**Consultation on Biodiversity Net Gain Regulations and Implementation**

**Response by the National Infrastructure Planning Association**

**Introduction**

The National Infrastructure Planning Association (“NIPA”) was established in November 2010 with the aim of bringing together individuals and organisations involved in the planning and authorisation of major infrastructure projects. Our principal focus is the planning and authorisation regime for nationally significant infrastructure projects (“NSIPs”) introduced by the Planning Act 2008. We provide a forum for those with an interest in the planning and authorisation of national infrastructure projects in the UK, particularly those brought forward within the framework of the Planning Act 2008.

In summary, we:

* advocate and promote an effective, accountable, efficient, fair and inclusive system for the planning and authorisation of national infrastructure projects and act as a single voice for those involved in national infrastructure planning and authorisation;
* participate in debate on the practice and the future of national infrastructure planning and act as a consultee on proposed changes to national infrastructure planning and authorisation regimes, and other relevant consultations; and
* develop, share and champion best practice, and improve knowledge, skills, understanding and engagement by providing opportunities for learning and debate about national infrastructure planning.

NIPA welcomes the Department for Environment, Food and Rural Affairs (DEFRA) Consultation on Biodiversity Net Gain Regulations and Implementation (“theConsultation”) and the opportunity to comment on the proposals to help shape developing legislation, processes and guidance.

NIPA convened a discussion on the Consultation amongst interested members who are actively engaged in a range of types of NSIP, and represented a cross-section of interests, e.g. developers, consultants, local authorities, and other stakeholders. The discussion identified potential issues and opportunities for improvement. Those issues and opportunities are set out below: first a set of overarching comments, followed by a table setting out responses to specific Consultation questions.

NIPA’s response is focused on Questions 17-27, which are specific to the NSIPs regime, but we have also provided responses to Questions 4, 10 and 11, as these are also of relevant to the NSIP-related questions.

**Section 1: Overarching Comments**

* For consistency and a level playing field, NIPA recommends that the Biodiversity Net Gain (BNG) requirements should also apply to Hybrid Bill, Transport and Works Act Order and Harbours Act Order projects. It is important that the requirements should be applied universally to ensure that all major infrastructure projects deliver BNG, and that schemes utilising different consenting routes are treated in a consistent way, and held to the same standards in terms of BNG delivery, management and maintenance.
* NIPA considers that it is important that applicants have as long as possible to prepare for implementation of the BNG regime for NSIPs in November 2025, and that Regulations, guidance, the Biodiversity Gain Statement and appropriate Biodiversity Metric(s) to be used should be consulted on and published by November 2023 at the latest, to give applicants time to build this into their schemes, noting the lead-in times for major infrastructure projects.
* NIPA recognises the benefits of applying BNG to NSIP projects, but would highlight that there is a risk that it is deployed on projects merely as a ‘box ticking exercise’, forming an additional layer of ‘mitigation’ to comply with legislative requirements, rather than leading to better outcomes that communities can genuinely benefit from. Our responses to the Consultation seek to identify opportunities to incentivise the delivery of such better outcomes.
* NIPA notes that Figure 4 refers to pre-application discussions with the Examining Authority. However, it should be noted that any such discussions would take place with the Planning Inspectorate (PINS), not the Examining Authority, which is only appointed at a later stage in the process (after submission of the DCO application) and does not participate in any form of pre-application discussions with applicants. We therefore recommend revising these references to refer to PINS instead.

**Section 2: Responses to Consultation questions**

| **Question Number** | **Question from Consultation Document** | **Response** |
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| 4 | Do you think developments which are undertaken exclusively for mandatory biodiversity gains should be exempt from the mandatory net gain requirement? | NIPA considers that developments which are undertaken exclusively for mandatory biodiversity gain purposes should themselves be exempt from the mandatory net gain requirement, including where they are undertaken to provide mandatory BNG for a NSIP under the Planning Act 2008.  NIPA considers that this is important to ensure that the creation or enhancement of off-site habitat for BNG purposes for NSIPs is not discouraged or made too costly, and to avoid over-reliance on the purchase of credits from the Secretary of State in circumstances where on-site BNG cannot be delivered. |
| 10 | Do you agree with our proposal not to exempt development within statutory designated sites for nature conservation from the biodiversity gain requirement? | NIPA agrees that this should not be exempted. |
| 11 | Do you agree with the stated proposals for development (or component parts of a development) on irreplaceable habitats, specifically: |  |
|  | 1. The exclusion of such development from the quantitative mandatory biodiversity gain objective? | NIPA considers that there are a number of practical issues to be taken into account in the context of this question:   * NIPA considers that irreplaceable habitat is just that, and therefore BNG as characterised through the Biodiversity Metric cannot apply – the habitat cannot be replaced with a 10% net gain. * It is also important to consider the risk of unintended and perverse outcomes, such as developers gravitating towards irreplaceable habitats on the basis that they are excluded from the BNG regime. * Further, it is undesirable to have a proliferation of separate and different regimes applying on top of existing requirements and the BNG regime, such as appears to be proposed in the Consultation in terms of a separate regime for irreplaceable habitat.   The proposals in the Consultation risk duplication of other policy requirements, in relation to irreplaceable habitat, and other mechanisms such as HRA.  If certain elements of development affecting irreplaceable habitat cannot be avoided, planning policy already establishes a high bar for development affecting irreplaceable habitats. Where the decision-maker uses planning judgement to seek to approve development affecting irreplaceable habitats, the net gain regime should be deemed to be acceptable by virtue of the decision-maker’s judgement and consideration of other relevant factors which may include other forms of gain or enhancement. |
|  | 1. The inclusion of a requirement to submit a version of a biodiversity gain plan for development (or component parts of a development) on irreplaceable habitats to increase proposal transparency? | See above. |
|  | 1. Where there are no negative impacts to irreplaceable habitat, to allow use of the biodiversity metric to calculate the value of enhancements of irreplaceable habitat? | See above. |
|  | 1. To use the powers in biodiversity net gain legislation to set out a definition of irreplaceable habitat, which would be supported by guidance on interpretation? | NIPA considers that it would be helpful to have a clear definition of ‘irreplaceable habitat’, supported by guidance on interpretation, for the purposes of assessing effects on this type of habitat. See our response above. |
|  | 1. provision of guidance on what constitutes irreplaceable habitat to support the formation of bespoke compensation agreements? | NIPA considers that it would be helpful to have a clear definition of ‘irreplaceable habitat’, supported by guidance on interpretation, for the purposes of assessing effects on this type of habitat. See our response above. |
| 17 | Are any targeted exemptions (other than that for irreplaceable habitat), reduced biodiversity net gain objectives, or other modified requirements necessary for the application of the biodiversity net gain requirement to NSIPs? | **Targeted exemptions**  As a general point, NIPA recommends that any exemptions are clearly defined and supported by appropriate guidance.  NIPA considers that the following exemptions should apply in the context of the application of the biodiversity net gain requirement for NSIPs:   * developments impacting habitat areas below a ‘de minimis’ (minimal) threshold – this may also be appropriate for amendments to DCOs and so we consider that in principle a de minimis threshold should apply and be proportionate in the major infrastructure context; * creation of biodiversity gain sites where these are serving NSIPs - please see our response to Question 4 in this regard; * development giving rise to temporary effects, provided that the habitat is reinstated or can be proven to be capable of natural regeneration within, for example, 5 years. NIPA considers that the Regulations or else the Biodiversity Metric should exempt development giving rise to temporary effects, such as those that arise from underground pipelines and other infrastructure, from the BNG requirements provided that the habitat is reinstated or can be proven to be capable of natural regeneration within, for example, 5 years; and * temporary works, for the duration of the temporary works, provided that the habitat is reinstated - NIPA considers that an exemption should apply for temporary works in the context of NSIPs. We consider that it would be appropriate to have an exemption relating to the maximum period of the temporary works, but on the proviso that reinstatement or natural regeneration would be undertaken or would occur, which would achieve at least equivalence (no net loss) following cessation of the temporary use. Consideration also needs to be given to subsurface development and reinstatement/ natural regeneration, and how this will be addressed in terms of temporary *vs* permanent works, and the requirements that should apply.   **Other modifications necessary for NSIPs**  Transitional arrangements  Given the long lead-in time for most NSIPs, NIPA considers it important that appropriate transition arrangements are provided, so as to ensure that projects which did not expect to be caught by the biodiversity net gain requirement, but which end up being caught by it at a later project stage, for example due to unexpected delays or later amendments to the DCO, are not disproportionately impacted or rendered undeliverable. Please see our response to Question 20.  Amendments to a DCO  NIPA considers that non-material amendments to a DCO should not trigger a requirement to deliver biodiversity net gain, because such amendments are unlikely to result in additional habitat loss over and above what has been consented in the DCO, and for which BNG provision will already have been made. Further, we consider that material amendments to a DCO should only trigger a requirement to deliver BNG relative to any additional habitat loss over and above the consented scheme, and in such cases only where the habitat loss is greater than the *de minimis* threshold suggested above.  Phasing  NIPA considers that in relation to NSIPs it is particularly important to consider the likely phased nature of such large and complex projects. By way of example, the construction of a pipeline may only require a period of 3 months for a section of pipeline to be installed and the ground reinstated, which differs markedly from a construction phase area that may be established to deliver a project construction period of 10 years, typical for new nuclear installations.  Complex phasing requirements may mean that, for instance, developers wish to undertake habitat enhancements in advance of commencing the main works (for example due to a need for species translocation). We recommend that there is clear guidance that in such cases advance habitat enhancements will be counted towards BNG for a scheme.  There might be reasons why certain habitat enhancements are not proposed to be delivered until later in the construction of a scheme, including in a later phase of development, and we recommend that Biodiversity Gain Plans can permit sufficient flexibility to enable this to be counted towards BNG, where appropriate.  NIPA considers that the approach should be explained and supported for projects requiring to take such an approach, and that this would help to avoid over-reliance on the purchase of biodiversity credits from the Secretary of State due to a lack of supply of appropriate biodiversity net gain units within a short timeframe.  Other considerations  In addition, NIPA considers that:   * consideration needs to be given in particular to linear development and multiple part development that is consented through a DCO, and whether particular provision should be made to facilitate this; * where DCO ‘associated development’ has been accounted for in terms of net gain provision, but is then amended and delivered through a replacement / slot in Town and Country Planning Act permission, it should be able to account for BNG through that original allowance, and provision should not be required to provide a net gain again, as long as the net gain contribution that has already been accounted for has been provided. In other words, the net gain that has already been provided should be capable of being relied upon; * the Regulations and any guidance (including the Biodiversity Gain Statement) should provide clarity on any differential requirements in relation to BNG applying in relation to different elements of an NSIP project, including linear and site area-based scheme elements, and marine components; and * the Biodiversity Gain Statement should provide clear requirements in terms of ongoing management, maintenance and reporting in relation to BNG. |
| 18 | Do you agree that the above approach is appropriate for setting out the biodiversity net gain requirement for NSIPs? | NIPA endorses the drafting of a single core Biodiversity Gain Statement, so as to ensure a consistent approach across all NSIPs, and enable the delivery of BNG to be effectively secured to meet a reasonable programme. This NSIPs-wide approach chimes with the BEIS Committee’s recent endorsement of NIPA’s recommendation in the Energy NPSs consultation for an ‘overarching NPS approach’ generally.  NIPA considers that it is also important that consideration is given to appropriate different or additional biodiversity net gain policy or requirements for specific types of NSIP or circumstances, and that any such policy or requirements are also published at least 2 years prior to the BNG requirements for NSIPs taking effect in November 2025.  NIPA therefore considers that, where appropriate, specific sector annexes to the core Biodiversity Gain Statement should be provided, to appropriately address sector-specific nuances. It is critical that the relevant sectors are consulted to underpin such sector-specific guidance, including consultation on the feasibility of possible percentage targets for BNG for specific sectors. This should be underpinned by appropriate benchmarking and impact assessment, as well as monitoring of BNG delivery over time, to support ongoing policy review.  NIPA does not consider that updating of individual NPSs to align with BNG policy requirements will be efficient and considers that this would be likely to hinder and delay the effective implementation of BNGs for NSIPs.  We note that the draft Water Resources Infrastructure NPS already refers to and includes certain requirements in respect of BNG. In addition, we consider that any interplay between biodiversity net gain and wider environmental net gain, such as is referred to in the draft Water Resources NPS, should be clearly explained.  The Biodiversity Gain Statement should clearly explain the interplay between it and NPSs, including whether it will be the primary policy to be applied in relation to BNG for the purposes of determining a DCO application, to the exclusion of any existing requirements in the relevant NPS. The Biodiversity Gain Statement should also be identified as a prescribed document in the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations, which then apply for the purposes of the determination of DCO applications under ss104 or 105 of the Planning Act 2008. |
| 19 | Do you consider that the November 2025 is an appropriate date from which NSIPs accepted for examination will be subject to the biodiversity net gain requirement? | NIPA considers that November 2025 is an appropriate date from which NSIPs are subject to the biodiversity net gain requirement. However, it is crucial that:   * the Regulations in relation to biodiversity net gain for NSIPs should be made at least 2 years prior to the requirements taking effect, and that clear guidance is provided to support the application of these; * the Biodiversity Gain Statement and any sector-specific annexes are published at least 2 years prior to the requirements taking effect; * there is clarity on the status of the Biodiversity Gain Statement in the DCO decision-making process; * the final Biodiversity Metric for use pursuant to the biodiversity gain statement and any sector-specific statements is published in final form at least 2 years prior to the requirements taking effect; and * appropriate guidance is prepared and published as early as possible to support relevant exemptions and the information requirements at all stages of the process, including application document requirements for acceptance.   The risk of not providing the Regulations, guidance, Biodiversity Gain Statement and finalised Biodiversity Metric at least 2 years prior to the November 2025 implementation date is that the early application of BNG on NSIP projects is likely to be characterised by excessive utilisation of credits and making use of off-site provision, rather than securing local beneficial outcomes using local BNG provision. |
| 20 | Do you agree that a project’s acceptance for examination is a suitable threshold upon which to set transition arrangements? | No. An applicant making a submission to PINs is already committed to the project definition and BNG approach at application submission. NIPA therefore considers that, at the latest, submission of a DCO application would be a more appropriate threshold for setting the transition arrangements. This is because otherwise projects would risk being in a position where they had submitted their DCO application, and the requirements could take effect between submission and examination, which would be likely to result in withdrawal of the application or in non-acceptance of the DCO application. An applicant would then have to remedy the position and consider re-submission, causing delay and additional cost. The submission date is within an applicant’s control, and so they can understand and align with this more readily than acceptance.  The earlier certainty on requirements and appropriate guidance can be provided, the better any negative effects will be mitigated.  If the Regulations, guidance, Biodiversity Gain Statement and finalised Biodiversity Metric are not provided at least 2 years prior to the November 2025 implementation date, NIPA considers that it would be necessary to provide transitional arrangements based on an earlier point in a project’s development and promotion, such as EIA scoping. NIPA notes that this is the approach that was adopted for transitional arrangements in the most recent update of the EIA Regulations for NSIPs. |
| 21 | Would you be supportive of an approach which facilitates delivery of biodiversity net gain using existing landholdings by requiring a lighter-touch registration process, whilst maintaining transparency? | Yes. NIPA considers that the portfolio approach as an option for the delivery of net gain for NSIPs could be positive, as it could allow appropriate strategies to come forward on appropriate sites within a large portfolio of sites. In some cases, this could deliver better outcomes for biodiversity, as long as it is done in such a way as to ensure that the BNG is properly accounted for and monitored, so as to ensure the provision of appropriate and genuine net gains.  NIPA is therefore supportive of an approach which facilitates delivery of BNG using existing landholdings but set within clear guidance in relation to hierarchy of preferred location, justification of approach and transparency. NIPA considers that it is not clear from the Consultation what ‘lighter touch registration’ would entail and recommends further consultation and engagement on this matter.  NIPA recommends that guidance is provided on the nature and justification of provision of BNG on existing landholdings, expressing a clear hierarchy of preference in relation to the location of BNG provision. NIPA considers that generally, in line with the mitigation hierarchy, the provision of local BNG is preferable in terms of delivering benefits to the local environment and local communities affected by the NSIP.  However, NIPA acknowledges that there will be instances where provision of local BNG may result in fractured habitats isolated within a wider environment, and that there could be benefits in aggregation of BNG provision on appropriate existing landholdings, including the potential for public access, more extensive and resilient habitats and economies of scale in management over time. Such portfolio approaches could also support wider government policies outlined in the Nature Recovery Green Paper.  In this context NIPA considers that it is important to be mindful of the purpose for which land is held by statutory undertakers, and to ensure that land which is to be used for BNG provision is suitable to endure for BNG purposes and contribute to wider nature recovery. Careful consideration should be given to whether such land can be released and managed and monitored, and accounted for, for BNG purposes.  NIPA notes that there are likely to be sector-specific considerations in relation to use of existing landholdings and recommends that the organisations mentioned, along with others, are fully engaged and consulted. |
| 22 | Do you consider that this broad ‘biodiversity gain plan’ approach would work in relation to NSIPs? | NIPA endorses the broad Biodiversity Gain Plan approach.  However, NIPA recommends that the process is not overly prescriptive in terms of how the commitments, proposals and controls are brought forward through agreed DCO mechanisms. NIPA considers that the regime should generally be looking to secure simplification of the processes overall, to ensure smooth delivery. The general suggested approach should be to secure conformity with an outline or draft proposal submitted as part of the application using agreed document tools/ processes, rather than introducing additional onerous layers of complexity to the process, noting that additional consenting and prescriptive steps that will slow down the DCO process.  NIPA considers that it is important to ensure that there is either an appropriate level of flexibility within Biodiversity Gain Plans to enable adaptive delivery within appropriate parameters, or that there is a simple process to enable amendments to be made to a biodiversity gain plan after DCO grant, so as to enable plans to be developed and adapted as more detailed design is developed, and to enable opportunities for, for example, additional cumulative benefits with other schemes to be taken advantage of, or co-benefits such as additional carbon sequestration or local community benefits to be delivered. |
| 23 | Should there be a distinction made for NSIPs between on-site habitats (which are subject to the biodiversity net gain percentage) and those habitats within the development boundary which are included solely for environmental mitigation (which could be treated as off-site enhancement areas without their own gain objective)? | Yes. NIPA considers that there should be a distinction between the on-site habitats affected by the NSIP project and dedicated mitigation areas, for the assessment of baseline and calculation of BNG requirements. This is to ensure that ‘double counting’ is not undertaken, and to link to the potential outcomes at question 21. It would be helpful for projects to have a baseline date established as soon as possible to ensure calculations and assessments are accurate, given the length of lead-in time to the preparation and submission of DCO applications.  NIPA therefore considers that for NSIPs careful consideration needs to be given to the approach to areas of land within the order limits that are intended for habitat creation or enhancement, and on which no physical built development works are to be located. In particular, careful consideration needs to be given to the development area that will be counted within the baseline for determining the level of biodiversity net gain required.  If areas of land which are intended solely for habitat creation or enhancement are included within the baseline, then the overall extent of habitat creation/enhancement required for the purposes of achieving a 10% BNG will be significantly greater than if this is not included. This could result in a disproportionate level of biodiversity net gain being required, when considered as against the biodiversity lost as a result of the development. In particular, this would tend to drive developers towards the use of off-site biodiversity net gain units, which is not consistent with the mitigation hierarchy.  NIPA considers that it would therefore be appropriate for the area for the baseline to comprise either only the NSIP, or only the NSIP plus associated development, but excluding areas for habitat creation or enhancement (including existing designated sites), and on which no physical built development works unrelated to the habitat creation are to be located.  NIPA considers that the delivery of BNG will be enhanced and supported by taking an environmentally-led approach to design, rather than focusing solely on the need to deliver a quantified amount of BNG. The quality of design for NSIP projects should be monitored and the risks of quantitative matters driving projects should be balanced with qualitative approaches, including through Good Design guidance in the delivery of BNG.  Appendix A to the Consultation ‘Other policies and objectives that interact with BNG’, is useful but NIPA considers that more detailed guidance on the interaction between the BNG regime, and the other regimes listed, will be necessary in order to inform scheme development, preparation of applications and decision-making. |
| 24 | Is there any NSIP-specific information that the Examining Authority, or the relevant Secretary of State, would need to see in a biodiversity gain plan to determine the adequacy of an applicant’s plans to deliver net gain (beyond that sought in the draft biodiversity gain plan template at Annex B)? | NIPA has the following specific comments on Annex B ‘Biodiversity gain plan template (working draft)’:   * The Biodiversity Gain Plan template should enable reference to be made to other relevant documents submitted with the DCO application in support of the BNG requirements. * Section G3: Designated sites for nature conservation. The template does not require any explanation of existing management regimes for designated sites. NIPA recommends details on the management regime are requested to provide a holistic overview of the relevant natural environment management. * G5 Net Gain Legacy. The template assumes a 30 year management plan - please refer to our response to Question 25. * Specific reference as to how the proposals for BNG delivery and management and maintenance address the risks posed by climate change and the need for adaptation should be considered and allowed for.   Please also see our response to Question 22. |
| 25 | Do you think that 30 years is an appropriate minimum duration for securing off-site biodiversity gains allocated to NSIPs? | NIPA considers that it would be appropriate to apply the same requirement of 30 years to NSIPs, as the BNG is to compensate for permanent loss, which would occur regardless of the consenting regime the development progresses through.  Setting a standard timeframe that is consistent with the requirements under the Town and Country Planning Act 1990 will assist developers and promoters of NSIPs, in terms of providing certainty over business planning and scheme viability, rather than having an undetermined long term land and management obligation that is not set out in legislation or guidance. |
| 26 | Are further powers or other measures needed to enable, or manage the impacts of, compulsory acquisition for net gain? | The Planning Act 2008 already includes broad compulsory acquisition powers to be included in DCOs made for NSIPs.  However, guidance is required to confirm the availability of such existing powers to enable developers of NSIPs to acquire land compulsorily solely or principally for biodiversity net gain purposes in appropriate circumstances, as ‘required to facilitate’ the main development, to use the wording of section 122(2)(b) of the Planning Act 2008. If the guidance is not clear on this, it will result in ambiguity and increased risk of challenge at examination stage and in relation to the decision itself, through judicial review. It could also result in an over-reliance on the purchase of biodiversity credits when a solution in closer proximity to the NSIP may actually be preferable and in the public interest. In particular, guidance should be clear as to what is required to establish a compelling case in the public interest and what needs to be shown - e.g. regarding equivalent habitat, proximity, availability of suitable offsite BNG sites, or of BNG credits (noting that these are intended to be used only as a ‘last resort’) – to justify the compulsory acquisition of a site when compared to reasonable alternatives.  NIPA recommends that the wording of all relevant policy requirements is sufficiently clear to support the structuring of a compulsory acquisition case. |
| 27 | Is any guidance or other support required to ensure that schemes which straddle onshore and offshore regimes are able to deliver biodiversity net gain effectively? | NIPA considers that further guidance is required to ensure that schemes which straddle onshore and offshore regimes are able to deliver BNG effectively. In particular, we note that works within tidal range watercourses are generally subject to a deemed marine licence in the context of the DCO consenting process. It will be important to be clear as to what are the BNG requirements for such projects and how BNG can be delivered and secured.  NIPA recommends that the marine BNG consultation considers whether there should be an alignment with the marine spatial plans and protected areas in support of more comprehensive planning of the marine and intertidal environment, including the interface with all offshore and related onshore connection and infrastructure provision, cable and substation connections including the transmission network review and strategy. We consider that the marine BNG consultation should consider not only offshore windfarm projects and their cables and substation connections, but should also fully consider implications for infrastructure such as ports, bridges and coastal defences, and carbon capture and storage projects. |

**National Infrastructure Planning Association**

**5th April 2022**