



Bridging the Conservation Gap Through Covenants and Section 106

Biodiversity loss is an escalating global crisis, with human activity and land development posing grave threats to ecosystems and wildlife. In response, the principle of biodiversity net gain (BNG) has gained traction, which mandates compensating for biodiversity impacts by demonstrably leaving nature in a measurably better state.

Robust legal mechanisms are essential to uphold BNG commitments over 30+ year timescales. The Environment Act 2021 introduced major reforms to biodiversity protection in England, including new powers for local planning authorities (LPA) to secure biodiversity gains from development. Under Section 106 of the Town and Country Planning Act 1990, planning authorities can enter into legal agreements with developers to mitigate the impact of projects. Landowners entering Section 106 agreements for BNG are required to maintain the biodiversity gain for at least 30 years.

An alternative to this agreement, Conservation Covenants enabled by the Environment Act allow landowners to enter binding agreements with responsible bodies to protect enhancements of natural assets.

These measures significantly strengthen nature recovery efforts by making biodiversity net gain obligations compulsory and empowering long-term conservation commitments. With development pressures rising, these instruments provide pathways for securing quantifiable and enduring improvements for nature.

Unlocking Section 106 Biodiversity Agreement.

Section 106 of the Town and Country Planning Act 1990 allows LPAs to negotiate legal agreements with developers tied to granting planning permission.

Section 106 planning obligations allow local authorities to place specific requirements on developments approved for planning permission.



Each LPA approaches Section 106 biodiversity agreements differently per local policies, which creates variability and uncertainty for developers working across regions. However, when structured appropriately, Section 106 provides LPAs legal authority to enforce 30-year BNG commitments on a site, ensuring units are not prematurely destroyed.

Section 106 agreements can also facilitate the provision of off-site biodiversity units by landowners, allowing developers to meet their BNG obligations by purchasing units from landowners who have created or enhanced habitats on their property.

Off-site biodiversity units provide flexibility for developers lacking sufficient space or suitable conditions on their site to achieve the required BNG. They also create opportunities for landowners to generate income by selling biodiversity units, incentivizing habitat creation and enhancement.

However, LPAs must ensure that off-site units are appropriately located, of sufficient quality, and properly managed over the long term, requiring careful due diligence and ongoing monitoring. The market for off-site biodiversity units is still developing, and availability and pricing may vary by area, necessitating close collaboration between landowners, developers, LPAs, and ecological experts to identify suitable sites and negotiate fair agreements.

Standardizing Sustainability: Conservation Covenants Streamline Nature Protection.

The Environment Act established conservation covenants - voluntary 30-year BNG private contracts between landowners and accredited responsible bodies, overseeing long-term compliance with biodiversity commitments.

To become a responsible body, an organization must meet requirements set by the government for conservation expertise and monitoring capacity. In theory, conservation covenants provide a more consistent national approach compared to complex negotiations under Section 106, which varies by local authority.

By entering a conservation covenant, if a land of 200 ha crosses multiple jurisdictions, a single agreement with one responsible body can cover it. However, responsible bodies take on substantial monitoring and enforcement duties for the 30-year minimum duration. Efficiency will depend on responsible bodies' capacity and resources. While the regime is still new, conservation covenants offer a promising alternative model for securing biodiversity net gain through private landowner contracts overseen by accredited environmental organizations.

Conservation Watchdogs: Local Planning Authorities (LPA) and Responsible Bodies.

Under the Section 106 framework, Each LPA takes a localized approach, setting policies and requirements aligned with community needs and priorities. For example, an LPA may choose to emphasize affordable housing, transportation, or biodiversity commitments from developers.



LPAs are responsible for tailored negotiation of Section 106 agreements for each project, drafting appropriate obligations, and monitoring/enforcing developer compliance over time. If developers breach agreements, the LPA can take legal action. Success depends on robust LPA administration of agreements to uphold obligations long-term and fully realize public benefits.

A Responsible body is a new concept that is a legal level of recognition the government can give to an organization. Organizations and NGOs can apply to become responsible bodies, and once they get approved, they can enter legally into conservation covenants with landowners.

Types of Responsible Bodies

As of June 2024, we are seeing three main types of responsible bodies being designated for conservation covenants and biodiversity net gain in England:

1. Local Planning Authorities (LPAs): LPAs, such as Bracknell Forest Council, Northumberland County Council, and Warwickshire County Council, who are likely to enter into conservation covenants for biodiversity net gain only within their respective jurisdictions. These responsible bodies work closely with developers and landowners to ensure that biodiversity net gain requirements are met and that conservation covenants are properly established and maintained within their local authority areas.

2. National Conservation Bodies for Landowners and Offsite Units: Organizations like Harry Ferguson Holdings and RSK Biocensus serve as national conservation bodies that focus on working with landowners to provide offsite biodiversity units for developers. These responsible bodies specialize in verifying and monitoring high-quality habitat units on private land, which developers can purchase to meet their biodiversity net gain obligations when onsite options are limited or unavailable.

3. Natural England Conservation Covenants: Natural England, the government's advisor for the natural environment in England, has the authority to enter into conservation covenants specifically for the use of government biodiversity credits, not BNG units. These credits are purchased by developers who are unable to meet their biodiversity net gain obligations onsite or through other offsite options. Natural England then uses the funds from the sale of these credits to establish conservation covenants with landowners, securing long-term biodiversity gains. As a responsible body, Natural England works to ensure that these government-funded conservation covenants are properly designed, implemented, and monitored to deliver lasting benefits for biodiversity.

For updated responsible bodies, you can check this [conservation covenant list](#).

Responsible Bodies: Ensuring Financial Viability and Long-Term Oversight of Conservation Covenants

Before signing conservation covenants, responsible bodies must apply due diligence on the land and ensure that the biodiversity enhancement metric prepared is accurate and feasible with sound ecological judgment.



Responsible bodies must ensure that the landowner has the necessary financial resources to implement and maintain the biodiversity enhancements over the long term. This may involve reviewing the landowner's financial statements, business plans, and funding sources to assess their ability to meet the ongoing costs associated with habitat creation, management, and monitoring.

In some cases, responsible bodies may require landowners to provide financial assurances, such as bonds or escrow accounts, to guarantee that sufficient funds will be available to fulfill the conservation covenant obligations. These financial assurances can help to mitigate the risk of non-compliance due to financial constraints or unforeseen circumstances.

Once a conservation covenant is signed, responsible bodies take on substantive long-term oversight duties. After the first year, they must monitor the site to validate that proposed biodiversity enhancements are being implemented per the agreed timeline and metrics. If enhancements fall behind schedule or fail entirely, responsible bodies must legally enforce the covenant through prescribed processes. Compliance enforcement can involve financial penalties or court injunctions to compel landowners to fulfill obligations.

In the event of non-compliance, responsible bodies may also need to assess the financial implications of enforcing the conservation covenant. This could include the costs associated with legal proceedings, habitat restoration, or alternative conservation measures. Responsible bodies should have contingency plans in place to ensure that the biodiversity objectives of the conservation covenant can still be met, even if the original landowner is unable to fulfill their obligations.

By incorporating financial viability assessments and assurances into the due diligence process, responsible bodies can help to ensure that conservation covenants are not only ecologically sound but also financially sustainable over the long term. This approach can help to minimize the risk of non-compliance and ensure that biodiversity enhancements are delivered as intended, contributing to the overall success of the biodiversity net gain system.

Bespoke vs. Standardized: Optimizing Conservation Through Section 106 and Covenants.

Section 106 biodiversity agreements allow for localized conservation solutions tailored to each development site's specific context and needs. Local planning authorities can leverage profound knowledge of local ecology and priorities when negotiating obligations. However, Section 106 processes can become complex for large landowners working across multiple regions, each with distinct LPA biodiversity policies and expectations. Slow or unclear negotiations may constrain the supply of biodiversity units through uncertainty in navigating varied LPA requirements. Additionally, some LPAs may lack specialized ecological expertise to structure agreements optimally for enduring biodiversity gains.

In contrast, conservation covenants offer the chance of national standardization through accredited responsible bodies, streamlining the process versus localized Section 106 complexity. However, as national entities, responsible bodies may lack a detailed understanding of site-level ecological sensitivities compared to LPAs.



Both agreements require rigorous, legally binding commitments to achieve responsible long-term biodiversity outcomes, necessitating ongoing site monitoring to track progress and adapt to changing conditions over 30+ years.

Overall, if equipped with skilled technical teams, responsible bodies can potentially provide greater ecological oversight than LPAs bound by local resource constraints. Yet responsible bodies must secure adequate capacity and funding to shoulder the substantial monitoring and enforcement obligations tied to covenants. Insufficient resourcing risks undermining the effectiveness of covenants in practice.

Responsible Biodiversity Protection Through Binding Conservation Contracts.

As development pressures on natural habitats continue rising, policy innovations like conservation covenants enabled under the Environment Act provide essential mechanisms to counteract impacts and achieve quantifiable ecological gains. Both frameworks allow durable conservation commitments to be enshrined through legal contracts between developers, landowners, local authorities, and responsible bodies.

However, the full promise of these instruments relies on rigorous implementation, monitoring, and enforcement over decades-long timescales. Local complexities around Section 106 must be streamlined to provide workable biodiversity solutions, while conservation covenants depend on responsible bodies securing adequate resources and oversight abilities.

Conservation covenants provide an important mechanism to facilitate the emerging biodiversity net gain market. Without covenants, landowners may be deterred by potentially lengthy, complex negotiations with local planning authorities under Section 106 rules. This could constrain the supply of biodiversity units if landowners are uncertain or unable to navigate localized Section 106 requirements across regions successfully. By offering a standardized national approach, conservation covenants can accelerate landowner participation, enabling responsible bodies to efficiently broker agreements that expand biodiversity unit availability. While still in early stages, conservation covenants help ensure accessible pathways for landowners to commit to biodiversity net gain actions, bolstering market growth.

Section 106 agreements and conservation covenants ultimately offer pathways to quantifiable biodiversity gains. Realizing their full potential requires binding, durable commitments backed by vigilant monitoring and enforcement to uphold biodiversity value in perpetuity. Ongoing scrutiny of these policy mechanisms in action will clarify optimal structures and safeguards.



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