

EXPLANATORY MEMORANDUM TO
THE BIODIVERSITY GAIN REQUIREMENTS (EXEMPTIONS) REGULATIONS
2024

2024 No. 47

AND

THE BIODIVERSITY GAIN REQUIREMENTS (IRREPLACEABLE HABITAT)
REGULATIONS 2024

2024 No. 48

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for the Environment, Food and Rural Affairs (Defra) and is laid before Parliament by Command of His Majesty.

2. Purpose of the instruments

- 2.1 The Biodiversity Gain Requirement (Exemptions) Regulations 2024 (“The Exemption Regulations”) prescribe categories of planning permission to which the biodiversity gain requirement that would otherwise be imposed as a general condition of planning permission do not apply.
- 2.2 The Biodiversity Gain Requirement (Irreplaceable Habitat) Regulations 2024 (“The Irreplaceable Habitat Regulations”) define what amounts to “irreplaceable habitat” for the purposes of Part 2 of Schedule 7A to the Town and Country Planning Act 1990 and modifies the application of that Schedule to planning permission in relation to such habitat.

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 only.

5. European Convention on Human Rights

- 5.1 As the instruments are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

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 into the Town and Country Planning Act 1990 (“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. The purpose of this is to ensure that the “biodiversity gain objective” is met in relation to the development. Paragraph 2 of Schedule 7A explains 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 Paragraph 17 of Schedule 7A provides for regulations to prescribe categories of development to be exempt from the requirement mentioned in paragraph 6.2. The Exemptions Regulations do this.
- 6.4 Paragraph 18 of Schedule 7A provides for regulations to define “irreplaceable habitat” and to modify or exclude the application of Part 2 of the Schedule in such cases. The Irreplaceable Habitat Regulations do this.

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 section 6 above, the Environment Act 2021 introduces mandatory BNG into the existing planning regime under the Town and Country Planning Act 1990. This will require new development under the Town and Country Planning Act 1990 to deliver a 10% net gain in biodiversity, unless exempt.

The Exemption Regulations

- 7.2 Schedule 7A (as inserted by Schedule 14 to the Environment Act 2021) already makes provision for permitted development and urgent crown development to be exempt from the requirement set out in paragraph 6.2 above. These Regulations outline six additional categories of planning permission which we have agreed through consultation that the biodiversity net gain planning condition should not apply to. This narrow and focused list of exemptions has been deemed necessary to keep the policy ambitious but proportionate.
- 7.3 **Temporary exemption for small developments:** To lessen the initial burden on Local Planning Authorities’ processing capacity for biodiversity gain, these Regulations will extend the transition period for small sites until April 2024. Therefore, a development which meets the definition of a small development will be exempt from the biodiversity net gain planning condition until April 2024. For the purposes of these Regulations small developments are residential developments consisting of one to nine dwellings on a site of less than one hectare, or if the number of dwellings is not known, a site size of less than 0.5 hectares. For other development, the exemption applies to a building or buildings where the floor space to be created by the development is less than 1,000 square metres or, to a site size of less than one

hectare. This exemption allows a longer period for Local Planning Authorities and developers to adapt and prepare for biodiversity net gain (BNG). Defra does not intend to extend this transition period further beyond April. These Regulations also exempt section 73 planning permissions from the biodiversity net gain planning condition where the original planning permission to which the section 73 planning permission relates was subject to the temporary small sites exemption.

- 7.4 **De minimis exemption:** This exemption will ensure the biodiversity net gain planning condition is not applied to development of such a small scale that it would result in negligible or no loss of habitat value. The de minimis threshold applies to the area or length of habitat impacted within a development, not the total development footprint. This is for sites containing impacted habitat of an area below 25m², and 5m for linear habitats such as hedgerows, but does not apply where priority habitat is impacted. If a development contains any priority habitat, the biodiversity net gain planning condition applies for all habitat within the development.
- 7.5 **Householder applications:** The biodiversity net gain planning condition will not apply to householder applications because of the expected low impact on biodiversity. This will reduce burdens and costs to individual households.
- 7.6 **High Speed Railway Transport Network:** The Exemption for the High Speed Railway Transport remains in place to cover development ancillary to the remaining phases of the high speed transport network
- 7.7 **Biodiversity gain sites:** This exemption removes the biodiversity net gain planning condition for projects which only enhance biodiversity for the purpose of net gain. This is because there could be situations where an off-site biodiversity gain project itself requires planning permission under the Town and Country Planning Act 1990 (TCPA) (for works such as earthworks or walkways), and if not exempt, the enhancement would require a 10% net gain. Without the exemption, this would effectively decrease the biodiversity gains created and may make such projects less attractive. The Regulations also specify that a fee must not be payable for entrance to such sites, as to be exempt the project's core purpose must be for delivering biodiversity gains and not to gain financially through entrance fees.
- 7.8 **Self-build and custom build applications:** The biodiversity gain planning condition will not apply in relation to planning permission for small-scale self-build or custom build development, where local planning authorities are satisfied that individuals have had the primary input into the final design and layout of a house to be occupied as homes for those individuals. The definition of self-build and custom housing building set out in section 1(A1) the Self-Build and Custom Housebuilding Act 2015. This exemption only applies where the development consists exclusively of self-build or custom build dwellings, is of no more than 9 dwellings, and is on a site of no larger than 0.5 hectares. This approach will reduce the burden on self and custom housebuilders and local planning authorities (LPAs), while ensuring that larger development sites containing some self or custom build plots are still subject to BNG.

The Irreplaceable Habitat Regulations

- 7.9 The government has committed to leaving the environment in a better state than that in which we found it, and the introduction of mandatory BNG will contribute positively to this commitment. However, it is important to consider that some habitat is irreplaceable, and therefore impossible to achieve a measurable net gain on. Therefore, it is necessary that regulations set out a clear definition of irreplaceable

habitat and provide a list of habitat types to be considered irreplaceable for the purpose of BNG. These Regulations modify the application of the biodiversity net gain planning condition to disapply the 10% measurable net gain requirement for irreplaceable habitat and instead requires appropriate bespoke compensation relative to the baseline habitat type.

- 7.10 **Definition of ‘irreplaceable habitat’:** The habitats that are considered to be irreplaceable for biodiversity net gain purposes are listed in a table in the schedule. Those looking to develop land should refer to the list to determine whether any habitat onsite is irreplaceable habitat as the modifications will apply in those instances.
- 7.11 **Modification of application of Part 2 of Schedule 7A:** These Regulations modify how the biodiversity gain requirements apply to developments where there is irreplaceable habitat onsite. The modification results in disapplying the requirement to increase the biodiversity value by a specified percentage. Instead, these Regulations require that alternative arrangements must be made for the purpose of minimising the adverse effect of the development on the biodiversity of irreplaceable habitat and that a compensation plan is in place that secures appropriate compensation for any impact on that irreplaceable habitat.
- 7.12 Where there is both irreplaceable and non-irreplaceable habitat onsite, developers should follow the normal procedure for the area of habitat that is non-irreplaceable. For the irreplaceable habitat, the 10% biodiversity net gain requirement is replaced with a requirement for appropriate compensation relative to the baseline habitat type. The planning authority must be satisfied that the adverse effect of the development on the biodiversity of the onsite habitat is minimised and that there is a compensation plan in place that secures the appropriate compensation. Losses of irreplaceable habitats cannot be compensated for using statutory biodiversity credits.
- 7.13 The regulations make an exception where irreplaceable habitat is present on development which has received outline planning permission and where the development proceeds in phases. The Biodiversity Gain (Town and Country Planning) (Modifications and Amendments) (England) Regulations 2024 modify the operation of Schedule 7A for phased development, and in the event that there is land which contains irreplaceable habitat which is subject to phased planning permission, provision is made in that instrument which is equivalent to the treatment of irreplaceable habitat on non-phased development in these regulations.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / 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 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 online.¹ Specific guidance will be available on the exemptions to BNG and approach to irreplaceable habitat.

12. Impact

The Exemption Regulations

- 12.1 The impact on business, charities or voluntary bodies is a reduced cost burden in delivering biodiversity net gain due to fewer developments being in scope of the 10% biodiversity net gain planning requirement where it is impractical or disproportionate.
- 12.2 The impact on the public sector is a reduced cost burden for local planning authorities in delivering biodiversity net gain. There is also expected to be a small net cost saving to local planning authorities due to lower workloads, as a result of the exemptions requiring less biodiversity gain plans to be assessed and less resource required for ongoing monitoring and enforcement action.
- 12.3 Exemptions will mean fewer developments will be in scope of the net gain requirement, and so less habitat creation and enhancement will be delivered, relative to the case where no exemptions exist. Nonetheless, if the exemptions are not made, the biodiversity net gain policy may not be fully efficient as it may lead to the over-delivery of net gain in situations where it is disproportionate for biodiversity (habitat creation) to be delivered, thereby imposing undue burden on developers and society. Exemptions are expected to reduce the costs of delivering BNG more than the fall in the overall benefits of BNG, in percentage terms.
- 12.4 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on the [legislation.gov.uk](https://www.legislation.gov.uk) website.

The Irreplaceable Habitat Regulations

- 12.5 There is no, or no significant, impact on charities or voluntary bodies.
- 12.6 There is no, or no significant, impact on the public sector.
- 12.7 There are existing protections for irreplaceable habitat in national planning policy, so the effect of this instrument is to reinforce existing practices and ensure a consistent approach is taken to the definition and treatment of irreplaceable habitat in the context of biodiversity net gain.

¹ Biodiversity Net Gain Guidance 2023: <https://www.gov.uk/government/collections/biodiversity-net-gain>

12.8 A full Impact Assessment has not been prepared for this instrument because it has no significant costs or benefits and is considered to be below the de minimis threshold (under the Better Regulations Framework).

13. Regulating small business

13.1 The legislation applies to activities that are undertaken by small businesses.

13.2 To minimise the impact of the requirements on small businesses (employing up to 50 people), there are several exemptions targeted at smaller development types that are expected to reduce the burden of biodiversity net gain on small and micro business. This includes the exemption for small sites until April 2024, allowing developers more time to prepare for biodiversity net gain.

13.3 The basis for the final decision on what action to take to assist small businesses was taken after considering the available evidence and feedback from the biodiversity net gain consultations, impact assessments, and stakeholder engagement.

14. Monitoring & review

14.1 The approach to monitoring of this legislation is through statutory review.

14.2 A statutory review clause is included in both instruments. A review of the regulatory provision contained in these Regulations is required within 5 years of the date that the Regulations come into force and at least every 5 years thereafter, as required by the Small Business, Enterprise and Employment Act 2015. The conclusions of such reviews must be published.

15. Contact

15.1 Aemelia Humfrey at the Department for Environment, Food and Rural Affairs or Aemelia.humfrey@defra.gov.uk can be contacted with any queries regarding the instrument.

15.2 Lisa Keenaghan, Deputy Director for Biodiversity Net Gain, at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

15.3 Rebecca Pow MP at the Department for Environment, Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.