8. MEASURES TO SUPPORT BIODIVERSITY NET GAIN (GL/AE/BJT)

1. Purpose

To seek approval for the Authority to apply to DEFRA to become a Responsible Body and offer a service to support landowners to register land as Biodiversity Gain Sites (BGS) and sell Biodiversity Units (BU) to deliver Biodiversity Net Gain (BNG).

2. Context

2.1 BNG is an approach to development and/or land management which aims to leave the natural environment in a measurably better state than it was beforehand.

2.2 Under S.98 of the Environment Act 2021, most development is required to deliver at least 10% mandatory BNG. Delivery of BNG is subject to a hierarchy which sets out an order of priority for where BNG should be delivered. There are three ways in which a developer can achieve BNG. These are not mutually exclusive, and all three approaches can be used simultaneously to deliver the required gain:

a) developers can enhance and/or restore habitat on site;

b) developers can make gains off-site on other land within their control, or they can purchase off-site BUs from third party providers;

c) as a last resort, any remaining gain can be purchased from Central Government in the form of statutory biodiversity credits.

The recommendations in this report would allow the Authority to facilitate the second of these approaches.

2.3 In order to sell BUs, landowners must apply to Natural England to register land as a BGS. BGSs are required to be subject to an enforceable legal agreement that secures the habitat creation and/or enhancement for at least 30 years; this can either be a S106 Agreement with the local planning authority for the area where the site is located, or a Conservation Covenant with a Responsible Body designated by the Secretary of State, to guarantee delivery of the required gain (Enter a legal agreement for biodiversity net gain - GOV.UK).

2.4 To support landowners to sell BUs, set up BGSs and increase opportunities to deliver BNG within the National Park, it is proposed that the Authority offer a service to secure BGSs, both as the Local Planning Authority, and also as a Responsible Body, by pursuing an application with DEFRA to become a Responsible Body.

2.5 Securing BGSs within the National Park would facilitate nature recovery on private land and across the National Park landscape. It would also facilitate the local BNG marketplace, enabling developers to purchase BUs from BGSs within the National Park that have been created locally, rather than from outside. The BNG metric (used to calculate how much Biodiversity Gain is required) includes a “spatial risk multiplier”, which increases the cost of units purchased outside the local planning authority boundary, designed as an incentive to deliver BNG benefits locally. Where landowners choose to pursue registration of their land within the National Park through a Responsible Body located outside, the Authority may have no opportunity to influence the agreement. There has already been one such example in the Peak District, where measures to deliver biodiversity gain appear to have resulted in damage to features of archaeological importance.

2.6 In the Environmental Land Management (ELM) Tests & Trials report conducted by the Authority on behalf of the English National Park Authorities and Defra, the private finance consultants, Finance Earth, recommended that National Park Authorities should become Responsible Bodies for BNG as they could provide:

- Quality assurance - integration of the special qualities and NPMP priorities
- Conservation covenants
- Nature recovery platform

2.7 There are currently 48 designated Responsible Bodies nationally, including 14 Local Planning Authorities and 2 other National Park Authorities (Lake District and South Downs).

2.8 Operating Requirements for BGS Proposals/Agreements

2.8.1 The proposals would involve the Authority entering into a S106 Agreement/Conservation Covenant with the landowner to secure a Biodiversity Gain Site. The offer of an agreement/covenant would be at the Authority's discretion. Once an agreement/covenant is signed the Authority would be committed to reviewing monitoring reports and ensuring delivery of the promised biodiversity gain by the landowner over a 30-year period, for which the landowner would be charged. It is important to recognize that the Authority would not be carrying out the monitoring itself, but would be reviewing monitoring reports to ensure they are satisfactory, thereby limiting the resource implications.

Entering into a S106 Agreement/Conservation Covenant

2.8.2 To proceed with the recommendations in this report would involve the Authority establishing processes with adequate built-in safeguards to ensure that only proposals likely to be delivered successfully, and aligned with National Park purposes, are progressed.

2.8.3 **Appendix A** sets out the information which is considered to be required from applicants to enable the Authority to make an informed decision on whether to facilitate a BGS. This evaluation process would be undertaken in two stages. Stage one would include the Authority undertaking a due diligence exercise to identify any potential issues or conflicts that may arise. If that does not highlight any concerns, then further information would be requested from the applicant to inform Stage 2 of the evaluation process.

2.8.4 The costs incurred through officer time taken to evaluate a BGS proposal would be charged to the applicant. This fee would be calculated on a "price on application" basis and would depend on the amount of officer time taken to carry out the necessary work. The fee will vary depending on the complexity of the proposal, the nature of the site and the amount of work needed to assess the plans. The hourly rates and fees of the officers involved would need to be kept under review to ensure full cost recovery for the Authority.

Reviewing Monitoring and Enforcement

2.8.5 The costs incurred for undertaking the ongoing monitoring work associated with overseeing BNG delivery on BGSs for 30 years after the habitats have been created and enhanced will be incorporated into the agreement (either S106 Agreement or Conservation Covenant) and paid by the BGS provider. The charges made to cover these costs will be based on officer time required to read monitoring reports and undertake site visits as required over the 30-year monitoring period. The charges will depend on the size of the site and the technical difficulty of the proposal. Smaller sites and those with habitats that are more easily created and maintained will incur lower fees than larger sites and those with complicated habitats which are difficult to deliver and maintain. An annual inflation rate will be added to the costs to account for cost increases over 30 years and they will be revised each year using the Consumer Price Index (CPI). Where landowners have a proven track record of delivery, monitoring requirements and associated charges may be reduced.

To manage potential enforcement risks, acceptance of applications will be on a case by case basis and every case will go through a due diligence process.

2.8.6 A further requirement of the Authority would be to enforce the S106 Agreement/Conservation Covenant in the event of breach by the BGS provider. Enforcement of S106 Agreements would take place via the statutory provisions in the Town and Country Planning Act 1990, which is an established well-known process. Conservation Covenants would be enforced using contractual law principles. The cost of enforcement would be borne by the Authority and, whilst there is a risk that a full costs award would not be granted upon conclusion of any litigation/mediation process, full cost recovery would be sought. It is, therefore, important that the Authority maintain a long-term relationship with the BGS provider to ensure that any issues are identified and resolved as early as possible. Ensuring proper evaluation at the outset, realistic cost recovery throughout and effective dialogue, monitoring and review with the BGS provider will reduce the risk of enforcement being required.

2.9 In addition to supporting other landowners, the Authority may wish to sell Biodiversity Units on land in its ownership, bringing in income to support biodiversity enhancement. Because the Authority cannot enter into the required agreement with itself, becoming a Responsible Body would allow the Authority to enter into a reciprocal arrangement with other Local Planning Authorities or Responsible Bodies, to enable it to register and sell Biodiversity Units on land in its ownership.

3. Proposals

3.1 For the Authority to apply to become a Responsible Body and to offer a service, entering into and administering Section 106 Agreements and Conservation Covenants with landowners, on a full cost-recovery basis, for the purpose of securing Biodiversity Gain Sites within the National Park.

4. Recommendations

1. **That approval be granted for the Authority to apply to become a Responsible Body under S.119 of the Environment Act 2021 and, if successful, offer a service to secure Biodiversity Gain Sites by way of Conservation Covenant;**

2. **That approval be granted for the Authority to offer a service to secure Biodiversity Gain Sites within the National Park as Local Planning Authority by way of S106 Agreement;**

3. **That the Operating Requirements set out in paragraph 2.8 of this report are adopted and approved;**

4. **That authority is delegated to the Head of Planning and Conservation and the Authority Solicitor to make amendments to the Operating Requirements (including criteria and information in Appendix A) as required from time to time;**

5. **That authority be delegated to the Head of Planning and Conservation and the Monitoring Officer to implement the decisions at recommendations 1 and 2 above in their entirety in accordance with the Operating Requirements at recommendation 3 above (including any subsequent amendments);**

6. **That authority be delegated to the Monitoring Officer to amend Standing Orders to include the above powers and delegations in the Scheme of Delegation.**

5. Corporate Implications

a. Legal

Pursuant to Schedule 7A of the Town and Country Planning Act 1990, developments must deliver an enhancement of a minimum of 10% net gain in biodiversity and, for off site gains and significant on site gains, this must be legally secured for 30 years.

There is no legal requirement for the Authority to facilitate habitat banks, however, in addition to its statutory purposes in section 5(1) of the National Parks and Access to the Countryside Act 1949, the Authority has a statutory duty under Section 40(1) of the Natural Environment and Rural Communities Act 2006 to consider what action it can properly take in the exercise of its functions to conserve and enhance biodiversity in England.

Pursuant to section 93 of the Local Government Act 2003, the Authority has power to charge for discretionary services providing any fees charged constitute cost recovery.

b. Financial

BNG legislation requires that significant biodiversity gain is maintained for a minimum period of 30 years. Any S.106 Agreements or Conservation Covenants would therefore need to be for that period, with a requirement that the Authority monitors and enforces compliance with the agreement for that duration.

Agreements would be on a full cost-recovery basis, including on-costs and overheads for setting up and monitoring agreements. Options for covering enforcement could, at the Authority's discretion, include a bond (a financial guarantee to be retained until satisfactory completion of the agreement).

In addition to basic costs that the Authority would require in order to administer agreements, additional full cost-recovery services could be offered to landowners at the Authority's discretion and subject to resource availability, e.g. carrying out Biodiversity Metric surveys and/or the field monitoring Such additional services could be at cost, or the Authority could set up a simple Separate Legal Entity if it wished to do the work for profit (this would be subject to separate Authority approval).

c. National Park Management Plan (NPMP) and Authority Plan

Where the Authority enters into S.106 Agreements/Conservation Covenants with landowners, setting up agreements will include quality assurance to ensure that the proposed biodiversity gain is appropriate and that other National Park special qualities and priorities, such as cultural heritage, are safeguarded. This work will help deliver the Nature Recovery Plan and the following National Park Management Plan Objectives:

- Objective 4: To be a place where nature recovers and biodiversity flourishes
- Objective 11: To promote a flourishing economy in accord with nature recovery and climate change mitigation

d. Risk Management

The risk of not achieving full cost recovery over the 30-year period of agreements will be mitigated by a combination of detailed initial costings including on-costs and overheads; linking to long-term inflation indices; reviewing best practice; utilising BNG software which includes calculation of monitoring costs; and including review clauses.

Current demand is limited and can be managed in-house.

Currently the Authority has limited capacity and skills for this new area of work so there is a risk around the skills and capacity to deliver. This will be mitigated by utilising savings in the current financial year to buy in support for developing procedures around establishing habitat banks; and for future monitoring by seeking full-cost recovery in any S106 Agreements or Conservation Covenants to fund future support.

e. Net Zero

Whilst there may be some carbon emissions associated with initial habitat creation, most biodiversity gain is likely to result in increased carbon storage and climate resilience longer-term.

6. Background papers (not previously published)
None.

7. Appendices
Appendix A attached.

Report Author, Job Title and Publication Date

Gemma Longman, Senior Nature Officer

Responsible Officer, Job Title
Brian Taylor, Head of Planning and Conservation