



Six Pump Court

## Dealing with nutrient neutrality and biodiversity net gain - in 2023

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Six Pump Court  
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## BACKGROUND

- These topics are live issues, now
- e.g. at a recent Select Committee appearance, the HBF described the main challenges that the housebuilding industry has at the moment with environmental regulation as:
  - The need for developers to achieve nutrient neutrality, water neutrality and the spread of other factors such as recreational impact zones;
  - In addition, following the Environment Act of 2021, there is the requirement which will come into play in November 2023 of biodiversity net gain.

(Built Environment Committee, House of Lords, 7 March 2023)



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## NUTRIENT NEUTRALITY

- This whole issue is underpinned by the Habitat Regulations, and applies where European Protected Sites are in 'unfavourable condition'.
- Nutrients – especially nitrogen and phosphorus - are a significant problem for freshwater habitats.
- Planning Authorities must assess the likely impact (using a Habitat Regs Assessment), and can only grant permission if satisfied that there will not be an adverse effect.
- The concern about specific protected Sites has become river catchment wide
  - 27 water catchments, and 74 LPAs, in England;
  - Similar legal issues for catchments in Wales, Scotland and NI.



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## NUTRIENT NEUTRALITY

- It's not the new housing development, per se, but the expected increase in nutrients in the Outfall from STWs.
  - Other development not involving new overnight accommodation is generally not included, e.g. offices, retail, schools.
- The advice from Natural England has led to a far tougher standard than might have been expected
  - Precautionary approach taken, and seeks certainty, so:
  - Nutrient calculator has 20% buffer added;
  - Assumed size of households & that are all new to the area.
- It has led to a moratorium on new housebuilding, despite this representing 4% of the impact on the protected sites



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## NUTRIENT NEUTRALITY

- NE's advice has survived court challenge,
  - *Wyatt v Fareham Borough Council [2022] EWCA Civ 983*
  - only limited grounds on which a court will overrule a policy.
- N.B. existing permissions are at risk: HRA is required at all stages of pp – outline, Reserved Matters and discharge of conditions.
  - Onsite, or ad hoc solutions, are happening as a result.
- Government reaction –
  - LURB amendment, deeming that STWs meet the standard in 2030;
  - Pilot project for sites providing 'nutrient credits' (Teesside).



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## BIODIVERSITY NET GAIN

- BNG is arising in applications and appeals already:
  - There are BNG provisions in some local plans, some even with specific % expectation;
  - It is also stated in NPPF, without any particular % on the net gain – e.g. para 174: policies and decisions should contribute to and enhance the natural and local environment by: [...]
    - “d. minimising impacts on and providing net gains for biodiversity, ...”
- Scotland talks about 'enhancement of biodiversity';
- Wales talks about 'Net Benefit for Biodiversity' and 'resilience of ecosystems' (& March 2023 consultation);
- but this BNG only carries the weight of policy.



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## BIODIVERSITY NET GAIN

- Mandatory BNG introduced by the Environment Act 2021,
- but the legal regime is not yet in force (announced that it will be in force in Nov. 2023)
  - The 2021 Act amends the TCPA 1990, new s.90A & Sched 7A,
  - Still awaiting secondary legislation and guidance.
- BNG will apply to all new development in England, but
  - Will be subject to exemptions (eg. householder development), but not - it seems – brownfield;
  - Does not apply to permitted development (Sched 7A, Para 17).
- Ensures measurable net gains for biodiversity, secured for 30+ years.



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## BIODIVERSITY NET GAIN

- This becomes a legal requirement – not some general aim
- TCPA 1990, new Sched 7A, para 13 (1): “Every planning permission granted for the development of land in England shall be deemed to have been granted subject to the condition in sub-paragraph (2).”
  - “(2) The condition is that the development may not be begun unless—
  - (a) a biodiversity gain plan has been submitted to the planning authority (see paragraph 14), and
  - (b) the planning authority has approved the plan (see paragraph 15).”
- In order to approve the plan, the plan has to contain specified information (para 14), and the approval by the LPA is dependent on that information being there, that it is accurate, and:
  - “that the biodiversity gain objective is met.”



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## BIODIVERSITY GAIN OBJECTIVE

- Para 2 (1), of new Sched 7A of the TCPA 1990:
- “The biodiversity gain objective is met in relation to development for which planning permission is granted if the biodiversity value attributable to the development exceeds the pre-development biodiversity value of the onsite habitat by at least the relevant percentage.”
- (2) The biodiversity value attributable to the development is the total of—
  - (a) the post-development biodiversity value of the onsite habitat,
  - (b) the biodiversity value, in relation to the development, of any registered offsite biodiversity gain allocated to the development, and
  - (c) the biodiversity value of any biodiversity credits purchased for the development.
- (3) The relevant percentage is 10%.



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## “BIODIVERSITY METRIC”

- Sched 7A, Para 3 “**References to the biodiversity value of any habitat or habitat enhancement are to its value as calculated in accordance with the biodiversity metric.**”
- Para 4 (1) “The biodiversity metric is a document for measuring, for the purposes of this Schedule, the biodiversity value or relative biodiversity value of habitat or habitat enhancement.
  - (2) The biodiversity metric is to be produced and published by the Secretary of State.
  - ...
  - (5) The Secretary of State may by regulations make transitional provision in relation to the revision and republication of the biodiversity metric.
  - (6) The Secretary of State must lay the biodiversity metric, and any revised biodiversity metric, before Parliament.”



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## BNG ISSUES

- We now have the Biodiversity Metric version 4.0 from Defra, and a Small Site Biodiversity Metric (March 2023)
  - Complex excel spreadsheet, inputs based on site surveys and competent ecologists' judgments
- Metric uses habitats as a proxy for biodiversity value & measures and expresses it in terms of "biodiversity units":
  - By area, hedgerow and watercourse units.
- The baseline is the date of the planning application
  - so uncertainties & risks do produce a reduced BU value
- The Biodiversity Metric does not address
  - impacts on species, recognise the significance of site designations, or take account of indirect impacts, cumulative impacts or in-combination impacts.



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## DELIVERY OF BNG ?

- The policy preference remains for on-site provision
  - Calculation for offsite BNG units reduces their BU value.
- Offsite: We can use section 106 agreements to link a site to offsite provision (& secure for 30 yrs), now, but
  - the wider "conservation covenant" provisions in the 2021 Act are not yet in force.
  - BNG Credits scheme, not yet available.
  - National register for net gain delivery sites, not yet available.
- N.B. This BNG is additional to any existing legal or policy requirements.



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## LNRS

- Local Nature Recovery Strategies to cover all of England under the Environment Act ss. 104-108.
  - Defra appoints ‘responsible authorities’ to prepare around 50 LNRSs covering the whole of England, with no gaps or overlaps;
  - SoS will publish a habitat map for England (s.107).
- The LNRS will
  - State the biodiversity priorities for the area;
  - Contain a local habitat map;
  - Identify opportunities for recovering or enhancing biodiversity. (s.106)
- local authorities have a responsibility, including through their planning functions, to have regard to the contents of these strategies.
- Regrettably – again - more guidance on this duty is promised.



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## CONTACT DETAILS

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