An Open Letter to The Rt Hon Michael Gove, The Rt Hon George Eustice, and Tony Juniper: Ensuring that mandatory Biodiversity Net Gain fulfills its potential for nature recovery

The new mandatory requirement for developers to deliver a Net Gain in biodiversity outlined in the Environment Act has the potential to be a historic step forward in English nature conservation. However, as researchers specialising in biodiversity conservation, we believe the current proposals contain important gaps which will lead to the policy failing to deliver a net gain in biodiversity. Most importantly, the government's proposed governance, monitoring and enforcement mechanisms are unsuited to the job, and these must urgently be improved if development is to generate long-term and locally meaningful improvements in biodiversity.

Over many decades, England's legal and planning systems have given consent for development to proceed whilst causing biodiversity loss, which has contributed towards the declining state of habitats and species in England. Mandatory Net Gain requires that developers mitigate the impacts of their projects on biodiversity as much as possible, and compensate for unavoidable impacts through generating an minimum 10% uplift in biodiversity units through habitat restoration, creation or enhancement. The achievement of Biodiversity Net Gain is based on the fundamental assumption that the biodiversity units promised by developers, or third-party providers, materialise in reality. **If this assumption is false, then development will continue to result in the loss of English nature.**

With this in mind, we here highlight three key issues which need to be addressed. These are:

1) Credible mechanisms for the Monitoring and Enforcement of biodiversity gains are required to ensure the delivery of mandatory Net Gains
2) The current under-resourcing of local authorities and the deficit of skilled and experienced staff working on BNG - leading to limited oversight of biodiversity gain designs and implementation activities - casts doubt on whether biodiversity gains will actually be delivered
3) The likely dominance of on-site biodiversity gains means opportunities for ambitious, coordinated nature recovery are not being realised

The good news is there is a sound understanding of how to address these issues, enabling BNG to help in delivering the improvements to England's nature necessary to meet the government's nature recovery targets. We suggest some mechanisms for addressing these issues:

To improve monitoring and enforcement:

- Formally review enforcement mechanisms for ensuring the delivery of promised biodiversity gains, encourage local authorities to penalise developers for non-compliance with their promised biodiversity gains, and provide comprehensive, practical and on-going support for local authorities on how to monitor and enforce planning conditions, including those associated with biodiversity net gain (a full package of dedicated support measures is required; one-off support or additional written guidance is not sufficient),

- Provide dedicated support to apply these enforcement mechanisms at a lower threshold than the currently unrealistically-high 'serious harm to a local public amenity', and make this new threshold clear and unambiguous.

To improve oversight of delivery:

- Place on-site biodiversity gains on the Net Gain register (we understand that this is already being considered and wish to highlight the critical importance of this recommendation),
- Do not permit developers to sell 'excess' biodiversity units promised on-site until ecological data from real-world developments shows strong evidence that these promises are being delivered in reality and developers are realistically delivering these units,
- Develop a rigorous, funded and independent approach for monitoring delivery of on-site as well as off-site biodiversity gains (e.g. based on randomised compliance checks including by public ecologists), to prevent problems arising from reliance on self-reported assessments alone,
- Make adoption of the guidance provided in the industry's best practice guide and best practice Standards such as the British Standard 8683: 2021 a condition of planning consent for developments, and embed this guidance into LPA guidance on BNG
- Make a condition of the development's consent that funding is ring-fenced to deliver BNG for the full duration of the BNG requirement.

To improve capacity to deliver Biodiversity Net Gain:

- Deliver on the additional capacity required to deliver BNG successfully through funding skilled and experienced staff with ecological expertise at both the higher-tier and lower-tier local authority levels.

To ensure that opportunities for nature recovery are realised:

- Identify the actions needed for alignment of, and consistency between, the Planning Bill, the Environment Act and the Agriculture Act, so that changes to planning law do not undermine biodiversity net gain and the other new approaches to nature recovery,
- Strengthen the status in planning law of Local Nature Recovery Strategies and link the delivery of Biodiversity Net Gain more explicitly to them, especially for Nationally Significant Infrastructure Projects (NSIPs),
- Use best practice guidance for appropriate and inclusive stakeholder engagement in the design and delivery of BNG,
- Align BNG with existing requirements within planning policies on people's wellbeing so that delivering BNG does not negatively affect people's wellbeing, and where possible and appropriate, enhances wellbeing,
- Provide clear guidance about requirements, thresholds and rules for provision of on-site units (e.g. the minimum area of habitat patches required before developers can claim they are high quality), and on situations in which off-site units are more appropriate in generating long-term and locally meaningful gains for biodiversity.
- Ensure that incentives are not tipped towards on-site net gain delivery, and that as a minimum the same level of monitoring and enforcement applies for on-site gains as for off-site gains.

We now provide detail on our concerns related to each of the three key issues.

Credible standards and mechanisms for the Monitoring and Enforcement of biodiversity gains are required to ensure promises by developers are delivered upon

The proposed system allows developers to generate losses in biodiversity today with a consent requirement to deliver higher quality biodiversity at some point in the future (which is based on a BNG design, metric and management plan). Whilst this is not necessarily a problem (we want to encourage the creation and restoration of habitats that may take some time to become established like woodlands), if future delivery of Net Gain fails, then developments will fail to compensate for the damage they cause. One would therefore expect that the Biodiversity Net Gain policy proposals would include a watertight framework for monitoring the progress of habitats towards their ecological targets, and for providing councils with the mandate and capacity to take enforcement action against developers if the consent requirements on BNG are not delivered. However this is not yet the case.

The government has proposed some measures for monitoring the biodiversity gains provided by third-party providers such as habitat banks, and a Net Gain register. These have the potential to be effective. However, currently, providers are being asked to self-report the quality of their BNG delivery, despite lessons from compensation systems all over the world suggesting that third-party oversight of these reported gains is essential if they are to achieve biodiversity gains and meet the requisite standards. For example, in the USA, after recognising that developer-led and third-party wetland offsets were being delivered to different standards (developer-led were consistently lower quality), legislation was adopted in 2008 for equal standards for both on-site and off-site mitigation.

Additionally, recent academic work has demonstrated that, in early-adopter councils, the vast majority of the biodiversity gains delivered under Net Gain-type policies are being delivered via habitats within the development footprint itself. While the exact on-site off-site proportion of net gain delivery will change as the off-site biodiversity unit market matures, there is currently no credible system to monitor and enforce delivery of 'on-site' gains. The government proposes that these can be monitored and enforced by local authorities through the existing planning enforcement system. But the government's own guidance to local authorities advises them not to take enforcement action unless the violation of the relevant planning condition constitutes a 'serious harm to a local public amenity'. Under the current system, it is highly unlikely that a developer's failure to deliver a habitat of a given quality that was consented when the development was approved years ago will trigger this threshold – **leaving these biodiversity gains unenforceable**.

In fact, the ongoing consultation on Net Gain has gone one step further, and opened the door to allowing developers to sell biodiversity units from their own developments as 'offsets' to other developments. This creates incentives to overestimate how many biodiversity units are being created on-site, as the 'excess' has the potential to be sold on and generate additional revenue. We recognise the potential of this approach to encourage developers owning large expanses of land to manage that land for biodiversity gain. However, we highlight the critical importance of robust evidence that these excess units are actually being delivered, and are excess to the original legal requirement to deliver BNG. Watertight monitoring and enforcement mechanisms are clearly required to ensure this option does not lead to unintended negative consequences.

Under-resourcing of local authorities, and limited oversight, casts doubt on delivery of biodiversity gains

Local authorities are chronically under-resourced with respect to ecological capacity – a recent BBC investigation found that just 20% of local authorities have some form of in-house ecological expertise of the kind required to oversee BNG.

We know that, in the absence of quality governance and credible enforcement mechanisms, a large proportion of the biodiversity units promised by developers is likely to fail. An academic study which surveyed developments where habitat enhancements were proposed at the application stage found that most of these did not meet the ecological criteria that had been agreed at the consent stage years earlier.

Robust biodiversity compensation systems tend to add an administrative fee to the price of biodiversity units to cover the cost of monitoring and enforcement. A mechanism such as this could be used to resource governance and oversight of BNG implementation, using the new funding released by the market in biodiversity units which is envisaged in the Net Gain consultation.

Likely dominance of on-site biodiversity gains could mean lost opportunities for ambitious, coordinated nature recovery

Current data suggests most biodiversity gains are being delivered 'on-site', although this may change as the off-site biodiversity market matures. However, the greatest biodiversity gains are likely to come from investing in areas of strategic biodiversity importance throughout the landscape, which may not be within the development footprint. A dominance of 'on-site' gains means that Net Gain actions may often be piecemeal and localised to the specific development sites (which are chosen based on considerations other than optimising biodiversity recovery). Such Net Gain will not contribute to ambitious nature recovery plans under the 25 year Environment Plan, which requires natural areas to be "more, better, and joined up". If off-site actions represented the majority of offsets (rather than the very small minority) all sorts of opportunities for synergy with wider nature restoration efforts could be catalysed, including using offsets to support the connectedness of conservation areas and to contribute to the Local Nature Recovery Networks.

On a practical note, it is critical that clearer and firmer definitions are required for what "on site" and "off site" tabs represent in the Biodiversity Metric published by Natural England. This greatly affects the way that the Metric calculates the minimum 10% net gain requirement and is currently a source of confusion and inconsistency in application of the Metric.

Robust demand for off-site units could incentivise the creation and restoration of natural areas to generate marketable biodiversity units. This could also contribute to local wellbeing by enabling suitable and appropriate access for people to high-quality natural areas. Participatory approaches with local nature groups will help to achieve the best outcome, contributing to Local Nature Recovery Strategies and allowing for flexible siting and portfolios of nature conservation actions that respond to local needs.

England requires a regulatory system that enables, encourages and incentivises the delivery of BNG that: firstly, meets the BNG requirements for specific developments (ie with a clear reference scenario and like-for-like/better good practice); and secondly, is designed within a landscape-level context so

that development-specific BNG can contribute towards regional and strategic goals for nature recovery. In practice, this is about joining the dots: between BNG policies and all other policies that influence and are related to the natural environment; between BNG policies and policies on health and wellbeing; and at the local level between development-specific BNG designs and Local Nature Recovery Networks (or the equivalent strategic plan for nature conservation and recovery).

Conclusion

BNG has the potential to be a key part of England's strategy for nature recovery and contribute to achieving the ambitions in the Environment Act to halt wildlife declines by 2030. However, clear problems with the suggested governance and delivery mechanisms have been identified which open the door to negative outcomes. These problems must be addressed through clearer rules, guidance, enforcement, and capacity for BNG to achieve its purpose. Only then will the government's ambition for development to leave nature better off than before be realised.

Signed,

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