligence to accompany this decision making has been undertaken. Once the decision has been taken, the terms upon which the Conservation Covenant are entered will be a private matter but will nevertheless need to satisfy Natural England for the purposes of registration on the Biodiversity Gain Site Register and to allow the Responsible Body to adhere to its statutory duties as a Responsible Body (see further paragraph 2.24.3).

5.2.5 Agreeing the terms

The points to be considered in the negotiation of the Conservation Covenant agreement would be the same as those that would apply in respect of a private landowner.

However, the Local Authority character of participants would give rise to additional considerations and before embarking on this approach it may be appropriate for the authorities to consider engaging with local representatives of Natural England and other stakeholders, i.e. LNRS.

The respective authorities would also need to enter into distinct maintenance agreements and allocation agreements, as appropriate for the operation of the respective Habitat Banks, but they would not be entered collaboratively unless the Habitat Bank was to be operated on a regional level with further collaboration between the respective authorities.

It would in theory be possible for a number of local authorities to seek Responsible Body status in order the allow for multiple Conservation Covenant agreements to be entered into across a region and then for maintenance and trading of BNG Units arising from those various schemes to be traded centrally. Those central activities would need to be co-ordinated either collaboratively by the landowning authorities or via a new entity established for this purpose.

5.2.6 Entering into a Conservation Covenant with a Responsible Body

In this context the Local Authority would also be entering into a Conservation Covenant agreement with the Responsible Body in relation to their Habitat Bank scheme and so the same points raised at paragraph 5.1.5 above would apply. The reciprocity of those positions may assist in entering into negotiations.

In this situation it would potentially be possible to enter into a Section 106 Agreement with the other Local Authority in order to allow for the creation of the respective Habitat Banks. This is likely to be a more cost effective and quicker way of establishing Habitat Banks as it does not require designated status to be obtained or for the legal framework relating to Conservation Covenants to be adhered to. However, this approach would not assist with cross-boundary sites to the extent that the boundaries involved affect the local authorities engaged in this option.

5.2.7 Natural England compliance

See also paragraph 5.1.6.

It would be for the respective landowning Local Authorities to apply to register the Habitat Bank(s) with Natural England and therefore to register allocations. This role cannot be undertaken by the Responsible Body (see paragraph 2.24.3).

The Conservation Covenant agreements would also need to be recorded as a local land charge. See further paragraph 2.31).

5.2.8 Establishing the Habitat Bank

The Local Authority will need to carry out the habitat enhancement and creation works in line with the Conservation Covenant in order to establish the Habitat Bank and then start trading (see paragraph 5.1.7).

The Local Authority would need to consider how to approach Habitat Banking, for example, whether to allow trading of all of the BNG Units to be derived from the scheme at the outset once the habitat

enhancement and creation works have been carried out, or, to allow some to come forward at the outset and others at a later stage.

5.2.9 Likely timescales

See paragraph 5.1.8.

The timescales for obtaining Responsible Body status are not yet known and this will depend upon whether the information required is readily available and in a form which is acceptable to DEFRA. If not, then the process of seeking designation will take more time.

Given the collaborative nature of this approach it may be that the authorities work together in terms of the respective stages in the process in the interests of speed. However, each Local Authority will need to consider its position in its own right, although that can be by reference to the likely advantages to be derived from a reciprocal approach in terms of speed, consistency and collaboration.

It is very unlikely that it will be possible to prescribe timescales but it may be possible for the authorities involved to agree pursuant to collaboration arrangements to act without delay and in good faith.

5.2.10 Implications of delay?

Clearly the longer it takes to establish a Habitat Bank the greater the delay until a return is received on investment and during which time there may be limited options for BNG Units locally. The market may be changing significantly in the coming months as developers adjust to the need to deliver BNG and Habitat Bank operators become more established. The market will be changing significantly in this time.

5.2.11 How a Conservation Covenant will be enforced by a Responsible Body

This is unknown territory but given the reciprocal nature of this proposal, it would be for the authorities involved to consider how they might like to go about enforcement while adhering to the statutory regime.

However, the reciprocity cannot impinge the enforcement powers of the Responsible Bodies, they will each be required to go about this role properly, as failure to do so could lead to the revocation of their designated status.

5.2.12 Advantages and Disadvantages

The advantages to this approach are that it would allow close working relationships with nearby authorities on the delivery of BNG in the area. The respective authorities would each have the opportunity to bring forward Habitat Banks on an individual or collaborative basis, but in a manner which is likely to be more streamlined than acting with multiple Responsible Bodies or a Responsible Body that is not familiar with the limitations and requirements of a Local Authority. This should allow matters to progress more quickly.

The disadvantages are that there is a process to become a Responsible Body which may or may not be successful and the timescale is uncertain. If obtained, there are then duties and responsibilities associated with that status and accountability to DEFRA for the same over a period of more than 30 years. This in turn brings an additional potential resourcing and record-keeping obligations for a considerable time and consideration would need to be given to recovering the costs associated with that.

The Conservation Covenant regime is unfamiliar at present and it may be that this is more time-consuming and costly than simply entering into a Section 106 Agreement with a neighbouring Local Authority.

While the opportunity for collaboration is an advantage, the terms of any such collaboration would need to be carefully considered and defined and regard would necessarily need to be had to what would happen if things went wrong. There is a risk that Local Authority would need to enforce against one of its neighbours, impacting on relations between authorities.

There is also no certainty as to how Local Authorities will approach their role as a Responsible Body. They may outsource their monitoring and enforcing role, or adopt an approach that is unpalatable to the Local Authority landowner.

5.3 Enter a Section 106 Agreement with another LPA as enforcing body

This option involves working with another Local Planning Authority on the basis that that Local Authority agrees to take on the role of enforcing Local Authority under the terms of section 106 of the 1990 Act for the other's Local Authority area. This allows a Local Authority to enter into a Section 106 Agreement as landowner and for the obligations contained within that agreement to be enforced by another Local Planning Authority.

5.3.1 Can a LPA enter a Section 106 Agreement with itself?

It is a standard contractual principle that a party, such as a Local Planning Authority, cannot covenant with itself. This is because, in the event of a breach of that contract (i.e. the Section 106 Agreement), the Local Planning Authority would not be able to enforce the planning obligations against itself.

5.3.2 Why not a Unilateral Undertaking?

A Unilateral Undertaking is a legal deed whereby a landowner covenants to perform planning obligations, but the Local Planning Authority is not party to the deed.

The principle that a party cannot covenant with itself applies equally to the possibility of a landowning Local Authority entering into a Unilateral Undertaking. The position in relation to enforcement is the same.

5.3.3 Power to enter a Section 106 Agreement

Where a Local Authority want to use a Section 106 Agreement to secure BNG improvements and management on their own land, one option is to ask another Local Authority to enter into the Section 106 Agreement with them as the enforcing Local Authority.

Where the relevant land is in an area with two tiers of planning Local Authority (i.e. a Local Planning Authority and a County Council) the Local Authority (as landowner) could enter into covenants with the other tier of local government in order to secure enforcement.

Alternatively, a neighbouring Local Planning Authority could be asked to be the enforcing body. As a Local Planning Authority can only enter into a Section 106 Agreement in relation to land in its area, this would need to be pursuant to the power in section 101(1)(b) Local Government Act 1972 which states that "*a local authority may arrange for the discharge of any of their functions…(b) by another local authority*". The neighbouring Local Authority would enter into the Section 106 Agreement as enforcing Local Authority and the Local Planning Authority would enter into it as the landowner.

5.3.4 Reciprocal opportunity

Where a Section 106 Agreement is entered into with another Local Planning Authority, there may be opportunities for a reciprocal arrangement to be entered into whereby the Local Planning Authority acts as the enforcing Local Authority for the other Local Planning Authority in relation to land they own.

There may also be opportunities in relation to sites which cross local authority borders for collaborative working between the two authorities to create a larger bank on which more habitat enhancements can be delivered, increasing the units available for sale and giving rise to economies of scale in terms of the set up and management costs. In this instance there may be another Local Planning Authority that is willing to act as enforcing Local Authority, such as a County Council or another Local Planning Authority.

5.3.5 Legal requirements

See also paragraph 2.24.1.5.

The Section 106 Agreement will need to be entered into by the Local Planning Authority as the freehold landowner, or as a leaseholder benefiting from a lease on the land that is for at least 30 years. It will be important to ensure that the site is not subject to any other interests or title constraints which would be reasonably capable of affecting its suitability as a Habitat Bank.

The Agreement must be in writing and executed as a deed by all parties. The obligations will then run with the land and therefore pass to the new owner of the land in the case of a sale, or to the leaseholder on the grant of a lease. Most Section 106 Agreements include a provision requiring the enforcing Local Authority to be notified of any change in the ownership of the relevant land.

The position of existing or future mortgagees and charges will need to be protected, along with that of parties benefitting only from easements or covenants in relation to the land, such as statutory undertakers and potentially plot purchasers or Registered Providers.

The Agreement will need to be registered on the local land charges register and there will need to be provision for this to be removed on termination of the Agreement.

5.3.6 Governance considerations

In the event that a planning application is submitted in relation to the BNG scheme, then the Local Authority would need to follow its usual governance procedures. This may require that the

application is taken to Planning Committee and that any further procedural or constitutional requirements are observed in respect of the Local Authority entering into an agreement of this nature.

It is not necessarily the case that there would need to be a planning application in relation to the BNG scheme and in this case, the Local Authority would need to adhere to its procedural or constitutional requirements are observed in respect of the Local Authority entering into an agreement of this nature.

5.3.7 Agreeing the terms

See also paragraph 2.24.1.2.

The Section 106 Agreement will require the planned biodiversity habitat creation or enhancement works for the site, usually by reference to the implementation of the Habitat Management and Monitoring Plan ("HMMP").

The HMMP will also provide a detailed schedule of management and monitoring which the Agreement will require compliance with. The enforcing Local Authority will need rights to access the land in order to monitor compliance with the requirements of the Section 106 Agreement and HMMP, and may also want to ensure that they have the right to step in in the event of a significant and/or prolonged breach. Consideration will need to be given to how any disputes will be managed.

The HMMP should detail the management plan for the 30 year period and include planned contingencies and demonstrate adaptive management processes.

The Section 106 Agreement will impose an obligation on the landowner to provide a report in relation to the operation and effectiveness of the HMMP and any necessary remedial measures to the enforcing Local Authority. This is usually on an annual basis for the first five years, then every five years thereafter, but this is subject to negotiation.

The Section 106 Agreement will also need to deal with funding arrangements, particularly for ongoing monitoring of the habitat and its management, and a payment schedule may be agreed as part of the Agreement. There is also likely to be provision for the payment of the Local Planning Authority's legal costs of dealing with the Section 106 Agreement, wider set up costs and potentially monitoring compliance with the Section 106 Agreement.

The Agreement will need to make it clear that the habitat site can be used to provide different credits for different ecosystem services to achieve multiple environmental outcomes (i.e. stacking or bundling), provided it does not involve the sale of the same unit more than once as the basis for duplicated claims of biodiversity gain (i.e. double counting).

The Agreement will specify an end date that is at least 30 years from when the creation or enhancements of the habitat is complete.

However, you may also want to consider an earlier end date in the following scenarios:

(i) Where there is a force majeure event (e.g. an act of God)

(ii) Where there is a change of law of policy such that BNG is no longer a requirement

(iii) At the discretion of the landowner in respect of any part of the habitat site to which biodiversity units which have yet to be sold can be attributed (this is generally desirable in the case of a Habitat Bank scenario)

Consideration should also be given to whether there should be provision of the parties to agree changes to the Section 106 Agreement where there is a change in custom or practices such that the obligations are no longer appropriate.

Consideration should also be given to whether there should be a clause relating to evidence that the funding available will be managed appropriately and last 30 years of management and monitoring requirements, ring-fencing of maintenance and monitoring costs or security. It may be appropriate to impose an obligation to ensure that adequate insurance is in place, particularly if public access is permitted.

Ordinarily, the applicant would meet the costs of the Local Planning Authority in relation to the Section 106 Agreement and so this would also need to be considered between the respective authorities.

5.3.8 Establishing the Habitat Bank

The first step in setting up a Habitat Bank is to engage an ecologist to carry out a baseline habitat survey to determine what habitats are present and in what condition. It will be necessary to carry out due diligence to confirm that no unauthorised habitat degradation has taken place since 30th January 2020. See further paragraph 3.4.

The habitat enhancement or creation proposed to establish the Habitat Bank should align with local habitats, variety and extent, as well as consider how it can assist in connecting and improving existing habitats. The LNRS or other relevant local policies should be considered. It may well be that the proposal has been consulted upon locally.

Consideration should then be given to what habitats you want to create and enhance – you can enter the baseline habitats and planned enhancements into the off-site tab of the Biodiversity Metric to get an idea of biodiversity unit output.

It will then be necessary to agree a HMMP with the Local Planning Authority that is to act as the enforcing Local Authority to achieve the planned enhancements.

5.3.9 Entering into the Section 106 Agreement

See also paragraph 2.24.1.

The Local Planning Authority will enter into the Section 106 Agreement as the landowner with the other Local Planning Authority as the enforcing Local Authority.

The Agreement must be in writing and executed as a deed by all parties. The obligations will then run with the land and therefore pass to the new owner of the land in the case of a sale, or to the leaseholder if a lease is granted. For the avoidance of doubt, this applies to the positive and negative obligations.

The Agreement will need to be registered on the local land charges register and there will need to be provision for this to be removed on termination of the Agreement.

5.3.10 Natural England compliance on creation

See also paragraph 5.1.15.

On completion of the Section 106 Agreement, an application to register the Habitat Bank must be made to Natural England by the person who is required to carry out and maintain the habitat enhancement works (i.e. the Local Authority as landowner). See further paragraph 2.21.2.4.

The Section 106 Agreement would also need to be registered on the local land charges register (see further paragraph 2.31).

5.3.11 How to trade units

See also paragraph 5.1.10.

The BNG Units created by the Habitat Bank can be sold to different developers on the private market pursuant to allocation agreements. Pricing and payment terms will be determined by that market and in practice will vary from bank to bank. The Local Authority would need to adhere to its Best Value Duty in this regard and may have/wish to be transparent as to its pricing of BNG Units and income deriving from the same.

However, broadly speaking, the price paid for the units is likely to reflect the costs of undertaking the habitat creation/enhancement works, management for at least 30 years, complying with monitoring and reporting requirements, insurance and professional costs (for ecologists, lawyers and any land agency). It may also be necessary to provide for indexation where there is likely to be a delay between commitment to purchase and completion.

The costs of providing units is likely to be disproportionate in relation to sales relating to small numbers of units, or shares of units. Accordingly, some Habitat Banks will not sell less than one unit, or will charge a proportionately higher price for shares of units.

It is reasonable to expect that the price of units sold for higher distinctiveness habitats will fetch more than those in moderate distinctiveness habitats. This is on the basis of the anticipated limited supply of higher distinctiveness habitats which are also likely to have a higher maintenance cost which would need to be reflected in pricing, but ultimately pricing will be determined by the market.

There are no restrictions or requirements in relation to how the payment is structured, this could be a staged payment throughout the life of the Habitat Bank or a single payment where the balance is ring-fenced. Some landowners will prefer to receive a lump sum payment for the sale of the biodiversity units, whereas others will prefer a staged payment. A staged payment is unlikely to be palatable to a developer who will want to have addressed their liability to allow them to sell the development and not have any overhanging liability. Therefore a staged payment may be more likely to arise in relation to larger, strategic sites and would also require consideration of the security for the phased payments.

In terms of the legal structure for the sale of the Biodiversity Units, a developer may not be willing to commit to purchasing the units until they are confident that their Biodiversity Gain Plan will be approved by the determining Local Planning Authority. Accordingly, an option to purchase

Biodiversity Units will often be entered into between the developer and the BNG provider (i.e. the Local Authority as landowner) in order to enable the developer to satisfy the Biodiversity Gain Condition whilst not being obliged to buy the biodiversity units. On exercise of the option, the required Biodiversity Units will be allocated to the developer pursuant to an allocation agreement or and the full allocation fee will be paid.

In the interests of ensuring the Local Authority is not required to reserve the BNG Units indefinitely the option agreement may include a longstop date after which the BNG Units will no longer be available or would need to start the process again.

5.3.12 Will any criteria be applied to the sale of BNG Units?

See also paragraph 5.1.11.

Some local authorities may want to impose qualifying criteria as a prerequisite to the sale of the BNG Units. This may allow the Local Authority to control the sale of the BNG Units in a manner which does not require an exercise of discretion on every occasion. It ensures a consistent and coherent approach to the allocation of units and therefore lessens the risk of any challenge to the decision making process.

Developers may have criteria of their own for the purchase of BNG Units – e.g. price, quality, deliverability (has it been legally secured), innovation. It is not just a tick box exercise for some developers – they will not want to tarnish their reputation by committing to BNG that is not ultimately effectively delivered, particularly as developers are increasingly scrutinised for their environmental credentials.

The Future Homes Hub has published a checklist for developers which is intended to help assess the credibility of an offset being marketed by a provider. It is hoped that the checklist will give developers confidence that the offset provider has, or will be developing, a credible biodiversity offset if it has not yet been legally secured or registered. The checklist relates to matter such as use of the statutory Biodiversity Metric and appropriate HMMP, funding arrangements, deliverability and legal arrangements. It is acknowledged that a site that is registered, or is not registered but has been legally secured, meets the basic biodiversity requirements/principles, but does not provide confidence regarding long term financial security. Principles around Equity and Landscape Context are also flagged as longer term goals.

5.3.13 Competition considerations

See also paragraph 5.1.12.

In establishing and administering a Habitat Bank, it will be necessary to ensure compliance with the Public Contracts Regulations 2015 and the principles of non-discrimination, equal treatment, transparency, mutual recognition and proportionality.

Local authorities will also need to be aware of the risks of crowding out private sector activity and distorting the market in ways that might harm the interests of developers looking to buy BNG Units.

Local authorities also need to be aware that when operating in a market as a supplier, they are likely to be subject to the same competition law as private sector competitors.

5.3.14 Marketing

See paragraph 5.1.13.

Local authorities also need to be mindful not to use their position as Local Planning Authority to secure themselves a more favourable position in the marketplace.

There are a number options in terms of marketing the biodiversity units that you have created by way of your habitat site, such as:

(i) Through an online market place

(ii) Through a land agent, broker or other consultant

(iii) Directly to developers who have approached you, or who you already have a relationship with

5.3.15 Does the LPA have a requirement for BNG Units for its own development?

See also paragraph 5.1.14.

There is no exemption from the BNG requirements for Local Planning Authorities so they may want to consider setting aside some of their Habitat Bank units for the purposes of satisfying the Biodiversity Gain Condition on their own developments.

5.3.16 Natural England compliance on trading

The Habitat Bank will need to be registered on the Biodiversity Gain Register as a precursor to trading of BNG Units and upon all allocations. See further paragraph 2.21.2.

5.3.17 Likely timescales

It is likely to take at least three to six months to agree the terms of the HMMP and the Section 106 Agreement, but much will depend on the conduct of the parties and those advising them.

The timing for the sale of the units will depend on market demand, local supply , eligibility criteria (if any) and completion of the relevant legal agreements on the developer's intended timeline for bringing forward their development.

5.3.18 Implications of delay?

The sooner the Habitat Bank can be established, the sooner the biodiversity units will be generated, and the biodiversity value of the land will change over time. Significant delay could result in the HMMP needing to be revisited in order to ensure it reflects up to date habitat values.

5.3.19 Management, monitoring and reporting

The HMMP will provide a detailed schedule of management and monitoring which the Section 106 Agreement will require compliance with. The enforcing Local Authority will need rights to access the land in order to monitor compliance with the requirements of the Section 106 Agreement and HMMP, and may also want to ensure that they have the right to step in in the event of a significant and/or prolonged breach. Consideration will need to be given to how any disputes will be managed.

The Section 106 Agreement will impose an obligation on the landowner to provide a report in relation to the operation and effectiveness of the HMMP and any necessary remedial measures to the enforcing Local Authority. This is usually on an annual basis for the first two to five years, then every five years thereafter, but this is subject to negotiation.

If a step-in right is required to monitor compliance with the management of the habitat then it would need to be secured in the Section 106 Agreement.

5.3.20 Enforcement of Section 106 Agreement

See also paragraph 2.27.4.

Only the Local Planning Authority identified in the Section 106 Agreement as entitled to enforce it will have the power to do so.

There are two principal methods of enforcement set out in the 1990 Act:

1. by injunction (mandatory or prohibitory); and
2. entry upon land and recovery of costs.

The enforcement of a Section 106 Agreement is a matter for the discretion of the Local Planning Authority who cannot be compelled to act.

The enforcing Local Authority will have an enforcement policy which it will need to adhere to in the usual way when exercising or deciding whether to exercise its enforcement powers.

5.3.21 Advantages and Disadvantages

The advantages to entering into a Section 106 Agreement with another Local Planning Authority in order to secure a Habitat Bank is that it is relatively straight forward and familiar to the parties. The upfront costs will be limited to the ecologist's costs of undertaking the baseline assessment and preparing the HMMP, the legal costs associated with the completion of the Section 106 Agreement and the costs of registration with Natural England. However, those costs will need to be met up front, before any payments from developers are received. This is in contrast to a more bespoke biodiversity mitigation scheme where a contribution is likely to be paid by the developer before the biodiversity improvements are secured.

The main hurdle to entering into a Section 106 Agreement with another Local Planning Authority is finding a Local Planning Authority that is willing to do so on terms that both authorities are happy with. The responsibilities associated with being an enforcing Local Authority for the purposes of a Habitat Bank are clearly significant, albeit that there will be financial compensation payable. A reciprocal arrangement between authorities could be advantageous in facilitating the creation of Habitat Banks in this way.

5.4 Agreements with public bodies

This involves consideration as to whether there are any other public bodies which may be able to take on the role of enforcing obligations relating to the delivery of a Habitat Bank.

Local Authorities need to have a statutory authority for all of their actions.

There are various different powers which may be available to allow agreements to be entered, as considered below

5.4.1 Section 111 of the Local Government Act 1972

Pursuant to section 111 of the Local Government Act 1972, "*local authorities may do anything that is calculated to facilitate, or conducive or incidental to, the discharge of any primary function*".

This section was formerly heavily relied upon but has largely been superseded by the more expansive general power of competence and so will not be considered further in this advice.

5.4.2 Section 1 Localism Act 2011

Section 1 of the Localism Act 2011 ("the 2011 Act") introduces the general power of competence which provides that "*A local authority has a power to do anything that individuals generally do"*.

The general power of competence applies to all English authorities, including County and District Council (section 8 of the 2011 Act).

According to section 1(4) of the 2011 Act this power is conferred anywhere in the United Kingdom, for a commercial purpose (with or without charge) and for or otherwise than for the benefit of the Local Authority, its area or persons resident. The power is therefore broadly defined but subject to limitations.

Therefore, the general power of competence permits trading but not in the fulfilment of statutory duties and where trading is to be undertaken, this should be via a company on the basis of a business case which has been approved pursuant to the Local Government (Best Value Authorities) (Power to Trade) (England) Order 2009.

In addition the explanatory notes to the 2011 Act states in relation to the limitations on doing things for a commercial purpose in the exercise of the general power that: *"The power does not authorise authorities to trade in a service with a person to whom they are already statutorily obliged to provide*

it. The must also only trade commercially through a company. These provisions reflect the trading powers in section 95 of the Local Government Act 2003".

On this basis, in order to operate a Habitat Bank on Local Authority owned land pursuant to the general power of competence, the Local Authority would need to establish a company to operate the Bank.

5.5 Transfer land to a private Habitat Bank

This option would involve the transfer of land that is currently in the ownership of the Local Authority to a body which will deliver a Habitat Bank to trade units on the private market. The Habitat Bank in this instance would be a private company rather than a charitable body and so would enter into this transaction as a commercial arrangement.

5.5.1 Sale or lease of Local Authority land

The Local Authority would sell the land in question or grant a lease of the same to allow for the life of the Habitat Bank (i.e. at least 30 years, allowing for the time it takes to establish the habitat).

The sale would be subject to a restrictive covenant as to the use of the land to ensure that the land is used to provide a Habitat Bank rather than any other activity or development. This may also specify that public access is to be maintained in whole or part. As these provisions are restrictive, the Habitat Bank operator may resist such provisions and in that eventuality it may be that other restrictions could be secured either by registration on the title or by way of Section 106 Agreement. These points would need to be resolved at the outset.

A lease may be a preferable option for the Local Authority as it allows an income to be generated from the land whilst retaining the capital asset. This would only be acceptable in the event that it would be possible for the Local Authority to enter into the lease and to act as Local Planning Authority in respect of a Section 106 Agreement to secure the delivery of the Habitat Bank. Or, if the Habitat Bank operator was intending to secure the BNG by way of a Conservation Covenant.

5.5.2 Governance arrangements

The Local Authority would need to adhere to its constitutional procedures and requirements in respect of the disposal of land. This may require that the land is offered for sale or lease on the open market and this may in turn attract interest from a range of Habitat Bank operators and/or developers. In this case, it may be necessary to carry out a procurement exercise before committing to an arrangement with a particular Habitat Bank operator.

Careful consideration of the relevant public procurement legislation is required in the event that a Local Authority enters into a sale or lease of land to a third party for the purposes of creating and/or maintaining a Habitat Bank.

The starting point is that transfers of land are exempt from the requirements of the Public Contracts Regulations 2015, and will remain exempt under the Procurement Act 2023. However, a Court will always look to the substance of the transaction in question and not merely its form, and seek to determine what the principal purpose of the transaction is.

Under the current law, this is an issue that has arisen most acutely with Public Works Contracts. Under the Public Contracts Regulations, a Public Works Contract is defined (at regulation 2(1)) as being:

> *""public works contracts" means public contracts which have as their object any of the following:—*
>
> *(a) the execution, or both the design and execution, of works related to one of the activities listed in Schedule 2;*
>
> *(b) the execution, or both the design and execution, of a work;*
>
> *(c) the realisation, by whatever means, of a work corresponding to the requirements specified by the contracting authority exercising a decisive influence on the type or design of the work;"*

The Procurement Act 2023 adopts a different definition to Public Works Contract as follows (Schedule 1 para. 4):

> *"A contract is a "works contract" if its main purpose is—*
>
> *(a) the carrying out of works under the contract (whether or not resulting in a complete work), or*
>
> *(b) to facilitate the carrying out of works otherwise than under the contract, where those works are intended to result in a complete work that complies with specifications set out in, or determined under, the contract."*

Under the transitional provisions on the coming into force of the Procurement Act, and depending on the circumstances, both definitions are likely to continue to be of relevance to local authorities.

Under the current Regulations, there have been instances where a transaction involving land has also included obligations on a party to carry out works on that land. In circumstances where the obligation to carry out works is such that the principal purpose of the contract has been deemed to be the carrying out of works, the transaction has been caught by the Public Contracts Regulations.

This is potentially relevant to local authorities for the purposes of creating Habitat Banks:

- Where land is transferred to a third party to carry out works for the creation of a Habitat Bank, consideration must be given as to whether the principal purpose of the contract(s) is the carrying out of works and therefore whether the Regulations/Act are engaged.

- Even if the works are below threshold, some (albeit more limited) obligations will remain on the local authorities concerned.

- Where the transaction includes the obligation to maintain the Habitat Bank, consideration should be given as to whether the principal purpose of the contract(s) fulfil the definition of Public Service Contract. If so, the Regulations/Act may be engaged.

Specific public procurement advice should be sought as part of the arrangements for establishing a Habitat Bank, even if the arrangements involve the transfer of land.

5.5.3 Best Value Duty

Under section 123 of the Local Government Act 1972, a Local Authority may dispose of its land in any manner that it may wish. However, except in the case of a short tenancy, the consideration for such disposal must be the best that can be reasonably be obtained. Local authorities are also under the Best Value Duty to "*make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness*".

Local authorities will need to ensure that they comply with these statutory requirements in disposing of land for the purpose of the creation of Habitat Banks. Undertaking a marketing process may be sufficient to demonstrate best consideration, market value or best value and not for other purposes unless the disposal is permitted on that basis. The Local Authority may also want to address any eligibility criteria to apply on the sale of BNG Units.

5.5.4 Covenants

The disposal (by sale or lease) of land for a Habitat Bank may be restricted to give the Local Authority comfort as to the use of the land for the purpose for which it has been disposed of. In the case of a sale of the land, this would give the Local Authority recourse in the event that the land was not used

in the manner for which it was sold or in relation to the basis upon which the BNG Units will be traded.

If the land was to be disposed of by way of a lease, then there would not be a need to register any form of restriction or covenant as the Lease would govern the permitted use of the land and the Local Authority would be able to enforce the terms of the Lease and terminate in the event of breach by the Habitat Bank operator.

5.5.5 Public access

The disposal of land for a Habitat Bank may be on the condition that public access is permitted. This may have an impact upon the Habitat Bank operator's ability to generate BNG Units on the land and so may be contentious from that perspective. However, it will deliver a spin-off benefit which would make the proposal beneficial for social as well as environmental reasons.

5.5.6 Overage

It will be important to consider whether the use of land as a Habitat Bank has the potential to trigger overage payments. This is a contractual mechanism which allows a previous owner of land to potentially benefit from (or claw back) any subsequent increase in the land's value having sold it. The detailed drafting of such provisions varies and legal and valuation advice will need to be taken on a case by case basis where overage payments could potentially be triggered.

In the event of a sale of land for a Habitat Bank, the Local Authority may wish to require that overage provisions are put in place to ensure that if the land is used to generate more BNG Units than expected or is put to another purpose, i.e. by way of stacking or bundling, that the Local Authority can recover some of the additional value that is attributable to the land for those reasons.

This is becoming increasingly common where land is sold which may be used for Habitat Banking to ensure that the seller does not lose the benefit of any increase in the value of the land. The overage provisions are likely to be resisted by the purchaser and would need to be included at head of terms stage and negotiated carefully throughout the sale process. This may contribute to the Best Value Duty.

5.5.7 Involvement in the operation of the Habitat Bank

The Local Authority may or may not want to have ongoing involvement with the Habitat Bank operator on the sale or lease of land.

If the Habitat Bank is to be established by way of Section 106 Agreement then the Local Authority will have ongoing involvement as Local Planning Authority enforcing the Section 106 Agreement.

If the Habitat Bank is to be created by way of a Conservation Covenant agreement then it is not necessarily the case that there will be ongoing involvement for the Local Authority, save to the extent that it receives planning applications which have sought to rely upon off-site gains from the Habitat Bank.

In any event the restrictions on the use of the land and the regulation of the Habitat Bank remain distinct and are regulated accordingly in the legal agreements.

Upon a sale of the land, no ongoing input would be expected and the Local Authority should be careful not to require too much information to be provided to it which may conflict with its capacity to act as Local Planning Authority.

5.5.8 Legal requirements

It would be necessary to negotiate a sale or lease and to enter into the relevant legal processes and agreements to facilitate this. Those documents would be negotiated privately but will be subject to the Freedom of Information Act and Environmental Information Regulations save where commercially sensitive.

The disposal would need to be registered at the Land Registry and so would be in the public domain at that stage.

There may also be reporting and accounting requirements in relation to the Local Authority's other regulatory requirements.

It will be important to take advice upon the tax implications of any corporate structure or entity which is created by the authority, particularly in relation to disposals of land which may for example trigger a liability to Stamp Duty Land Tax (SDLT). There will also be accounting requirements for any commercial entity.

5.5.9 Agreeing the terms

As Habitat Banking is a relatively new purpose for which land would be sold by a Local Authority, there are no standard terms and so it will be important to obtain legal advice on the transaction and the implications for the Local Authority as a landowner, public body and Local Planning Authority.

Any Section 106 Agreement will require the planned biodiversity habitat creation or enhancement works for the site, usually by reference to the implementation of the HMMP.

The HMMP will also provide a detailed schedule of management and monitoring which the Agreement will require compliance with. The enforcing Local Authority will need rights to access the land in order to monitor compliance with the requirements of the Section 106 Agreement and HMMP, and may also want to ensure that they have the right to step in in the event of a significant and/or prolonged breach. Consideration will need to be given to how any disputes will be managed.

The Section 106 Agreement will impose an obligation on the landowner to provide a report in relation to the operation and effectiveness of the HMMP and any necessary remedial measures to the enforcing Local Authority. This is usually on an annual basis for the five years, then every five years thereafter, but this is subject to negotiation.

The Section 106 Agreement will also need to deal with funding arrangements, particularly for ongoing monitoring of the habitat and its management, and a payment schedule may be agreed as part of the Agreement. There is also likely to be provision for the payment of the Local Planning Authority's legal costs of dealing with the Section 106 Agreement, wider set up costs and potentially monitoring compliance with the Section 106 Agreement.

The Agreement will need to make it clear that the habitat site can be used to provide different credits for different ecosystem services to achieve multiple environmental outcomes (i.e. stacking or bundling), provided it does not involve the sale of the same unit more than once as the basis for duplicated claims of biodiversity gain (i.e. double counting).

The Agreement will specify an end date that is at least 30 years from when the creation or enhancements of the habitat is complete. However, you may also want to consider an earlier end date in the following scenarios:

(i) Where there is a force majeure event (e.g. an act of God)

(ii) Where there is a change of law of policy such that BNG is no longer a requirement

(iii) At the discretion of the landowner in respect of any part of the habitat site to which biodiversity units which have yet to be sold can be attributed

Consideration should also be given to whether there should be provision of the parties to agree changes to the Section 106 Agreement where there is a change in custom or practices such that the obligations are no longer appropriate.

5.5.10 Likely timescales

The likely timescales for the disposal of land for Habitat Banking will depend upon the particular negotiations and willingness of the parties to proceed at pace, as well as the time it takes to obtain constitutional approval and to administer any of their processes which need to be undertaken to allow the disposal to take place.

It is likely to take three to six months to agree the terms of the HMMP and the Section 106 Agreement, but much will depend on the conduct of the parties and those advising them.

The timing for the sale of the units will depend on market demand and the arrangements to trade the same on the open market or to a particular developer in relation to one scheme. Following which, the completion of the relevant legal agreements on the developer's intended timeline for bringing forward their development.

5.5.11 What to do with receipts – accounting and reporting measures

As a public body, the Local Authority will need to publish details of the income received as a result of the disposal of land for Habitat Banking. It may wish to ringfence those funds in order to utilise the same towards other environmental projects within the Local Authority area.

5.5.12 Advantages and Disadvantages

The sale/lease of land for Habitat Banking would allow the Local Authority to play a part in the creation of a Habitat Bank which could allow for BNG Units to be traded locally while also generating an income.

This option allows the Local Authority to take some of the benefit of the creation of BNG Units without taking all of the burden to deliver and maintain the same. The reward is therefore reduced in the same way as the risk.

The Local Authority would not have to worry about setting up a different legal entity in order to operate the Habitat Bank, or engage in the complexities of entering into Section 106 Agreements or Conservation Covenant agreements with other Local Authorities.

The Local Authority would not have the long-term management and monitoring responsibility in respect of the Habitat Bank.

However, the Habitat Bank would be operated on the private market and so the Local Authority would have no control over the prices paid for BNG Units, who or how they are traded, etc.

The Local Authority would also lose control of an asset for at least a period of 30 years.

5.6 Transfer land to a Wildlife Trust or conservation charity

Wildlife Trusts and conservation charities often engage in projects intended to enhance biodiversity in the interests of meeting their charitable objectives.

One option is therefore to transfer land to a wildlife trust or conservation charity for the purpose of establishing a Habitat Bank. In this regard, wildlife trusts and conservation charities are experienced in this area and are regulated already in the context of their activities. Any transfer would, however, need to be in accordance with their charitable objectives and public access may be restricted as a result.

5.6.1 Sale/lease of Local Authority land

A Local Authority landowner could seek to sell or lease land to a Wildlife Trust or conservation charity for the delivery of a Habitat Bank. Any lease would need to be for at least 30 years to enable the Trust/charity to legally bind the land for the appropriate period (i.e. allowing time for the establishment of the habitat).

It will be important to ensure that the site is not subject to any other interests or title constraints which would be reasonably capable of affecting its suitability as a Habitat Bank.

It will be important to take advice upon the tax implications of any corporate structure or entity which is created by the authority, particularly in relation to disposals of land which may for example trigger a liability to SDLT. There will also be accounting requirements for any commercial entity.

5.6.2 Governance arrangements

The Local Authority would need to adhere to its constitutional procedures and requirements in respect of the disposal of land. This may require that the land is offered for sale or lease on the open market and this may in turn attract interest from a range of potential purchasers. In this case, it may be necessary to carry out a procurement exercise before committing to an arrangement with a particular Habitat Bank operator.

Again, the Local Authority will need to consider the extent to which the arrangements entered into are properly considered to be public contracts caught by the Public Contracts Regulations or the Procurement Act (see further paragraph 5.5.2). Separately, in the case of arrangements with other public authorities, it may be possible for local authorities to avail themselves of the “horizontal Teckal”

exemption, whereby two public authorities enter into a contract aimed at the joint performance of a common task.

This process should be less contentious in relation to a disposal to a conservation charity or wildlife trust than a commercial operator, due to the regulated status of the charity.

5.6.3 Best value

Under section 123 of the Local Government Act 1972, a Local Authority may dispose of its land in any manner that it may wish. However, except in the case of a short tenancy, the consideration for such disposal must be the best that can be reasonably be obtained. Local authorities are also under the Best Value Duty to "*make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness*".

Local Authorities will need to ensure that they comply with these statutory requirements in disposing of land for the purpose of the creation of Habitat Banks. Undertaking a marketing process may be sufficient to demonstrate best consideration, market value or best value and not for other purposes unless the disposal is permitted on that basis. The Local Authority may also want to address any eligibility criteria to apply on the sale of BNG Units.

5.6.4 Covenants

The sale/lease of land for a Habitat Bank would need to be subject to appropriate covenants/restrictions to ensure that the land can only be used for the purposes of a BNG Habitat Bank. See further paragraph 5.5.4.

5.6.5 Public access

Many conservation charities will want/require an element of public access to land under their control. It will be necessary to consider whether it is possible to accommodate this in the context of the proposed habitat enhancement measures and their ongoing management.

This is likely to be appealing to the Local Authority and particularly on the basis that the wildlife trust or conservation charity would be responsible for regulating public access, maintaining the habitat in light of the public access and insuring accordingly.

5.6.6 Overage

It will be important to consider whether the use of land as a Habitat Bank has the potential to trigger overage payments. This is a contractual mechanism which allows a previous owner of land to potentially benefit from (or claw back) any subsequent increase in the land's value having sold it. The detailed drafting of such provisions varies and legal and valuation advice will need to be taken on a case by case basis where overage payments could potentially be triggered.

In the event of a sale of land for a Habitat Bank to a conservation charity, the Local Authority may wish to require that overage provisions are put in place to ensure that if the land is used to generate more BNG Units than expected or is put to another purpose, i.e. by way of stacking or bundling, that the Local Authority can recover some of the additional value that is attributable to the land for those reasons.

This is becoming increasingly common where land is sold which may be used for Habitat Banking to ensure that the seller does not lose the benefit of any increase in the value of the land. The overage provisions are likely to be resisted by the purchaser and would need to be included at head of terms stage and negotiated carefully throughout the sale process. This may contribute to the Best Value Duty.

5.6.7 Involvement in the operation of the Habitat Bank

A Local Authority landowner could seek to retain an involvement in the operation of the Habitat Bank. The easiest way to do this would be to retain the freehold interest in the land and control the activities of the Trust/charity through the terms of the lease or licence.

Otherwise, it may be that the Local Authority requires reporting and this may be secured under the terms of the Section 106 Agreement.

If the Habitat Bank is to be created by Conservation Covenant then it is not necessarily the case that there will be ongoing involvement for the Local Authority, save to the extent that it receives planning applications which have sought to rely upon Off-Site Gains from the Habitat Bank.

In any event the restrictions on the use of the land and the regulation of the Habitat Bank remain distinct and are regulated accordingly in the legal agreements.

5.6.8 Legal requirements

The Trust/charity will enter into the Section 106 Agreement and undertake to perform the obligations in relation to the enhancement. Where the Trust/charity's interest in the land is a lease, they cannot bind the freehold or any superior interest, so it will be necessary to ensure that the leasehold interest could not be terminated before the satisfaction of the obligations in the Section 106 Agreement, or before the grant of an interest to another party, to provide certainty of delivery of the habitat enhancement obligations.

There is a possibility to secure delivery of BNG by way of a Conservation Covenant but that would require the involvement of a Responsible Body.

5.6.9 Agreeing the terms

As Habitat Banking is a relatively new purpose for which land would be sold by a Local Authority, there are no standard terms and so it will be important to obtain legal advice on the transaction and the implications of the Local Authority as landowner, public body and Local Planning Authority.

Any Section 106 Agreement will require the planned biodiversity habitat creation or enhancement works for the site, usually by reference to the implementation of the HMMP.

The HMMP will also provide a detailed schedule of management and monitoring which the Agreement will require compliance with. The enforcing Local Authority will need rights to access the land in order to monitor compliance with the requirements of the Section 106 Agreement and HMMP, and may also want to ensure that they have the right to step in in the event of a significant and/or prolonged breach. Consideration will need to be given to how any disputes will be managed.

The Section 106 Agreement will impose an obligation on the landowner to provide a report in relation to the operation and effectiveness of the HMMP and any necessary remedial measures to the enforcing Local Authority. This is usually on an annual basis for the five years, then every five years thereafter, but this is subject to negotiation.

The Section 106 Agreement will also need to deal with funding arrangements, particularly for ongoing monitoring of the habitat and its management, and a payment schedule may be agreed as part of the Agreement. There is also likely to be provision for the payment of the Local Planning Authority's legal costs of dealing with the Section 106 Agreement, wider set up costs and potentially monitoring compliance with the Section 106 Agreement.

The Agreement will need to make it clear that the habitat site can be used to provide different credits for different ecosystem services to achieve multiple environmental outcomes (i.e. stacking or bundling), provided it does not involve the sale of the same unit more than once as the basis for duplicated claims of biodiversity gain (i.e. double counting).

The Agreement will specify an end date that is at least 30 years from when the creation or enhancements of the habitat is complete. However, you may also want to consider an earlier end date in the following scenarios:

(i) Where there is a force majeure event (e.g. an act of God)

(ii) Where there is a change of law of policy such that BNG is no longer a requirement

(iii) At the discretion of the landowner in respect of any part of the habitat site to which biodiversity units which have yet to be sold can be attributed

Consideration should also be given to whether there should be provision of the parties to agree changes to the Section 106 Agreement where there is a change in custom or practices such that the obligations are no longer appropriate.

5.6.10 Likely timescales

The timing for the transfer/lease of the land will depend on how quickly a willing Wildlife Trust or conservation charity can be found. It could take three to six months to complete the transfer/lease, but this will depend on the conduct of the parties and those advising them.

Once the land is transferred, timescales for the provision of the Habitat Bank are at the discretion of the Trust/charity, unless appropriate provisions can be agreed in the contractual documents.

It is likely to take three to six months to agree the terms of the HMMP and the Section 106 Agreement, but much will depend on the conduct of the parties and those advising them.

The timing for the sale of the units will depend on market demand and the arrangements to trade the same on the open market or to a particular developer in relation to one scheme. Following which, the completion of the relevant legal agreements on the developer's intended timeline for bringing forward their development.

5.6.11 What to do with receipts – accounting and reporting measures

As a public body, the Local Authority will need to publish details of the income received as a result of the disposal.

It may wish to ringfence those funds in order to utilise the same towards other environmental projects within the Local Authority area.

Similarly, as a charity, the conservation charity or wildlife trust would have obligations to make information about their finances publicly available and subject to scrutiny.

5.6.12 Advantages and Disadvantages

The main advantage to transferring land to a Wildlife Trust or conservation charity for the purpose of creating a Habitat Bank is that such bodies are well placed to deliver the habitat enhancements in terms of the resources and expertise required. In this respect they have a proved track record. However, their willingness to do so is likely to depend on the funding available to them as a certain amount of up front spending is likely to be required to acquire the land and establish the Habitat Bank.

The disadvantage is that, once the land is transferred, there is an inevitable loss of control on the part of the Local Authority. Whilst appropriate covenants and restrictions can be written into the transfer documents and the Trust/charity will be required to comply with the Section 106 obligations, ultimately the Local Authority will have limited control over how and when the habitat enhancements are created and sold.

The Trust/charity will need to accord with its charitable objectives in the management of the land, which may mean that public access is restricted. They also cannot provide a Habitat Bank purely for the purpose of generating income; it must be for the purposes of habitat enhancement/ management which they would otherwise want to achieve in line with their objectives.

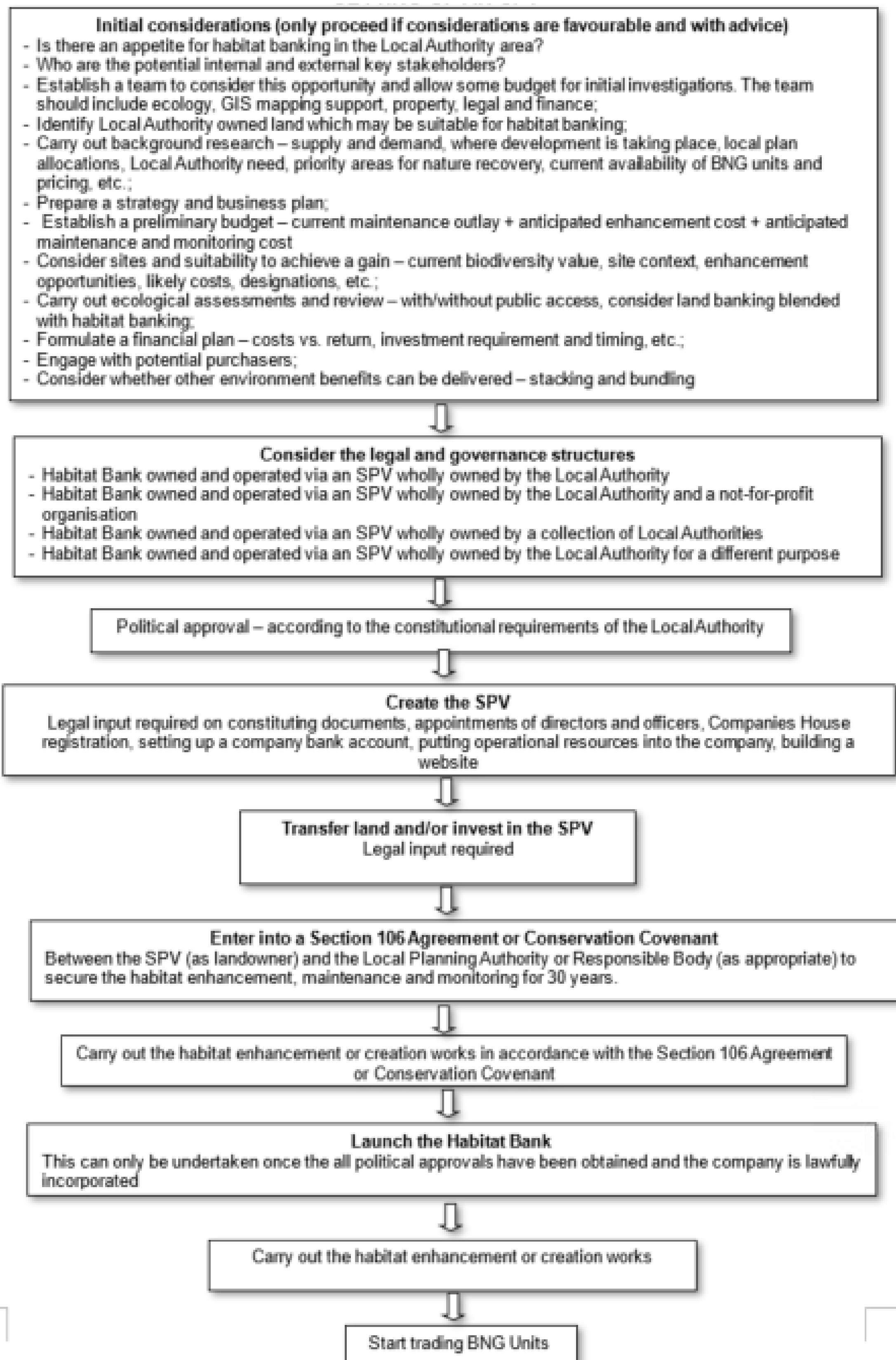
The grant of a lease, rather than a freehold sale, is likely to offer more control and may be preferable on the basis that the land will come back to the Local Authority on expiry of the 30 year management period.

The Local Authority would not have to worry about setting up a different legal entity in order to operate the Habitat Bank, or engage in the complexities of entering into Section 106 Agreements or Conservation Covenant agreements with other Local Authorities.

The Local Authority would not have the long-term management and monitoring responsibility in respect of the Habitat Bank.

However, the Habitat Bank would be operated on the private market and so the Local Authority would have no control over the prices paid for BNG Units, who or how they are traded, etc.

5.7 Create a Special Purpose Vehicle to operate the Habitat Bank (as adopted by Plymouth City Council)



In October 2023, Plymouth City Council set up a Habitat Bank in order to generate BNG Units in Plymouth to be traded locally. The proposal was advanced as a key part of the city's nature recovery initiative and to ensure that there is a local supply of BNG Units where they are required as an Off-Site BNG solution. It was brought forward in this way to circumvent the issue of the Council not being able to enter into a Section 106 Agreement or Conservation Covenant with itself and also as an investment vehicle to attract finance, funding and to hold income and incur expense in respect of natural capital projects, one of which being BNG. Therefore, this is an example nature finance model, with the first revenue generating route being BNG. This generally means that this model is more complex to establish but that is with a view to allowing for additional functionality and sources of revenue to be added.

The advantages of pursuing this approach are: to cover the maintenance costs for the natural infrastructure beyond the 30 years required by law; to improve the accessibility of green space; to create jobs and boost the green economy; to fund community nature projects; and, to help close the UK nature recovery funding gap (which was defined in the Funding Gap for UK Nature Report, 2021 as being £56bn for the UK to meet its nature-related outcomes over the next 10 years but those figures may be changed by the Labour Government).

An overview of Plymouth's Habitat Bank model is included at paragraph 5.7 above.

As it is not possible for a Local Planning Authority to be a landowner and to enter into a Section 106 Agreement in relation to its own land, this model looks to create a distinct legal entity (by way of a Special Purpose Vehicle or SPV) which can then enter into a Section 106 Agreement with the Local Planning Authority. It may well be that the Local Planning Authority plays a part in the creation, operation and composition of the legal entity, but as this is a corporate structure, the company will have a separate legal entity. There will however be points for the Local Authority to consider due to the overlap between the corporate structure and their Local Planning Authority functions.

5.7.1 Overview of possible legal structures and steps to be taken

There are various different ways to establish a Habitat Bank operated by a distinct legal entity, for example:

(i) A Habitat Bank operated and owned by a Local Authority

(ii) A Habitat Bank owned and operated via a Special Purpose Vehicle which is wholly owned by the Local Authority

(iii) A Habitat Bank owned and operated via a Special Purpose Vehicle which is owned by the Local Authority and a not for profit organisation working in partnership

(iv) A Habitat Bank owned and operated via a Special Purpose Vehicle which is owned by a collection of Local Authorities

(v) A Habitat Bank owned and operated via a Special Purpose Vehicle which is owned by the Local Authority but was originally established for a different purpose

5.7.2 Process

The best option for establishing an SPV will depend upon the particular circumstances of the Local Authority and the relationships with the other parties involved. It is therefore prudent to consider and explore all the options available and potentially to discuss with third parties and stakeholders.

As Habitat Banking draws upon a range of specialist areas, a team will need to be assembled to ensure that proposals have been considered from all perspectives particularly given that this option involves creating an SPV and incurring the time and cost that goes along with this. At various stages it will also be necessary to seek authority from members to advance the proposals.

Given the number of considerations, their implications and the testing of the proposals, it is likely to take some time to establish a Habitat Bank, particularly if land is to be acquired for that purpose. In Plymouth's case, this was said to have taken over 18 months and was not linear in fashion – a number of points were revisited to reach this position and it is important to note that the Habitat Bank has been established and is currently offering BNG Units for a range of habitats while others are being built. Plymouth is suggesting that those interested in purchasing BNG Units contact them rather than placing any more details in the public domain at this stage.

In terms of the steps to be undertaken in this process, these are likely to be along the following lines:

(i) Understand whether there is an appetite to consider the opportunity of Habitat Banking in the Local Authority's area.

(ii) Discuss the prospect internally and with key stakeholders.

(iii) Seek authorisation to create a team to consider this opportunity and to allow some budget for initial investigations (according to the Local Authority's Constitution).

(iv) Build a team - including ecology, GIS mapping support, property, legal and finance.

(v) Identify Local Authority owned land which may be suitable for Habitat Banking – it will be important to consider the strategic significance of the sites, in light of the likely proposed development for the area in the future (as this will give rise to a demand) as well as the ecological significance of the sites and their connectivity; consider where development is likely to take place; where the Local Authority is likely to need new and enhanced natural infrastructure; where there are priority areas for nature recovery.

(vi) Carry out background research – as to the local market for BNG Units and the involvement of other Habitat Bank operators in the area.

(vii) Prepare a strategy and business plan.

(viii) Establish a preliminary budget - based on current outlay for maintenance, anticipated cost of enhancement or creation of habitat and anticipated management and monitoring costs.

(ix) Assess demand - review Local Plan allocations and other strategy documents, consider any likely intended infrastructure projects. This can be used to forecast demand.

(x) Assess supply - Review strategic habitat priorities (including GI Strategy), map the sites in light of their habitat characteristics and suitability for delivering a gain. May wish to consider pilot sites.

(xi) Consider sites and suitability to deliver a gain - this may be based upon: any restrictions on the land or designations; current habitat value and capacity to viably achieve a gain – generally to require a jump in the distinctiveness of the habitat; existing grant/public funding; proximity to likely development sites; the context of the site and connectivity with other strategic habitat; proximity to local community; size – often 15ha is the area referred to as being capable of delivering economies of scale; possible for aggregation with a collection of small sites; likely habitat enhancement or creation costs; likely maintenance costs; other Habitat Banks operating in the area.

(xii) Carry out ecological assessments.

The purpose of the assessment is to understand the baseline condition of the sites, their capability of to deliver a gain, how many BNG Units could be created by adopting different approaches to habitat enhancement and the likely costs of doing so.

The Biodiversity Metric incorporates a difficulty multiplier for the habitats which are harder to enhance and so this will be reflected in the calculations. This may mean that there is an advantage in allowing such habitats to establish to a point at which the risk has reduced in order that they generate more BNG Units.

This may also advise upon the measures to be taken to help to protect the habitats where they are accessible to the public, i.e. fencing, gates, etc.

In-house or external ecologists can be appointed, the latter may give some additional comfort due to their independence.

(xiii) Review ecological assessments

This should give a clearer picture of the sites available, whether they can deliver a gain and if so, at what likely cost and with what level of ongoing maintenance responsibility.

(xiv) Prepare a financial plan

As Habitat Banking is a new area and the market for trading BNG Units is not yet established, it may be prudent to appoint an external financial advisor that has experience in financial modelling in this area and in brokering related investment deals. However, in-house financial teams should remain involved and have an input.

The purpose of this advice would be to help to build a financial model, assess viability, identify any funding gaps (particularly at the outset in respect of the initial habitat enhancement), understand risk and to help to determine the most appropriate framework for the Habitat Bank based on financial modelling.

The financial model will need to consider all of the costs associated with the Habitat Bank throughout the life of the Habitat Bank. This may be more than 30 years depending upon whether the Habitat Bank is created so as to allow BNG Units to be generated from the outset and immediately traded or for the BNG Units to come forward in the future once the habitat has established, or a combination of both.

This will need to factor in all maintenance costs including in relation to ancillary infrastructure and account for the risk of failure and costs increasing.

This information is important to help to determine:

- Which sites are most appropriate and viable for inclusion within the Habitat Bank;
- Whether it is better to Habitat Bank, land bank or both;
- The break-even point which may in turn help to decide when surplus can be reinvested;
- How much investment will be needed at different stages;
- How the calculations and valuations are likely to be impacted as the market develops and to account for inflation and indexation.

However, the financial advisor can only advise and will not be in a position to guarantee or underwrite the performance of the Habitat Bank. Therefore the pricing of the BNG Units will need to be sufficiently cautious to ensure costs are covered, while also remaining affordable in the market place.

Insurance is not currently available in respect of Habitat Banks but may be available in the future.

(xv) Engage with potential purchasers of BNG Units

It can be helpful to ensure that local developers and registered providers are aware of the potential prospect for BNG Units to become available from the Local Authority.

So as to gauge the level of demand, there is the possibility to 'test the market' in respect of the possible availability of BNG Units from the Habitat Bank. Initially on an informal basis to give an overview of the proposal under consideration, to seek views and to understand whether there is a demand for the BNG Units, as well as more generally to understand the needs and wants of developers as potential future purchasers.

As and when the proposals are more advanced, it might be worth revisiting this engagement more formally by seeking views in light of developer experience and seeking expressions of interest on an informal and non-committal basis.

If and when the Habitat Bank has been approved to proceed and has all of the necessary authorisations and consents, then there would need to be a formal launch of the Habitat

Bank with marketing materials and potentially events in which the Local Authority can showcase the BNG Units available and how to purchase the same.

It will not be possible to require developers to purchase BNG Units from the Local Authority; this must remain within the discretion of the developers and there should not be any ramifications in the consideration of a planning application for the decision to purchase BNG Units from an alternative source.

(xvi) Choose the legal and governance structure

Paragraph 5.5 of this advice considers the options in which the land is sold or let for the creation or restoration of habitats.

The alternative options are:

- For the Local Authority to run the Habitat Bank itself;

This option has the advantage of ensuring the Local Authority remains in control of its asset (as it retains ownership) as well as the way in which the Habitat Bank operates and trades. However, this means that the Local Authority retains all of the risk and maintenance responsibilities, as well as the burden of administering the Habitat Bank. This approach may not sit comfortably along the other functions of the Local Authority and may give rise to conflicts of interest. Given the sole responsibility of the Local Authority, it may be more difficult to attract investment and to raise capital, if needed. The delivery of the Habitat Bank would need to be secured by way of Section 106 Agreement.

- To create an SPV which is wholly owned by the Local Authority;

This option has the advantage of giving some separation between the legal identity and responsibilities of the Local Authority and the Habitat Bank, while also ensuring that the Local Authority retains control over the establishment and operation of the Habitat Bank and where/how the proceeds from it are used. Due to the distinct legal personality of the SPV, it is likely to be simpler to obtain finance. The Habitat Bank will not be an asset or function of the Local Authority and so will not be subject to the same level of public scrutiny. However, this approach will require a considerable amount of advice and expertise and there is no guarantee that this investment will be recovered.

- To create an SPV which is owned by the Local Authority in partnership with a conservation charity;

This option has the advantage of giving some separation between the legal identity and responsibilities of the Local Authority and the Habitat Bank, while also ensuring that the Local Authority retains control over the establishment and operation of the Habitat Bank and where/how the proceeds from it are used. Due to the distinct legal personality of the SPV, it is likely to be simpler to obtain finance. However, all the decisions relating to financing and operation of the Habitat Bank will need to be agreed with the partner charity, the latter will be subject to Charity law. The Habitat Bank will not be an asset or function of the Local Authority and so will not be subject to the same level of public scrutiny or reporting, but the Habitat Bank would of course be considered as a charitable asset and so this would carry certain implications. That said, there may also be tax savings.

Due to the partnership there would need to be an agreement in place to regulate how the partnership is to operate and how liability will be shared, this would also need to provide for disputes and bringing the partnership to an end. There would inevitably be a loss in control over the operation of the Habitat Bank and proceeds would need to be shared. However, the initial outlay is likely to be lower in view of the involvement of the charity.

This approach will require a considerable amount of advice and expertise, particularly in terms of the governance and collaboration arrangements and there is no guarantee that this investment will be recovered.

- To create an SPV which is owned by a collection of local authorities.

This option has the advantage of giving some separation between the legal identity and responsibilities of the authorities and the Habitat Bank. The governance and collaboration arrangements between the authorities would need to be carefully defined which would mean that each Local Authority would have a limited amount of influence and control over the operation of the Habitat Bank. Due to the distinct legal personality of the SPV, it is likely to be simpler to obtain finance. The Habitat Bank will not be an asset or function of the local authorities and so will not be subject to the same level of public scrutiny.

Given the collaboration between numerous authorities, the initial outlay is likely to be lower but the returns would also then need to be shared. Given the wider reach of the local authorities across a larger area, there may be some economies of scale and it may be simpler to market the Habitat Bank at a regional level. It may also be possible to support landscape level local nature recovery.

This approach will require a considerable amount of advice and expertise, particularly in terms of the governance and collaboration arrangements and there is no guarantee that this investment will be recovered.

- To utilise an existing SPV which has been established by but not currently used by the Local Authority

This model applies where the Local Authority has an existing commercial entity (a SPV) which is not currently being used for a commercial purpose. In this situation and subject to Cabinet and such other approvals as are required pursuant to the Council's Constitution, the SPV could be utilised for the purpose of habitat banking.

The incorporation documents relating to the SPV would need to be reviewed to determine whether any changes need to be made and whether the company can be used for this purpose. Assuming so, with or without changes to the incorporation of the documents, then the Local Authority would need to identify the land proposed for habitat banking, determine the habitat enhancement or creation works, decide how the same are to be managed and whether this would be contracted out to a third party entity.

The advantage of this model is that the steps to establish a corporate entity are avoided. However, the remainder of the steps applicable in the case of the Plymouth model would equally apply. The remainder of the advantages and disadvantages therefore equally apply.

(xvii) Seek legal advice

As there will need to be legal agreements and processes completed in each of the above examples, bespoke legal advice will need to be obtained. Indeed, given the nature of the BNG on a statutory footing, it would be recommended to have legal input throughout the process. The Local Authority's solicitors may also be able to highlight (to the extent needed) when senior management, members and other approvals are required.

As and when the legal advisors have considered and advised upon the different legal mechanisms, it is likely to be useful to prepare draft Heads of Terms. These will formalise any informal arrangements that have been discussed and also identify any points that may not have been considered and would require negotiation.

According to the structure that is to be put in place there will be different legal agreements and documents required. This may comprise the following: an outline business plan, articles of association, shareholders or members agreement, management services agreement (to be entered with third party suppliers), lease, land management agreement (in relation to any third party management of the habitat creation or enhancement works), allocation agreement and Section 106 Agreement or Conservation Covenant.

Plymouth City Council has commissioned model Heads of Terms in connection with its Habitat Banks and has advised that they are available upon request.

(xviii) Consider whether investment is needed

The financial model may or may not be reliant upon finance for the establishment of the Habitat Bank; if it is necessary to seek investment then further advice will need to be obtained from a Financial Conduct Authority regulated advisor. The advisor will be able to identify and negotiate with investors, as well as to assist with the necessary documents.

In Plymouth's case, the Council invested £500,000 in respect of the habitat enhancement works and costs associated with the establishment of the Habitat Bank.

The nature of investment required is likely to turn upon the size of the investment, the investor's rate of return, the legal structure, the way in which the Habitat Bank will trade (i.e. Habitat Banking or land banking) and the appetite for risk. The financial advisor will be able to prepare an investment case on the basis of the information available and the proposals that have been developed in the hope of attracting investors.

(xix) Consider whether it is possible to deliver any other environmental benefits

If the scheme can deliver additionality then it would be worth considering whether to deliver additional environmental benefits or to reserve the ability to add the same in the future. This may include carbon, SANGS, natural flood management, etc.

This may make it simpler to achieve investment as an additional way to generate an income from the scheme. However, the certainty of this income and any impact upon the project may have an influence.

(xx) Political approval

In order to proceed with the Habitat Bank, approval through political structures, as appropriate to the organisation, would be required

The report to either a pollical cabinet, committee or board will need to be comprehensive. It will need to include; details of the investigations carried out and the options considered, the business case, a detailed explanation of the legal and governance model, details of the proposed implementation of the Habitat Bank and how that will be resourced (including finance) and a risk assessment.

It is likely to be helpful to have the legal and financial advisor present at the relevant political meeting in case any questions arise.

The purpose of the report would be to ask for political authorisation to establish the Habitat Bank, this will in turn allow a series of actions to be taken depending upon which model has been chosen. This may comprise the following: to create the Habitat Banking vehicle or company structure; to resource the structure; to nominate directors; to appoint a senior officer(s) that will sit within the structure that has been created but represent the interests of the Local Authority and to delegate Local Authority to that officer; and, to formally engage with investors and developers.

The political board/ committee/ cabinet approval may also need to extend to a disposal of land to the Habitat Banking Vehicle by way of lease or transfer.

(xxi) Complete the Section 106 Agreement to secure the BNG delivery

(xxii) Complete any necessary disposal of the habitat bank site to the Habitat Banking Vehicle

It will be important to take advice upon the tax implications of any corporate structure or entity which is created by the Local Authority, particularly in relation to disposals of land which may for example trigger a liability to SDLT. There will also be accounting requirements for any commercial entity.

(xxiii) Launch the Habitat Bank

Once authorisation has been obtained, the steps set out in the associated report to allow the Habitat Bank to be established can be undertaken. If there are any changes in circumstances then it may be that fresh approval is required.

The steps to set up the Habitat Bank will reflect the model chosen, but will likely involve: completion of the constituting documents; appointments of directors and officers; Companies House registration; setting up a company bank account; putting operational resources in place (i.e. for staff, accountants and insurance); building a website and other collateral for the marketing of the BNG Units.

(xxiv) Carry out the habitat enhancement and creation works

As and when the Habitat Bank has been launched, providing all other necessary consents are in place then it will be possible to carry out the habitat enhancement or creation works.

The Section 106 Agreement will define the works which need to be undertaken before trading can take place (see further paragraph 2.24.1).

As and when the Habitat Bank has been created, it will need to be registered on the Biodiversity Gain Sites Register (see further paragraph 2.26.1).

Once registered, the works for the habitat creation or enhancement can be undertaken and if funding has been obtained, then funds can be drawn down from investors prior to works taking place.

(xxv) Start trading BNG Units

At this stage the BNG Units can be marketed and offered for sale.

5.7.3 Who to involve?

This process of setting up a Habitat Bank by way of the creation of an SPV will require the involvement of:

(i) Environment – to provide the ecological input and to complete the Biodiversity Metric;

(ii) Finance – given the financial implications of establishing the Habitat Bank, it would be prudent to have a financial representative throughout and to direct any further questions

(iii) Planning

(iv) Legal

(v) Estates

(vi) Regeneration and development

(vii) Finance (potentially external)

(viii) Communications specialists

Throughout the process accountability should be clear at all stages.

5.7.4 Develop a Business Plan

In order to progress this option, the Local Authority would need to have a clear business plan drawing upon the expertise of the various specialists involved so as to consider all of the options available, how and why they might be pursued and the steps to be taken to reach the desired outcome.

This would necessarily require the desired outcome to be defined by reference to the key goals of the Local Authority:

5.7.4.1 Environmental benefits

There is an environmental benefit to a local solution to ensure that Off-Site BNG remains in the locality.

There may be additional positive ramifications such as improvements to air quality, temperature, carbon sequestration, water quality, natural flood management, sustainable drainage, etc.

There is the potential to reinvest any surplus revenue into extending the life of the Habitat Bank, other greenspace provision or local conservation activity.

5.7.4.2 Social benefits

The benefits of access to green spaces are well documented; these areas can play a significant role for local communities and play a key role in improving wellbeing, employment, educational opportunities, as well as improving the desirability of an area.

Site selection may allow for BNG sites to be prioritised in areas which are impacted by development and the community may otherwise have a more limited access to green space.

Consultation can assist in identifying suitable locations for Habitat Bank(s) with public access.

It will however be important to consider that there is a balance to be struck between the level of footfall and the objective of enhancing or creating habitats. The extent of access by the public also gives rise to risks, for example, of fire damage. Therefore these areas of land would need to managed in a way which allows the balance to be struck; this will come with an additional cost and potentially the need for additional development, such as, fencing, gates, paths, etc. The management and maintenance arrangements would need to extend to these aspects of the scheme throughout the life of the Habitat Bank.

It may well be the public engagement in the maintenance of the Habitat Bank in itself becomes a way of engaging with the local community, for example by way of community biodiversity projects which may also bring investment, allow for employment, training, volunteering and other potential opportunities.

Finally, it may well be that any surplus revenue from the operation of the Habitat Bank is recycled to fund other environmental projects. This will depend upon whether the Habitat Banking vehicle has been established on a not-for-profit basis. If so, then any surplus could be used to extend the life of the Habitat Bank or to fund other environmental projects in the area. Noting the lifespan of the project it will be important to ensure that proceeds are not utilised on other projects too quickly where there is potential for the costs associated with the Habitat Bank to unexpectedly increase.

5.7.4.3 Financial benefits

The purpose of the Habitat Bank may or may not be to generate a profit; this would need to be clearly defined and factored into the decision-making process. For this reason, the BNG Units generated may be traded at a price which is fair and reasonable, in view of the length of the commitment and the risk associated with the maintenance of the habitat for that period of time.

In turn, the operation of the Habitat Bank will contribute to the local green economy. This may in turn lead to the creation of more jobs, businesses and improve skills locally.

In the event that finance has been obtained from an investor in order to allow the Habitat Banking SPV to deliver a fair return to investors, this is on the basis that the investors take the risk that the

habitat will fail, that the BNG Units will not sell and the initial outlay of costs in respect of the establishment of the Habitat Bank.

The pricing of the BNG Units will therefore be a delicate exercise. In addition to consider the costs and risks associated with the establishment of the Habitat Bank, it should also be noted that pricing should be set at a level which seeks to preserve so far as possible the viability of developments or at least, does not deter developers.

In considering the likely return from a Habitat Bank, the site selection will be important to ensure that the sites that may be better suited for other schemes, funding or protections are utilised accordingly. The strategic significance of the site more generally will be a key consideration when deciding whether to put land into a Habitat Bank and will need to be considered in light of the local plan allocations and anticipated future development of the area over the next 30 to 35 years, as well as in terms of the strategic significance of the habitat, its connectivity and climate resilience.

5.7.4.4 Accounting and reporting measures

As the SPV will operate the Habitat Bank as a private entity it will not be subject to the duties of the Local Authority in terms of accounting and reporting. However, the Local Authority will be required to report on its dealings with the SPV.

5.7.5 Advantages and Disadvantages

This option allows for a local solution to be reached whereby the BNG Units can be traded locally and in a manner which is removed from the Local Authority. It therefore avoids the complexities of entering into Section 106 Agreements or Conservation Covenant agreements with other Local Authorities, but a Section 106 Agreement or Conservation Covenant would still need to be entered into with the Local Planning Authority in order for the BNG Units to be capable of registration on the Biodiversity Gains Sites Register. In the circumstances this should be agreed more simply due to the proximity.

This has the advantage of avoiding some of the reporting and accounting constraints to which local authorities are subject, but this will depend upon the extent of involvement of the Local Authority. The key advantage of this option is that it allows for further schemes to be added as time goes on, in the event that the Local Authority is eager to advance other Habitat Banks or environmental schemes.

That said, it comes with a significant time and cost investment as it is the most complex legal structure of the options considered. This may also require finance to be secured and the risks and liabilities associated with this to be addressed.

6. SALE OF BNG UNITS

The purpose of setting up a Habitat Bank is to allow for BNG Units to be traded to offer a local BNG solution. This in turn generates an income.

However, there are a number of points to consider before looking into trading BNG Units, as follows:

6.1 Market analysis

See also paragraph 3.2.

It will be necessary to understand the options available for sourcing BNG Units in the local market and at what price in order to gauge whether there is a need. This may stray beyond the Local Authority area. It will therefore be necessary to consider/carry out:

(i) Supply and demand assessment

(ii) Any visibility on costs?

(iii) What other Section 106s and Conservation Covenants have been entered into?

(iv) Is it likely that developers will be able to provide on-site?

(v) Are there other Habitat Banks operating in the area?

(vi) How many planning applications requiring BNG to be secured are likely to come forward within the area?

(vii) Does the Local Authority have its own need for BNG Units that it would be more cost effective to provide to itself on other land and to trade the surplus?

(viii) Is this worth doing? Bearing in mind it will take time and incur a cost.

6.2 Establishment & Management costs

The options appraisal (see paragraph 3.6) should identify how BNG Units can be generated on land and at what level of cost and intervention at the outset and in terms of maintenance

Local Authorities should consider the pros and cons of Habitat Banking and land banking (see further paragraph 4.3.3) and how to maximise return.

Local Authorities should consider what is an acceptable level of cost to the Local Authority, and how much risk they are willing to take on.

Local Authorities should consider how the cost and risk can this be offset against the likely return. They should bear in mind that there is no guarantee that the return will come as and when expected due to trading on the private market and the uncertainties of the planning regime. i.e. what if the planning permission is not granted, the planning permission lapses, or the planning permission is subject to legal challenge, etc. It may be unclear as to whether there is any recovery of costs in this instance.

The costs incurred in connection with the Habitat Banks may be offset against previous maintenance costs associated with the land in question.

6.3 Pricing

See further paragraph 3.10.1.

The Local Authority will need to achieve best value.

Local Authorities may be more concerned about not being seen to make a significant profit and covering costs. Habitat Banking has the advantage of allowing for a circular economy whereby receipts can be reinvested in order to create further returns.

Local Authorities need to allow the risk factor and costs that may arise in connection with maintenance, etc. They will need to work on the best assumptions and costings as to what they may be but there is no certainty as to what these will be.

There is no opportunity to come back for more money if the costs are higher than the Local Authority expect them to be.

The tax implications would need to be considered and we would recommend that advice is taken on this point. The Government had indicated that advice may be provided on tax implications, but this has not come to fruition and it is therefore recommended to take advice.

6.4 Should preferential rates apply to some developments?

The price of the BNG Units is at the discretion of the Local Authority if it can justify it on the basis of best value or a justified departure from best value.

They could therefore be used as a method of assisting or facilitating development which is a priority for the Local Authority area or where viability is carefully balanced.

However the Local Authority would need to carefully define the criteria in accordance with principles of fairness and have a procedure in place to vet the applications that would be eligible. The sale of BNG Units is an exercise of Local Authority discretion and so subject to legal challenge. This is a risk if there are competing housebuilder or developers involved and one receives a cheaper price than another.

6.5 How to prevent unfair advantage in private marketplace

It will be important for the Local Authority to conduct itself in a manner whereby it does not facilitate the sale of its own BNG Units in favour of other available BNG Units on the private marketplace (see further paragraph 5.1.12). This may be a basis upon which the Local Authority could be subject to legal challenge.

It is also in the interest of the Local Authority to ensure that there is an active local marketplace for BNG Units so as to ensure that development is not prevented from coming forward and/or to prevent developers looking to buy BNG Units from other Local Authority areas.

That being the case, the Local Authority may wish to consider how it assists developers in locating local BNG Units and making information available in this regard and/or engaging with planning professionals via public forums, agents forums or the Local Authority's website.

6.6 Sale process and legal agreements on sale of BNG Units

Typically the sale process would operate in two parts. Firstly to allow a developer to reserve BNG Units for their scheme upon payment of a deposit so that they have a BNG solution to discharge the Biodiversity Gain Condition.

Secondly and prior to the discharge of the Biodiversity Gain Condition to complete the purchase of the BNG Units upon payment of the balance.

These terms would be documented in an allocation agreement which would site aside from the Section 106 Agreement or Conservation Covenant.

6.7 Accounting for BNG Units sale receipts

The Local Authority would need to record details of its income and expenditure in connection with Habitat Banking and trading BNG Units in the usual way.

6.8 How to maintain records of BNG Units trading

How to maintain records of BNG Units trading will be a matter for the Local Authority to consider in light of its current accounting practices and software available. This process will need to be undertaken distinctly to development management functions.

7. OTHER CONSIDERATIONS

7.1 Conservation Covenant or Section 106 – which is better?

Feedback from developers is that they are not familiar with Conservation Covenants and are therefore more comfortable with Section 106 Agreements. There is also uncertainty with the implementation, monitoring and enforcement of Conservation Covenants. Relatively little is known about some of the Responsible Bodies and they could change the way they operate and enforce without recourse to the landowner.

The National Audit Office Report notes that uptake on Conservation Covenants has been lower than expected.

However, Conservation Covenants may be beneficial where Biodiversity Units are to be traded in a wider area where it is less appropriate for the Local Planning Authority to be the monitoring/enforcing authority.

7.2 LINC and other support initiatives

LINC is an initiative being delivered by the WMCA to explore and develop mechanisms for how environmental outcomes can be traded, as part of this an accelerator project will work with local authorities that are already exploring habitat bank opportunities on their own land to assist them on their journey towards developing an investable proposition.

Local Authorities can also maximise returns by tying Habitat Banks in with LNRS priorities which can if a habitat bank is contributing to a 'strategic' area in the LNRS provide an uplift in the BNG units generated..

There are also subsidiary benefits of Habitat Banking, i.e. public access, climate change targets, etc.

7.3 Market awareness

Local Authorities need to have a good understanding of the supply available and the demand for BNG Units (see further paragraph 3.2). That cannot be assumed.

7.4 Assistance to developers

It will be important for Local Authorities to help developers with BNG. It is all very new and the preparation for the legislation taking effect was not as anticipated. DEFRA are going to step away and leave Natural England to administer this process; there is a question as to whether Natural England is

sufficiently resources to do this. There is unlikely to be much support at Governmental level so there will be a need for strong support from Local Authorities.

Support for BNG is in the interests of the Local Authority so as to allow development to come forward, especially if there is no five year housing land supply or a lack of affordable housing in the area.

7.5 Pre-application advice

The PPG encourages front-loading of this process and early engagement with the Local Planning Authority to discuss the Metric, BNG needs and how they can be met (Paragraph 002 Reference ID: 74-002-20240214).

This can be a charged for service and a number of constituent authorities have a paid for service in operation already. Local Authorities should take into account the need for ecology officer input and support. This is especially if paid for as the advice then needs to be of value and assist developers to shape their proposals.

It may even be recommended that BNG is considered at site selection stage on the basis that the ability to deliver BNG will be a requirement, save where the scheme is exempt or constitutes a small site.

7.6 Guidance

Local Authorities might want to consider bringing into force Guidance to assist developers in their area to approach BNG and the options available. This would not be binding and could not be attached weight in the planning balance but may help to ensure that applications are in the format that the Local Authority are looking for.

7.7 Local Agents Forum

The Local Agents Forum can be used as a mechanism to gather information about the market place for BNG Units.

It can also be used to identify issues being experienced by developers and to look to respond to the same.

It will enable Local Authorities to identify areas for additional support or where the planning process may need some improvement or additional information, procedures, etc.

7.8 LPA Website

The Local Authority's website should include local lists, any policies or guidance, details on pre-app procedures, details on Habitat Banks and sourcing BNG Units.

It may be that the Local Authority would like to establish its own BNG principles to guide developers on the delivery of BNG in light of the characteristics and policies of the area. However, this can be guidance only and must be consistent with statutory regime.

By way of example, Buckinghamshire Council has a 'Habitat Bank Criteria' document published on its website. This is available here:
https://www.local.gov.uk/sites/default/files/documents/Buckinghamshire%20Habitat%20Bank%20Criteria_November%202023.pdf

7.9 Funding

It may be useful for Local Authorities to keep in mind that developers and their funders are not yet familiar with the BNG regime and that may impact the way in which developers broach BNG and the speed of delivery of developments once consented.

Where Habitat Banks are set up on private land, it is typically the case that mortgagees require their charges to be redeemed before the land is committed to delivery of a Habitat Bank.

7.10 What happens at the end of 30 years?

The Section 106 Agreement or Conservation covenant should ensure that the obligations in relation to BNG cease at the expiry of the 30 year management period.

However, at the end of this time, it may be that the ecological character of the land has changed in such a way that the land has/is susceptible to designations which may have accrued and impact the future use of the site.

It is possible for the land to be entered into a new BNG scheme, but additionality will need to be secured and this may not be straightforward in relation to an established habitat.

If the public have been permitted access to the site, then it may be that prescriptive rights have accrued to the public or town and village status could be claimed. It would be worth considering the submission of a declaration and landowner statement under section 31(6) of the Highways Act 1980 and section 15 of the Commons Act 2006 to prevent this.

7.11 Reflections on BNG so far

The BNG regime has now been in force for 9 months and the overall impression seems to be that the impact has not been as significant as may have been expected (as evidence by a poll conducted by Planning Magazine of its readers). That said, initial observations reflect upon the impact of the regime on small to medium sized developers, in particular. Volume housebuilders and large or strategic developments seem to be responding well to the BNG regime and are routinely factoring this into their proposals. However, the smaller developers are impacted in a different way and are in many cases struggling to provide BNG on-site and their developments are not always viable if Off-Site BNG needs to be found and funded.

GLOSSARY

Term	Definition
1990 Act	Town and Country Planning Act
2011 Act	Localism Act 2011
2021 Act	Environment Act 2021
Best Value Duty	the requirement for an LPA to consider overall value– see Best Value Statutory Guidance, September 2011 https://assets.publishing.service.gov.uk/media/5a7968ab40f0b63d72fc591f/1976926.pdf - see paragraph 5.6.3
Biodiversity Duty	the duty set out in s40 of the NERC Act – see paragraph 1.16.3
Biodiversity Gain Condition	the mandatory condition imposed by paragraph 13 of Schedule 7A of the 1990 Act to secure the Biodiversity Objective – see paragraph 1.4
Biodiversity Gain Plan or Gain Plan or BGP	a document which sets out how a development with deliver the Biodiversity Objective to satisfy the Biodiversity Gain Condition – see paragraph 2.18
Biodiversity Gain Site Register	the register of biodiversity gain sites established under the Biodiversity Gain Site Register Regulations – see paragraph 2.26
Biodiversity Gain Site Register Regulations	the Biodiversity Gain Site Register Regulations 2024
Biodiversity Hierarchy	the hierarchy set out in Article 37A of the Development Management Procedure Order which prioritises avoiding and mitigating on-site habitat impacts over compensation – see paragraph 1.4
Biodiversity Metric or Metric	the statutory biodiversity metric published by DEFRA – see paragraph 1.6 https://www.gov.uk/government/publications/statutory-biodiversity-metric-tools-and-guides
BNG	Biodiversity Net Gain – see paragraph 1.2
Biodiversity Objective	securing a net gain of at least 10% in biodiversity as required by the 1990 Act – see paragraph 1.3
Biodiversity Unit(s) or BNG Unit(s)	a measure of biodiversity value as measured by the Metric

Conservation Covenants	legally binding agreements established by Part 7 of the 2021 Act – see paragraph 1.14
Degradation	a deliberate reduction in the biodiversity value of on-site habitat as a result of works or activities carried out on-site – see paragraph 1.8
DEFRA	Department for Environment, Food & Rural Affairs
DEFRA Guidance	Government Guidance on BNG published by DEFRA on 21 February 2023 https://www.gov.uk/guidance/biodiversity-net-gain
DEFRA Guidance on Conservation Covenants	Government Guidance on Conservation Covenants published by DEFRA on 18 November 2022 https://www.gov.uk/guidance/getting-and-using-a-conservation-covenant-agreement#landowners-roles-and-responsibilities
Development Management Procedure Order or TCP(DMP)(E)O 2015	Town and Country Planning (Development Management Procedure) (England) Order 2015
DHCLG	Department for Housing, Communities & Local Government
EIA	Environmental Impact Assessment
Exemption Regulations	The Biodiversity Gain Requirements (Exemption) Regulations 2024
Environmental Information Regulations	The Environmental Information Regulations 2004
Fees Regulations	The Biodiversity Gain Site Register (Financial Penalties and Fees) Regulations 2024
Freedom of Information Act	The Freedom of Information Act 2000
GI Strategy	Green Infrastructure Strategy
Habitat Bank	a piece of land used for habitat creation and enhancement that is then managed for 30 years legally secured by way of a Conservation Covenant or planning obligation – see paragraph 2.23
Heads of Terms	an agreement in principle between two parties, but which are subject to a formal contract

HMMP - Habitat Maintenance and Monitoring Plan	the habitat maintenance and monitoring plan for the BNG for the 30 year period
HRA	Habitats Regulation Assessment
Irreplaceable Habitats Regulations	The Biodiversity Gain Requirements (Irreplaceable Habitats) Regulations 2024
Land Banking	the principle of binding land into a habitat enhancement or creation scheme which will deliver a net gain for biodiversity once the habitat has matured to a particular level on the basis that a higher quantity of BNG Units will be generated but will not be capable of being traded until the pre-agreed level of maturity or condition has been reached
LINC	Local Investment in Natural Capital (LINC) programme
LNRS	Local Nature Recovery Strategies
LPA	the Local Planning Authority
Metric User Guide	the statutory biodiversity metric user guide published by DEFRA dated February 2024 - https://assets.publishing.service.gov.uk/media/65c60e0514b83c000ca715f3/The_Statutory_Biodiversity_Metric_-_User_Guide_.pdf
Mitigation Hierarchy	the principle that environmental harm resulting from a development should be avoided (through locating development where there will be less harmful impacts), adequately mitigated or, as a last resort compensated for – see paragraph 1.4
Modifications Regulations	The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024
National Audit Office report	National Audit Office report on Implementing statutory biodiversity net gain dated 17 May 2024 - https://www.nao.org.uk/wp-content/uploads/2024/05/implementing-statutory-biodiversity-net-gain.pdf
NE	Natural England
NERC Act	Natural Environment and Rural Communities Act 2006

National Character Area or NCA	a natural subdivision of England based on a combination of landscape, biodiversity, geodiversity and economic activity
NPPF	National Planning Policy Framework published on 27 March 2012 (as amended) - https://assets.publishing.service.gov.uk/media/669a25e9a3c2a28abb50d2b4/NPPF_December_2023.pdf
NSIPs	Nationally Significant Infrastructure Projects
On-Site BNG	BNG provided within the planning application boundary
Off-Site BNG	BNG provided beyond the planning application boundary
PAS	Planning Advisory Service
PGG	the Planning Practice Guidance published by the Department for Levelling Up, Housing and Communities and Ministry of Housing, Communities and Local Government on 29 November 2016 (as updated) - https://www.gov.uk/government/collections/planning-practice-guidance
Public Contract Regulations	The Public Contract Regulations 2015
Procurement Act	The Procurement Act 2023
Responsible Body or Responsible Bodies	a body responsible for ensuring that the objectives of a Conservation Covenant are secured – see paragraph 2.24.2.2
Secretary of State	Secretary of State for Environment, Food and Rural Affairs
Section 106 Agreement	an agreement under Section 106 of the 1990 Act
Scheme of Delegation	a Local Planning Authority's scheme of delegation providing information on the arrangements for the delegation of Local Authority to officers to carry out the Local Authority's various functions and which sets out those functions which have been delegated to officers
Statutory Credits	Credits available from the Secretary of State to meet the Biodiversity Objective – see paragraph 2.22
Small Sites Metric	the statutory biodiversity metric for small sites published by DEFRA - https://assets.publishing.service.gov.uk/media/669e46e0ab418

	ab055592a25/The_Small_Sites_Metric__Statutory_Biodiversity_Metric__-_User_Guide__23.07.2024_.pdf
Spatial Risk Multiplier (SRM)	the mechanism whereby Biodiversity Units from outside neighbouring Local Planning Authorities or NCAs will be reduced by 50% - see paragraph 2.21.2.1
Species Conservation Strategy	a new mechanism to safeguard the future of particular species at greatest risk– see paragraph 1.16.1
Special Purpose Vehicle or SPV	a special purpose vehicle set up as a distinct legal entity for a specific purpose, such as the delivery of BNG – see paragraph 5.7
TDC	technical details consent whereby the detailed development proposals are assessed following a grant of permission in principle
Transitional Provisions Regulations	Environment Act 2021 (Commencement No. 8 and Transitional Provisions) Regulations 2024
Unilateral Undertaking	a Unilateral Undertaking under Section 106 of the 1990 Act
Urban Greening Factor	The Urban Greening Factor for England published by Natural England on 24 January 2023 https://publications.naturalengland.org.uk/publication/5846537451339776 - see paragraph 2.20.2

APPENDIX A - OPERATIONAL HABITAT BANKS

1.1 Registered Habitat Banks

Name	Parties involved	Offering	Model
	Isle of Wight Council (LPA)	37.02 ha – grassland, heathland and shrub, hedgerow	Unknown
Duxford Old River Floodplain Restoration Project & Habitat Bank	Vale of White Horse District Council (LPA) Berkshire Buckinghamshire and Oxfordshire Wildlife Trust (landowner) Finance Earth (financial advisors) Bidwells (land agents) Trust for Oxfordshire's Environment (broker)	32.23 ha – grassland, woodland and forest, heathland and shrub	Wildlife Trust – s106 Agreement
Duryard Valley Park habitat Bank	Exeter City Council (LPA) Devon County Council Bio Gains Limited	3.2 ha – grassland, heathland and shrub, hedgerow	Unknown
Wiston Estate	South Downs National Park Authority (LPA) Wiston Estate (landowner) Bidwells (land agents)	31.79 ha – grassland, heathland and shrub, woodland and forest	Private landowner – s106 Agreement

	South Cambridgeshire (LPA)	66.89ha	Conservation Covenant
	RSK Biocensus Limited (Responsible Body) Mid Sussex District Council (LPA area)	39.84ha	Conservation Covenant
Witchampton, Wimbourne	RSK Biocensus Limited (Responsible Body)	35.87ha	Conservation Covenant
Bingfield, Newcastle upon Tyne	RSK Biocensus Limited (Responsible Body)	19.97ha	Conservation Covenant
Wild Cobham	Elmbridge Council (LPA)	15.15ha	Section 106 Agreement
Minting, Horncastle	RSK Biocensus Limited (Responsible Body)	18.75ha	Conservation Covenant
	East Cambridgeshire Council (1) Hundred Foot Holdings (2)	21.12ha	Section 106 Agreement
Puddington, Tiverton	Mid Devon Council (LPA)	10.26ha	Unknown
Martley. Worcester	RSK Biocensus Limited (Responsible Body)	17.67ha	Conservation Covenant
Chipping Norton	RSK Biocensus Limited (Responsible Body)	33.25ha	Conservation Covenant
Heighington, Darlington	RSK Biocensus Limited (Responsible Body)	19.86ha	Conservation Covenant

Yale Fold Farm	RSK Biocensus Limited (Responsible Body)	16.3ha	Conservation Covenant
Heacham, Kings Lynn	RSK Biocensus Limited (Responsible Body)	19.51ha	Conservation Covenant
Wistow, Leicester	RSK Biocensus Limited (Responsible Body)	16.52ha	Conservation Covenant
Prospect Hill	Northumberland Council (LPA)	5.25ha	Section 106 Agreement
Boothby Wildland	South Kesteven Council (LPA)	64.6ha	Section 106 Agreement
Milton Keynes	RSK Biocensus Limited (Responsible Body)	38ha	Conservation Covenant
Belvidere Road, Exeter	Exeter Council (LPA)	3.2ha	Section 106 Agreement
Higher Ayshford Farm, Tiverton	Mid Devon Council (LPA)	49.9ha	Section 106 Agreement
	South Downs National Park Authority (LPA)	18.77ha	Section 106 Agreement
	South Norfolk Council (LPA)	25.15ha	Section 106 Agreement
	RSK Biocensus Limited (Responsible Body)	21.01ha	Conservation Covenant

Yen Hall	South Cambridgeshire Council (LPA)	39.74ha	Section 106 Agreement
Wild Tees	Harry Ferguson Holdings Limited (Responsible Body)	32.55ha	Conservation Covenant
	RSK Biocensus Limited (Responsible Body)	17.47ha	Conservation Covenant
Fleam Dyke	South Cambridgeshire Council (LPA)	3.06ha	Section 106 Agreement
Towersey Solar Farm	South Oxfordshire Council (LPA)	16.65ha	Section 106 Agreement
Horwich, Bolton	RSK Biocensus Limited (Responsible Body)	33.23ha	Conservation Covenant
Fleam Dyke	South Cambridgeshire Council (LPA)	7.59ha	Section 106 Agreement
	RSK Biocensus Limited (Responsible Body)	15.74ha	Conservation Covenant
	South Downs National Park Authority (LPA)	23.82 ha – grassland, individual trees, woodland and forest, heathland and shrub	Unknown
Lopemede Farm	Buckinghamshire Council (LPA) River Thame Conservation Trust Trust for Oxfordshire's Environment	27.24 ha – heathland and shrub, grassland	Private landowner

	Eddie Rixon (landowner)		
Lower Valley Farm	South Cambridgeshire District Council (LPA) Cambridgeshire County Council (landowner) Bidwells (land agents)	66.89 ha – woodland and forest, grassland, heathland and shrub, hedgerow	Local Authority landowner
Ludgershall	Buckinghamshire Council (LPA) Berkshire, Buckinghamshire & Oxfordshire Wildlife Trust (landowner)	19.74 - grassland	Wildlife Trust – s106 Agreement
Wild Whittington	Chesterfield Borough Council	24.19 ha – grassland, Woodland and forest, heathland and shrub	Section 106 Agreement

1.2 Other Advertised Habitat Banks

The Environment Bank advertises the following available Habitat Banks on its website, but they are not registered with Natural England:

Name	**Local Planning Authority**	**Offering**
Heighington Habitat Bank	Darlington Borough Council (LPA)	Pond and other neutral grassland
Bingfield Habitat Bank	Northumberland County Council	Mixed shrub, lowland meadows, ponds
Horwich Habitat Bank	Bolton Metropolitan Borough Council	Ditches, mixed shrub, ponds, grassland
Hoscar Habitat Bank	West Lancashire Borough Council	Woodland, meadows, grassland

Newhey Habitat Bank	Rochdale Metropolitan Borough Council	Trees, mixed shrub, meadows, grassland, fens, ponds
Shaw Habitat Bank	Oldham Metropolitan Borough Council	Trees, meadows, ponds
Witby Habitat Bank	North Yorkshire Council	Scrub, meadows, ponds
Bolsterstone Habitat Bank	Sheffield City Council	Scrub, meadows, ponds, woodland
Ripon Habitat Bank	North Yorkshire Council	Scrub, meadows, ponds, grassland, rivers and streams
Harrogate Habitat Bank	North Yorkshire Council	Trees, scrub, hedgerow, meadows, ponds, grassland, woodland
Minting Habitat Bank	East Lindsey District Council	Scrub, ponds, grassland, woodland
Kilby Habitat Bank	Blaby District Council	Meadows, ponds
Cornwell Habitat Bank	West Oxfordshire District Council	Scrub, meadows, ponds, grassland, hedgerow, floodplain
Martley Habitat Bank	Malvern District Council	Scrub, meadows, orchard, pond, grassland, hedgerow
Ludlow Habitat Bank	Shropshire Council	Scrub, meadows, ponds, grassland, woodland
Winnington Habitat Bank	Shropshire Council	Scrub, meadow, grassland, woodland
Heacham Habitat Bank	Borough Council of Kings Lynn and West Norfolk	Scrub, meadows, grassland, ponds, hedgerow, woodland
Blackboys Habitat Bank	Wealden District Council	Scrub, meadows, grassland, ponds, woodland
Emerton Habitat Bank	Milton Keynes City Council	Scrub, meadows, grassland, hedgerow
Ardingly Habitat Bank	Mid Sussex District Council	Hedgerow, scrub, meadows, grassland, ponds, woodland
Chippenham Habitat Bank	Wiltshire Council	Culvert, ditches, scrub, meadows, grassland, ponds, rivers and streams, woodland, hedgerow

Witchampton Habitat Bank	Dorset Council	Ditches, scrub, meadows, grassland, rivers and streams, hedgerow, floodplain
Puddington Habitat Bank	Mid Devon District Council	Scrub, grassland

Other private companies, such as the Environment Bank, Habitat Legacy, Small Habitats Company and Biofarm, and some landowners (e.g. Belmont Estate) are also advertising BNG Units for sale.

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