EXPLANATORY MEMORANDUM TO

THE BIODIVERSITY GAIN SITE REGISTER (FINANCIAL PENALTIES AND FEES) REGULATIONS 2024

2024 No. XXXX

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 provide for the imposition of a financial penalty and the payment of fees. The financial penalty relates to the supply of false or misleading information in connection with an application to register land in the biodiversity gain site register, which will be established under the Biodiversity Gain Site Register Regulations 2024 ("the Register Regulations"). The fees set by these Regulations are for applications to register land, and other related applications, under the Register Regulations.

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, in that it applies only to applications which relate to land situated in England. However, it applies to such applications irrespective of whether they are made by persons who are in England or outside England.

5. European Convention on Human Rights

5.1 Parliamentary Under Secretary of State at the Department for Environment, Food and Rural Affairs, Rebecca Pow MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Biodiversity Gain Site Register (Financial Penalties and Fees) 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 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 the 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 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" allocated 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. Section 100 provides for regulations to make provision about a register of "biodiversity gain sites". A "biodiversity gain site" is land falling within section 100(2) of the Act. 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 that Schedule.

6.4 These Regulations relate specifically to applications under the Register Regulations, which will provide for the establishing of the biodiversity gain site register and for its operation by Natural England as "register operator". The Register Regulations will set out the conditions which will need to be met for land to be registered. In particular, one or more persons will need to 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 will need to be available to be allocated to one or more developments for which planning permission is given.

6.5 The biodiversity gain site register will record details about the habitat enhancement to be achieved on the land. It will provide the necessary record of offsite habitat enhancements for the purpose of the biodiversity gain regime, insofar as that regime enables a development to take account of "registered offsite biodiversity gains" in meeting the biodiversity gain objective (as explained above). The Register Regulations will provide for applications to be made to the register operator to register land in the biodiversity gain site register, to record allocations of habitat enhancement to specific developments, to amend information on the biodiversity gain site register and to remove land from the biodiversity gain site register. The purpose of these Regulations is to provide for the imposition of a financial penalty for the supply of false or misleading information in connection with an application to register land, and to set the fees which are payable for applications under the Register Regulations.

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

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

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 As explained in paragraphs 6.2 and 6.3, these Regulations relate to the biodiversity gain site register to be established under the Register Regulations.

7.3 These Regulations provide for the imposition of a financial penalty for the supply of false or misleading information in connection with an application to register land under the Register Regulations, and for the payment of fees for applications under those Regulations.

7.4 **Financial Penalties:** Part 2 of these Regulations gives a power to the register operator to impose a financial penalty, in the sum of £5,000, on an applicant, where the register operator is satisfied on the balance of probabilities that false or misleading information has been supplied in connection with an application to register land in the biodiversity gain site register. Part 2 provides the process for the imposition of a penalty, which involves the applicant in question being given a "notice of intent" by the register operator and having the opportunity to submit objections. Any penalty will ultimately be imposed by a "final penalty notice". If a penalty is imposed, there is a right of appeal to the First-tier Tribunal. Under the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009 (SI 2009/1976 (L. 20)) an appeal must be brought within 28 days of the final penalty notice being sent.

7.5 The ability to issue financial penalties will deter the supply of false or misleading information in connection with an application to register land in the biodiversity gain site register. As explained above, land will be registered in the biodiversity gain site register so that registered habitat enhancements on the land can be allocated to developments for the purpose of meeting the biodiversity gain objective. Developers will pay for the allocation of such off-site habitat enhancements to their development. Someone might attempt to secure the registration of land by providing false or misleading information, or to have false or misleading information about the nature or extent of habitat enhancements required on the land recorded in the register, so as to make a financial gain from selling fake habitat enhancements to developers.

7.6 **Fees:** Part 3 of these Regulations provides for fees to be payable to the register operator for applications under the Register Regulations. The Schedule to these Regulations specifies the amount of the fee for each type of application. A fee must be paid within 28 days of receipt of the application. Under the Register Regulations, the register operator will reject the application if the fee is not paid and will not begin to consider the application until it is paid.

7.7 The purpose of charging fees is to recover costs of establishing and maintaining the biodiversity gain site register. Different applications attract different fees because of the differing resources required to process these applications. For example, consideration by the register operator of applications to register biodiversity gain sites will include checking that the land satisfies the eligibility criteria, which will entail checking documents supplied with the application. On the other hand, consideration of (for example) applications to record the allocation of habitat enhancement to a development does not involve such extensive work and therefore the fee for such applications is smaller.

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 on Biodiversity net gain - GOV.UK (www.gov.uk). 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 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. In order to do this, they will have to register their land and pay the relevant registration fee. They will only participate in the BNG market if their private benefits outweigh their private costs. The registration fees are small when compared to the potential financial reward of supplying off-site habitat enhancements.

14. Monitoring & review

14.1 The approach to monitoring of Part 2 of these Regulations (financial penalties) is through statutory review.

14.2 A statutory review clause is included in this instrument in relation to Part 2 of these Regulations (financial penalties). A review of the regulatory provision in Part 2 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.

14.3 The approach to monitoring of Part 3 is through non-statutory review as necessary. The aim is that the costs of operating the biodiversity gain site register are covered by the income from charging applications fees. The regulations will be deemed to be effective if enough fee income is being received to cover those costs with little to no surplus income.

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.