

**EXPLANATORY MEMORANDUM TO**

**THE BIODIVERSITY GAIN (TOWN AND COUNTRY PLANNING)**  
**(MODIFICATIONS AND AMENDMENTS) (ENGLAND) REGULATIONS 2024**

**2024 No. 50**

**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 (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (“the 2013 Order”) and the Town and Country Planning (Development Management Procedure) (England) Order 2015 (“DMPO 2015”). The purpose of the amendments is to make provision for certain applications for planning permission to be accompanied by information relating to the biodiversity gain objective, and as to the contents of decision notices when planning permission is granted.
- 2.2 In addition, the regulations insert a new Part 7A in DMPO 2015 which makes provision for the submission and content of biodiversity gain plans, determinations as to whether a plan is to be approved and appeals.

**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) (Modifications and Amendments) (England) Regulations 2024 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”). Paragraph 13 of Schedule 7A has the effect that (subject to transitional arrangements set out in the Environment Act 2021 (Commencement No. 8 and Transitional Provisions) Regulations 2024 and 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 The Secretary of State for Environment, Food and Rural Affairs has laid before Parliament a biodiversity metric which is a document published under Paragraph 4 of Schedule 7A for measuring the biodiversity value or relative biodiversity value of habitat or habitat enhancement. It can be found at: [www.gov.uk/government/publications/statutory-biodiversity-metric-tools-and-guides](http://www.gov.uk/government/publications/statutory-biodiversity-metric-tools-and-guides).
- 6.4 Paragraph 5 of Schedule 7A provides that the relevant date for calculation of the pre-development biodiversity value of the onsite habitat is, in the case of planning permission granted following the making of an application for permission, the date of the application, unless the person submitting the plan and the planning authority agree that the relevant date is an earlier date.
- 6.5 Paragraphs 6 and 6A make provision for calculating the pre-development biodiversity value of the onsite habitat if certain activities have been carried out and, as a result of those activities the pre-development biodiversity value of the onsite habitat is lower on the relevant date than it would otherwise have been. Where paragraphs 6 and 6A apply, the pre-development biodiversity value of the onsite habitat is to be taken to be the value immediately before carrying out of these activities.
- 6.6 Paragraph 8 of Schedule 7A establishes that the post-development biodiversity value of the onsite habitat is the projected value of the onsite habitat as at the time the development is completed. That value is to be calculated by taking the pre-development biodiversity value and, if at the time the development is completed the development will, (taken as a whole), have increased the biodiversity value of the onsite habitat, adding the amount of that increase or subtracting the amount of that decrease.
- 6.7 Paragraph 9 of Schedule 7A requires that where the person submitting the biodiversity gain plan for approval proposes to carry out works in the course of the development which increase the biodiversity value of the onsite habitat, and the planning authority considers that the increase is significant in relation to the pre-development biodiversity value, habitat enhancement must be maintained for at least 30 years after the development is completed. This enhancement must be secured by a condition subject to which the planning permission is granted, a planning obligation, or a conservation covenant.

- 6.8 Paragraph 14 of Schedule 7A sets out matters which are to be specified in a biodiversity gain plan. It also provides the powers to make regulations specifying other matters to be included in a plan and to make provision in respect of the submission of plans. Paragraph 15 sets out matters as to which a planning authority must be satisfied before approving a plan.
- 6.9 Paragraph 16 of Schedule 7A enables the Secretary of State to make regulations as to the procedure which a planning authority is to follow in determining whether to approve a biodiversity gain plan (including the time by which a determination must be made), factors which may or must be taken into account in making such a determination and appeals relating to such a determination.
- 6.10 There is a power in paragraph 17 to specify in regulations development to which the condition in paragraph 13 does not apply. That power is exercised in the Biodiversity Gain Requirements (Exemptions) Regulations 2024.
- 6.11 There is a power in paragraph 18 to make provision in respect of habitat which falls within the meaning of “irreplaceable habitat” as defined in regulations. That power is exercised in the Biodiversity Gain Requirements (Irreplaceable Habitat) Regulations 2024.
- 6.12 Paragraph 19 of Schedule 7A enables the Secretary of State to make regulations modifying the application of Part 2 of Schedule 7A in relation to the grant of outline planning permission, where the reservation of matters for subsequent approval has the effect of requiring or permitting development to proceed in phases, or the grant of any kind of planning permission, where the grant is subject to conditions (whether requiring the subsequent approval of any matters or otherwise) having that effect. In this Explanatory Memorandum we refer to this as “development being brought forward in phases”.
- 6.13 Part 2 of Schedule 14 to the Environment Act 2021 and the Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024 (“the consequential amendments regulations”) make consequential amendments to the 1990 Act. The consequential amendments regulations include rules for identifying which local planning authority is the planning authority which is responsible for determining whether to approve a biodiversity gain plan under Paragraph 12 of Schedule 7A. In summary, depending on the route to the grant of permission, the planning authority could be a local planning authority, the Secretary of State or a person determining an appeal on behalf of the Secretary of State.
- 6.14 Section 59(2)(b) of the 1990 Act is a power for the Secretary of State to, by order, make provision for the granting of planning permission on an application made to a local planning authority. Section 62 of the 1990 Act is a power to make provision as to the making of applications for planning permission to local planning authorities. Section 62A makes provision for an applicant to choose to make certain applications to the Secretary of State instead of to the local planning authority where the local planning authority has been designated for that purpose. The 2013 Order sets out the procedure for applications submitted to the Secretary of State under Section 62A, and DMPO 2015 sets out the procedure for applications for planning permission made to local planning authorities.
- 6.15 Section 69 of the 1990 Act makes provision in respect of registers which local planning authorities are required to keep and make available to the public.

- 6.16 Section 73 of the 1990 Act 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. Regulation 7 of the Biodiversity Gain (Town and Country Planning) (Consequential Amendments) Regulations 2024 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.
- 6.17 Section 78 of the 1990 Act 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. Section 78 has been amended to insert a reference to these regulations which 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. The list includes decisions on an appeal under s78. Section 284 has been amended to add 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 paragraph 6.1 the Environment Act 2021 introduces mandatory BNG into the existing planning regime under the 1990 Act. Subject to transitional arrangements 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.
- Part 2 - Modification of application of Part 2 of Schedule 7A to the 1990 Act: development in phases (Regulations 3 to 8)
- 7.2 As paragraph 7.2 explains, the general condition applying to planning permission in England (subject to transitional arrangements and certain exceptions), requires the planning authority to be in receipt of the biodiversity gain plan, and to approve the plan before development can commence. Regulations 3 to 8 modify paragraphs 13, 14 and 15 of of Schedule 7A in respect of development within the meaning of paragraph 19 of Schedule 7A which is being brought forward in phases.
- 7.3 These provisions are necessary as the current framework within paragraphs 14 and 15 of Schedule 7A is not designed for development being developed in phases (where

detailed plans of onsite enhancements, allocations of any offsite gains and purchase of any biodiversity credits are required for the approval of the biodiversity gain plan.)

- 7.4 Phased development typically occurs for large development projects that are built in different phases over many years (where certain details of development of the later phases are not known when planning permission is granted.) For residential and commercial development, planning permission for these phased developments are usually granted through outline planning permission. An outline planning application for large development may only show broad development zones or parameters, with no detail around form, site layout or landscaping. As such, outline planning permissions are granted requiring subsequent approval through 'reserved matters'. Sometimes for other types of phased development, planning permission may be granted outside the outline planning permission framework with conditions requiring or permitting development to proceed in phases. In these cases, it is not possible to provide the information required for the biodiversity net gain Plan under paragraphs 14 and 15 of Schedule 7A: greater flexibility is required to account for changing circumstances during delivery of a phased development.
- 7.5 Regulation 4 substitutes the condition in paragraph 13 of Schedule 7A with new conditions which are imposed on the grant of permission (including the grant of permission under s73 of the 1990 Act) for development being brought forward in phases. The conditions are that:
- 8.4.1 development may not be begun pursuant to that permission unless: a biodiversity gain plan for the overall development (overall plan) has been approved by the planning authority, and
- 8.4.2 development of a phase may not be begun pursuant to that permission unless a biodiversity gain plan for the phase (phase plan) has been approved by the planning authority, and
- 8.4.3 where permission has been granted on an application made under s73 of the 1990 Act no further development of a phase which has been begun may be carried out pursuant to that permission unless a phase plan has been approved for that phase.
- 7.6 Regulation 5 modifies the application of Paragraph 14 of Schedule 7A of the 1990 Act, for the purpose of specifying the content of overall plans. Regulation 6 modifies the application of Paragraph 14 of Schedule 7A of the 1990 Act for the purpose of specifying the content of phase plans. Regulation 19 makes further provision in respect of the content of plans including overall and phase plans.
- 7.7 Regulation 7 modifies the application of Paragraph 15 of Schedule 7A of the 1990 Act for the purpose of specifying matters as to which the planning authority must be satisfied before approving an overall plan. Regulation 8 modifies the application of Paragraph 15 of Schedule 7A of the 1990 Act for the purpose of specifying matters as to which the planning authority must be satisfied before approving a phase plan. Regulation 19 makes further provision in respect of the approval of plans, including overall and phase plans.
- Part 3 - Amendments to the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (Regulations 9 to 12)
- 7.8 Part 3 makes amendments to the 2013 Order. Regulation 11 amends article 4 of the Order requiring a relevant application for planning permission made under section 62A of the 1990 Act to the Secretary of State to be accompanied by certain

information relating to the biodiversity gain condition including a statement as to whether the applicant believes that planning permission, if granted, would be subject to the biodiversity gain condition; where the applicant believes that planning permission, if granted, would not be subject to the biodiversity gain condition and the reasons for that belief.

- 7.9 In cases where the applicant believes that planning permission, if granted, would be subject to the biodiversity gain condition the application must be accompanied by the information listed in paragraph (1A) of article 4 of the Order (as inserted by regulation 11 of these Regulations). The provision of information at the time the application for planning permission is made, such as the pre-development value of the onsite habitat, will ensure that information relevant to meeting the biodiversity gain objective, if permission is granted, is provided for that development.
- 7.10 Regulation 12 amends article 24 of the Order. Article 24 sets out what the Secretary of State must include when giving notice of a decision on an application for planning permission under section 62A. The effect of the amendment is to require the Secretary of State to include certain information relating to Schedule 7A of the 1990 Act in the decision notice where permission is granted.
- Part 4 - Amendments to the Town and Country Planning (Development Management Procedure) (England) Order 2015 (Regulations 13 to 19)
- 7.11 Part 4 makes amendments to DMPO 2015 and inserts a new Part 7A in DMPO 2015 to make provision relating to the submission and approval of biodiversity gain plans.
- 7.12 Regulation 15 amends article 7 of DMPO 2015. Article 7 makes provision about applications for planning permission which are made to local planning authorities. The effect of regulation 15 is that certain information relating to the biodiversity gain condition must be submitted with an application for planning permission made to a local planning authority unless it is an application made under section 73 of the 1990 Act. The information required is the same as that required to be submitted with applications under section 62A.
- 7.13 Regulation 16 amends article 27 of DMPO 2015. Article 27 makes provision for the way applications made under a planning condition are made and determined. Regulation 16 makes clear that article 27 does not apply to the biodiversity gain condition. The arrangements for that condition are set out in Part 7A as inserted by these regulations.
- 7.14 Regulation 17 amends article 35 of DMPO 2015 to make the same provision for decision notices on the grant of permission by local planning authorities as is made in the 2013 Order for decision notices issued by the Secretary of State.
- 7.15 Regulation 18 disapplies article 37 of DMPO 2015 to make clear that the arrangements for making an appeal in respect of a decision by a local planning authority not to approve a biodiversity gain plan or a failure to make a determination are contained in article 37E of Part 7A as inserted by these regulations.
- 7.16 Regulation 19 inserts Part 7A DMPO 2015. Part 7A makes further provision for the content of biodiversity gain plans, and sets out arrangements for their submission, determination and appeals, as set out below.
- 7.17 Article 37A sets out the meaning of “biodiversity hierarchy” for the purpose of article 37D and the requirement in that article that, in determining whether to approve a biodiversity gain plan, a planning authority must take into account how the

biodiversity hierarchy is to be applied. The hierarchy sets out a stepped approach to the actions to be taken in order of priority: firstly avoiding adverse effects of the development to distinctive habitats (with biodiversity metric score equal to or higher than four as set out in the biodiversity metric) or in so far as adverse effects cannot be avoided mitigating them ; in relation to any onsite habitat which is adversely effected, compensating for that effect by habitat enhancement; so far as there cannot be that enhancement, creation of onsite habitat, so far as there cannot be that creation, the availability of registered offsite biodiversity gain; and finally so far as that offsite habitat enhancement cannot be secured, purchasing biodiversity credits. This requirement does not apply in respect of onsite habitat which is irreplaceable habitat.

- 7.18 Article 37B requires that a biodiversity gain plan is submitted to a planning authority in writing, and no earlier than the day after the day on which notification is given of the decision to grant planning permission.
- 7.19 Article 37C sets out the additional matters which a biodiversity gain plan must include. Paragraph 2 lists matters which all plans must include whether or not the development is to proceed in phases. Paragraph (4) makes further provision for the content of standard plans and paragraph (5) makes further provision for the content of overall and phase plans.
- 7.20 Article 37D sets out provisions relating to the determination of the biodiversity gain plan. The planning authority must give written notice to the person submitting the biodiversity gain plan of its determination whether to approve that plan within the period of eight weeks beginning with the day after the day on which that plan is received by the planning authority, or such longer period as is agreed, in writing, by the person who submits that plan and the planning authority.
- 7.21 Where the planning authority makes a determination not to approve the biodiversity gain plan, the notice provided must also state clearly and precisely their full reasons for the determination, specifying all elements of the biodiversity gain plan which are relevant to the determination. Except where planning permission is granted where the onsite habitat of that part is irreplaceable habitat, in determining whether to approve a biodiversity gain plan, the planning authority must take into account how the biodiversity gain hierarchy (as set out in Article 37A) is to be applied, and, where the order of priority is not to be applied to provide the reason for that.
- 7.22 Where the planning authority which gives written notice of their decision whether or not to approve the biodiversity gain plan) is not the local planning register authority, the planning authority must, within five working days beginning with the day after the day of that written notice, send to the local planning register authority a copy of the biodiversity gain plan submitted, including all plans, drawings and other documents submitted with the biodiversity gain plan; and the notice of the determination whether to approve the biodiversity gain plan including the date of that notice and the name of the planning authority.
- 7.23 Article 37E sets out the information which must be served on the Secretary of State by a person who wishes to appeal under section 78 of the 1990 Act, where a planning authority which is a local planning authority has either made a determination not to approve a biodiversity gain plan, or does not given written notice within the period required under 37D. A person who has submitted a biodiversity gain plan who wishes to appeal to the Secretary of State under section 78 of the 1990 Act must submit this within 6 months of the determination not to approve a biodiversity gain plan or expiry

of the period for a determination. Article 37E also sets out the information the person must send to the local planning authority about the appeal.

- 7.24 The Secretary of State may refuse to accept a notice of appeal from the person who submitted the biodiversity gain plan if the completed appeal form and the documents required are not served on the Secretary of State within the time limit.
- 7.25 Regulation 20 amends article 40 of DMPO 2015, requiring biodiversity gain plans submitted to the planning authority and notices of their determination (whether to approve), including the date of that notice and the name of the planning authority, to be published on the register local planning authorities are required to keep. Where the local planning register authority is not the planning authority in respect of a biodiversity gain plan these provisions only apply where the planning authority has sent the information required to the local planning register authority as required under article 37(D)(4).

#### Part 6 – Review

- 7.26 Part 6 requires the Secretary of State to from time to time carry out a review of the regulatory provision contained in these Regulations and publish a report setting out the conclusions of that review. The first report must be published within five years beginning with the day on which these Regulations come into force, and subsequent reports must be published at intervals not exceeding five years.

### **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 These Regulations amend two statutory instruments, the 2013 Order and DMPO 2015. These instruments are themselves subject to previous amendments which have not yet been consolidated. Given the narrow scope of the changes proposed in these Regulations, and imperative objective to implement biodiversity net gain implemented, we did not feel it expedient to pursue a wider consolidation of these statutory instruments.

### **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. A draft of this statutory instrument and accompanying guidance were also published prior to laying of these Regulations –



see ‘Guidance’ below, although not formally consulted on feedback has been taken into account when finalising the Regulations.

## **11. Guidance**

- 11.1 Defra has published guidance on Biodiversity Net Gain in 2023 on [Biodiversity net gain - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/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, however by virtue of The Biodiversity Gain Requirements (Exemptions) Regulations 2024 these provisions will not immediately apply to development which is not considered ‘major development’ within the meaning of article 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015(a). 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 Part 6 of the Statutory instrument contains provision relating to review of this legislation. The Secretary of State may from time to time review these provisions, and the first report will be published within five years beginning with the day on which these Regulations come into force, and subsequent reports must be published at intervals not exceeding five years.

## **15. Contact**

- 15.1 Andrew Short at the Department for Levelling Up, Housing and Communities Email: [Andrew.short@levellingup.gov.uk](mailto: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.