

EXPLANATORY MEMORANDUM TO
THE BIODIVERSITY GAIN (TOWN AND COUNTRY PLANNING)
(CONSEQUENTIAL AMENDMENTS) REGULATIONS 2024

2024 No. 49

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Levelling Up, Housing and Communities (DLUHC) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

- 2.1 These Regulations make amendments to the Town and Country Planning Act 1990 (“the 1990 Act”) that are consequential on provisions inserted by the Environment Act 2021 and regulations under that Act in respect of biodiversity net gain. They provide rules for determining the local planning authority which is responsible for the approval of a biodiversity gain plan. They set out circumstances when an earlier biodiversity gain plan is to be regarded as approved in the case of permission for development where the onsite habitat is irreplaceable habitat and they make provision relating to appeals in relation to biodiversity gain plan determinations.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.
- 4.2 The territorial application of this instrument (that is where the instrument produces a practical effect) is England, because the biodiversity gain regime introduced by the Environment Act 2021 relates only to planning permission for the development of land in England.

5. European Convention on Human Rights

- 5.1 Minister Lee Rowley, at the Department for Levelling Up, Housing and Communities, has made the following statement regarding Human Rights:

“In my view the provisions of The Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2023 are compatible with the Convention rights.”

6. Legislative Context

- 6.1 These Regulations form part of the implementation of mandatory biodiversity net gain (BNG) introduced by sections 98 to 101 of, and Schedule 14 to, the Environment Act 2021.

- 6.2 Schedule 14 to that Act inserts new Schedule 7A in the 1990 Act (“Schedule 7A”). Schedule 7A has the effect that (with some exceptions) every grant of planning permission in England is deemed to have been granted subject to a condition that development may not begin until a biodiversity gain plan, with certain specified content, has been submitted to and approved by the planning authority. A biodiversity gain plan may only be approved if (among other things) the “biodiversity gain objective” is met in relation to the development. Paragraph 2 of Schedule 7A provides that this objective is met if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of habitat on the land to which the planning permission relates by at least 10%.
- 6.3 Section 12 of Schedule 7A has the effect that ‘planning authority’ for the purpose of the Schedule means the local planning authority except in the case of permission granted by the Secretary of State, by a person determining an appeal or by the Mayor of London where permission is granted by Mayoral development order (the overarching framework for Mayoral development orders has not been commenced).
- 6.4 Part 1 and Schedule 1 of the 1990 Act allocate functions under the Act between different local authorities and other bodies such as the Broads Authority. For example, in non-metropolitan areas the functions of the local planning authority are shared between county councils and district councils. Part 1 and Schedule 1 make detailed provision for how the functions are exercised between local planning authorities. Bodies may be established under other Acts and have functions in place of the local planning authority for an area specified in an order. For example, where an order is made under section 149(1) of the Local Government, Planning and Land Act 1980, the urban development corporation specified in the order is the local planning authority for a specified area for specified purposes in place of any authority which would otherwise be the local planning authority. Part 2 of these Regulations makes provision for which local planning authority is the local planning authority for the purpose of paragraph 12 of Schedule 7A.
- 6.5 In particular, regulation 6 inserts a new Schedule 1A to the 1990 Act which creates rules for establishing the local planning authority in particular cases.
- 6.6 Paragraphs 12D to 12G of Schedule 1A set out rules in the case of permission granted following the making of an application for permission which has been the subject of a Direction under section 2A of the 1990 Act. Section 2A is a power for the Mayor of London to direct that he is to be the local planning authority for the purpose of determining an application for planning permission of potential strategic importance which has been made to a local planning authority. The Mayor of London may also direct that he is to be the local planning authority where an application has been made to the Secretary of State under section 62A of the 1990 Act instead of to a local planning authority as a result of a designation made by the Secretary of State for the purpose of section 62A. The Mayor of London’s powers in section 2A can also be conferred on a combined authority which has been established under section 103 of the Local Democracy, Economic Development and Construction Act 2009 using the powers in section 105A of that Act.
- 6.7 Part 3 of these Regulations amends section 73 of the 1990 Act. Section 73 gives an express power to apply for planning permission for the development of land without complying with conditions attached to an earlier permission. A successful application will result in a new grant of permission which is deemed to have been granted subject to the condition that development pursuant to that permission may not commence

unless a biodiversity gain plan has been approved. Paragraph 3(5) of Schedule 14 to the Environment Act 2021 amended section 73 to provide that nothing in section 73 authorises the disapplication of the biodiversity gain condition. Provision was also made to the effect that, if the conditions subject to which permission is granted under section 73 do not affect the post-development value of the onsite habitat as specified in a biodiversity gain plan approved in relation to the earlier permission, that earlier plan is regarded as approved for the purpose of the new section 73 permission. There are powers in paragraph 18 of Schedule 7A to modify or exclude the application of that Part of Schedule 7A in relation to any development for which planning permission is granted where the onsite habitat is “irreplaceable habitat” as defined in regulations made under that paragraph. The regulations will make provision requiring, in relation to any such development the making of arrangements for the purpose of minimising the adverse effect on the biodiversity of onsite habitat. Regulation 7 of these regulations further amends section 73 so that an earlier plan is only to be regarded as approved if the conditions subject to which the new section 73 permission is granted do not change the effect of the development on onsite habitat which is “irreplaceable habitat”.

- 6.8 Part 4 of these Regulations amends section 78 of the 1990 Act. Section 78 makes provision for appeals in respect of decisions made by local planning authorities, including decisions to refuse to agree matters required by a condition and appeals in respect of failure to take such decisions. The amendment inserts a reference to the regulations that will contain the time period within which an appeal to the Secretary of State may be made in the absence of a determination whether to approve a biodiversity gain plan. Appeals under section 78 are determined by inspectors appointed by the Secretary of State or by the Secretary of State. Section 288 of the 1990 Act makes provision in respect of statutory review in the High Court of the actions listed in section 284(3) of the Act which include decisions on an appeal under s78. Regulation 9 of these Regulations adds to the list in section 284(3) any determination by the Secretary of State whether to approve a biodiversity gain plan under Schedule 7A.

7. Policy background

What is being done and why?

- 7.1 The government has committed to leaving the environment in a better state than that in which we found it. As explained in paragraphs 6.1 and 6.2 the Environment Act 2021 introduces mandatory biodiversity net gain into the existing planning regime under the Town and Country Planning Act 1990. This will have the effect of requiring new development for which planning permission is granted in England to deliver a 10% net gain in biodiversity, unless exempt.

Rules for determining which local planning authority is responsible for approving a biodiversity gain plan:

- 7.2 **General Rule:** The general rule is that the local planning authority which grants planning permission, or which could have granted the planning permission if it had not been granted by the Secretary of State or an inspector, will be the planning authority.
- 7.3 **Cases Involving Directions under section 2A of the 1990 Act made by the Mayor of London:** As paragraph 7.6 explains, an application for permission may be “called

in” for determination by the Mayor of London under section 2A of the 1990 Act. If the Mayor of London grants permission, the local planning authority is the Mayor of London unless he determines that the responsibility should fall to the local planning authority to which the application for permission was made or would have been made had it not been made to the Secretary of State under section 62A. If a “called in” application is ultimately determined and permission granted by the Secretary of State or an inspector, the person determining the application may decide whether the local planning authority is the Mayor of London or the local planning authority to which the application for permission was made or would have been made had it not been made to the Secretary of State under section 62A.

7.4 **Cases Involving Directions under section 2A of the 1990 Act made by Combined Authorities:** In these cases the local planning authority is the local planning authority to which the application for permission was made or would have been made had it not been made to the Secretary of State under section 62A unless an order has been made under section 105A of the Local Democracy, Economic Development and Construction Act 2009 providing for the combined authority to exercise the functions of the local planning authority for the purpose of Schedule 7A.

7.5 Cases Involving Orders conferring local planning authority functions on bodies such as Mayoral Development Corporations and Urban Development Corporations: if an Order provides for the local planning authority for the purposes of Schedule 7A that authority will be the local planning authority for the purposes of Schedule 7A except where the rules for applications which have been the subject of a Direction under section 2A apply.

7.6 **Irreplaceable Habitats:** As explained in paragraph 6.7 there are circumstances when an earlier approved plan is to be regarded as approved for the purpose of permission granted under section 73 of the 1990 Act. The provision we have made ensures that an earlier approved plan cannot be regarded as approved unless the conditions subject to which the s73 permission is granted do not change the effect of the development on onsite habitat which is irreplaceable habitat. This is to make sure suitable arrangements are made in respect of irreplaceable habitat.

7.7 **Appeals:** Regulation 8 makes provision for the time limit within which an appeal must be brought in respect of local planning authority decisions to refuse to approve a biodiversity gain plan or failure to determine whether to approve a plan. Regulation 9 makes provision so that decisions made by the Secretary of State and inspectors in respect of plans are subject to statutory review in the High Court consistent with other planning decisions.

8. **European Union Withdrawal and Future Relationship**

8.1 This instrument does not relate to withdrawal from the European Union and does not trigger the statement requirements under the European Union (Withdrawal) Act.

9. **Consolidation**

9.1 Not applicable because these Regulations do not amend any other instrument.

10. **Consultation outcome**

10.1 A consultation on biodiversity net gain regulations and implementation was launched in January 2022 and ran for 12 weeks. It was supported by a consultation document,

market analysis study, impact assessment for nationally significant infrastructure projects, and a report detailing results of an economic appraisal for major infrastructure projects. A total of 590 responses were received during the consultation period.

- 10.2 The Department for the Environment, Food and Rural Affairs (“Defra”) has engaged with industry representatives and stakeholders. Defra held a series of stakeholder workshops in February 2022. This provided Defra with useful, in-depth feedback prior to the consultation closing. Attendees of the stakeholder workshops included local planning authorities, non-governmental organisations, developers, consultancies, professional institutes, academics and wider industry.
- 10.3 A consultation response was published on 21 February 2023 that aimed to summarise current policy positions and report on responses.

11. Guidance

- 11.1 Defra has published guidance on Biodiversity Net Gain in 2023 on <https://www.gov.uk/government/collections/biodiversity-net-gain>. The Department for Levelling Up, Housing and Communities has published planning practice guidance . Guidance is available at: <https://www.gov.uk/government/collections/planning-practice-guidance>.

12. Impact

- 12.1 There is no significant, impact on business, charities or voluntary bodies.
- 12.2 There is no significant, impact on the public sector.
- 12.3 An Impact Assessment has not been prepared for this instrument because impacts fall below the threshold for triggering an impact assessment. These regulations make provision which is consequential on the provision already made by the Environment Act 2021, for which an impact assessment was prepared. The Impact Assessment undertaken previously which considered the impact of biodiversity net gain is available at <https://www.gov.uk/government/consultations/biodiversity-net-gain-updating-planning-requirements>.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 The basis for the final decision on what action to take to assist small businesses is that any perceived burden on small businesses is not directly impacted by these consequential provisions compared to the original decision to create statutory biodiversity net gain in the Environment Act 2021. The Impact Assessment undertaken previously considered the impact of biodiversity net gain as a whole and is provided with this instrument.

14. Monitoring & review

- 14.1 There are no plans to monitor or review this legislation as these are amendments to primary legislation.

15. Contact

- 15.1 Andrew Short at the Department for Levelling Up, Housing and Communities Email: Andrew.short@levellingup.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Lucy Hargreaves, Deputy Director for Planning-Development Management at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Minister Lee Rowley at the Department for Levelling Up, Housing and Communities can confirm that this Explanatory Memorandum meets the required standard.