EXPLANATORY MEMORANDUM TO

THE BIODIVERSITY GAIN SITE REGISTER REGULATIONS 2024

2024 No. 45

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 instrument

2.1 These Regulations make provision for a new, publicly accessible "biodiversity gain site register" for the purposes of the biodiversity gain regime introduced by sections 98 to 101 of, and Schedule 14 to, the Environment Act 2021. The Regulations set the conditions which must be met for land to be eligible for registration in the biodiversity gain site register. They also provide for the recording of certain information in the biodiversity gain site register, for the amendment of information in the biodiversity gain site register and for the removal of land from the biodiversity gain site register.

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 only land in England is eligible for registration in the biodiversity gain site register and 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 As the instrument is subject to the negative resolution procedure and does 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 in 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 the 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 Paragraph 2(2) of Schedule 7A provides for the calculation of the biodiversity value attributable to a development for these purposes. It includes the biodiversity value, in relation to the development, of any "registered offsite biodiversity gain" attributable to the development. Paragraph 10 of Schedule 7A defines "registered offsite biodiversity gain" as any habitat enhancement required to be carried out on other land under a conservation covenant[1] or planning obligation[2] where that required habitat enhancement is recorded in the biodiversity gain site register established by regulations under section 100 of the Environment Act 2021. That section provides for the regulations to make provision about a register of "biodiversity gain sites" and requires the regulations to provide for information in the register to be accessible to members of the public. A "biodiversity gain site" is land falling within section 100(2). For the purposes of Schedule 7A, the biodiversity value of any habitat or habitat enhancement is calculated in accordance with the biodiversity metric published by the Secretary of State and laid before Parliament under paragraph 4 of Schedule 7A.

6.4 These Regulations are the regulations under section 100 of the Environment Act 2021 establishing the biodiversity gain site register and providing for the recording of habitat enhancements on land in that register for the purposes of 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 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 have the effect of requiring a new development of land in England to deliver a 10% net gain in biodiversity, unless exempt.

7.2 **The biodiversity gain site register**: These Regulations make provision for the biodiversity gain site register. The biodiversity gain site register is to be established and operated by Natural England as "register operator" and Natural England are required to ensure that information in it is accessible to the public. Land is eligible to be registered where certain specified conditions are met. In particular, one or more persons must be required to carry out works on the land for the purpose of habitat enhancement under a conservation covenant or planning obligation, and the resulting habitat enhancement must be made available to be allocated, for the purposes of Schedule 7A, to one or more developments for which planning permission is given. The Regulations also provide (among other things) that one or more persons must be required under the conservation covenant or planning obligation to maintain the habitat enhancement for at least 30 years. The biodiversity gain site register will record details of the habitat enhancement to be achieved on the land under the conservation covenant or planning obligation in question. Any off-site biodiversity gains being relied upon by developers to meet the biodiversity gain objective will

[1] See sections 117 to 139 of the Environment Act 2021.
[2] See section 106 of the Town and Country Planning Act 1990.

need to be allocated to the development and recorded on the biodiversity gain site register.

7.3 The biodiversity gain site register will be accessible to the public and will provide information about the habitat enhancements required on land which is registered in it. Where any habitat enhancement has already been allocated to a specific development project, this will be recorded when the land is registered. The subsequent allocation of habitat enhancements to specific developments may also recorded by means of a separate application process.

7.4 **Why we need a register:** As explained above, a register is needed as part of the implementation of the new biodiversity gain regime. The eligibility criteria for registration, and the registration process, will ensure that (among other things) off-site gains relied on by developers for the purpose of meeting the biodiversity gain objective are required under a planning obligation or conservation covenant.

7.5 Information recorded in the biodiversity gain site register will be publicly available, meaning interested parties will be able to see where off-site gains are being delivered. Local planning authorities will also be able to use the biodiversity gain site register to check that off-site gains included in a development's gain plan have been registered and that the biodiversity value of those off-site gains in relation to the development matches the value stated in the gain plan.

7.6 **The register operator:** Part 2 of the instrument provides for Natural England to be the register operator, responsible for establishing and maintaining the register. The register operator's primary role will be to verify that applications to register biodiversity gains sites and applications to record the allocation of habitat enhancements meet the requirements of the Regulations.

7.7 The register operator must ensure that information in the biodiversity gain site register is accessible to the public.

7.8 **Registration of land in the biodiversity gain site register**: Part 3 of the Regulations sets out the how and when land may be registered in the biodiversity gain site register. Land is registered in relation to a conservation covenant or a "section 106 agreement" (which means an agreement or other instrument under section 106 of the Town and Country Planning Act 1990 containing planning obligations). Land which is already registered can also be registered separately in relation to another conservation covenant or section 106 agreement. The Regulations set out the eligibility requirements for registering land in the biodiversity gain site register and the application process for registration. Some basic eligibility criteria are set out in section 100(2) of the Environment Act 2021 and are repeated in regulation 6 of the Regulations with further conditions. In addition, these Regulations require that one or more persons are required under the conservation covenant, or under a planning obligation in the section 106 agreement, to monitor habitat on the land to ensure that the required habitat enhancements are maintained, and require that the planning obligations or conservation covenant have been registered in the relevant local land charges register. The land in question must also be in England.

7.9 The Regulations set out who can apply and what information an applicant will need to provide in the application. They also set out in what circumstances the register operator must accept an application to register land in the biodiversity gain site register and in what circumstances the register operator must reject an application.

7.10 Applicants may apply to register land before any of the required habitat enhancement has been allocated to a development, but if any of the habitat enhancement has been allocated the application will need to provide details of the allocation, which will be recorded on the biodiversity gain site register if the application is successful.

7.11 **Recording allocation of habitat enhancements to a development:** Part 4 of the Regulations provides for applications to record the allocation of habitat enhancements to a development.

7.12 The Regulations set out who can apply to record an allocation, the application process, and what information needs to be provided. They also set out in what circumstances the register operator must accept an application to record an allocation and in what circumstances the register operator must reject an application to record an allocation.

7.13 **Amendment of an entry in the biodiversity gain site register:** Part 5 provides for applications to amend information within an entry on the biodiversity gain site register. This is intended to enable the biodiversity gain site register to be kept up to date and accurate regarding planned habitat enhancements. The regulations outline who can apply, the grounds on which an application can be made, and what information needs to be provided in an application. They also set out in what circumstances the register operator must accept an application to amend an entry and in what circumstances the register operator must reject an application to amend an entry.

7.14 After any habitat enhancement has been recorded as allocated to a development, there are limited circumstances in which the information relating to that habitat enhancement can be amended by application. An application can be made to remove information about the allocation where the habitat enhancement has in fact ceased to be allocated to the development, or to amend information about the allocation where the enhancement has in fact partly ceased to be allocated to the development. But those are the only circumstances in which an application may be made to amend information on the biodiversity gain site register so far as it relates to habitat enhancement which is recorded as allocated to a development. To the extent that the habitat enhancement required to be achieved on the land is not recorded on the biodiversity gain site register as allocated to a development, an application may be made to amend the information on the biodiversity gain site register relating to it, where the information is incomplete or inaccurate.

7.15 **Amendment of an entry in the biodiversity gain site register on the register operator's own initiative:** Part 6 provides for the register operator to make amendments to information recorded in the biodiversity gain site register on its own initiative when it considers that the information is inaccurate or incomplete.

7.16 **Removal of land from the biodiversity gain site register:** Part 7 of the Regulations provides for applications to remove land from the biodiversity gain site register.

7.17 It is not possible to apply to remove land from the biodiversity gain site register when any of the habitat enhancement required to be achieved on the land has been recorded as allocated to a development. An application first needs to be made, through the amendments process, to remove the recorded allocation, provided the necessary grounds exist for such an application.

7.18 **Removal of land from the biodiversity gain sites register on the register operator's own initiative:** Part 8 provides for the register operator to remove a biodiversity gain site entry when it believes that the obligations under the relevant conservation covenant or planning obligation have been complied with or the covenant or agreement is no longer in force, the land is no longer eligible to be registered, or false or misleading information was supplied in connection with the application to register the land.

7.19 **Appeals:** Part 9 provides for appeals to be made to the First-tier Tribunal against decisions made by the register operator. An applicant may appeal against the register operator's decision to reject an application. An appeal may also be brought against the amendment or removal of an entry by the register operator on its own initiative.

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 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.[3] This includes specific guidance on the biodiversity gain site register and creating planning obligations or conservation covenants to secure habitat enhancement of gain sites.

12. Impact

12.1 There is no, or no significant, impact on charities or voluntary bodies.

12.2 There is no, or 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 are

[3] Biodiversity Net Gain Guidance 2023: https://www.gov.uk/government/collections/biodiversity-net-gain

permissive in nature, meaning that businesses would only act if they expected their private benefits to exceed their private costs.

13. Regulating small business

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

13.2 The basis for the final decision on what action to take to assist small businesses is that businesses are not obliged to engage with the biodiversity gain site register. Small businesses may enter the BNG market to sell biodiversity units arising from habitat enhancements to development. To do this, they will have to register their land and pay the relevant registration fee. They will only do this if their private benefits outweigh their private costs. The registration fees are small when compared to the potential financial reward of supplying biodiversity units.

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 the instrument. A review of the regulatory provision contained in these Regulations is required within 5 years of the date 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 Tom Reynolds at the Department for the Environment Food and Rural Affairs Telephone: 07796 840243 or email: tom.reynolds@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 the Environment Food and Rural Affairs can confirm that this Explanatory Memorandum meets the required standard.

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