Scottish Environment LINK

Response to the Scottish Government consultation of March 2015 on the document on Guidance on prior notification and approval requirements in relation to agricultural and forestry private ways and buildings

Scottish Environment LINK welcomes the opportunity to comment on this guidance document. Given that the GPDO Amendment Order came into effect on 15th December, we feel it is crucial that this guidance is finalised to the satisfaction of all parties and published as soon as possible, as the season for track construction will shortly be underway.

First, we emphasise that we are unanimous in finding this guidance document in its current form to be weak and unsatisfactory on very many counts. It must be acknowledged by all concerned that it is in the best interests of all stakeholders to achieve a final guidance document that is clear and precise, unambiguous so that there are no uncertainties, and not open to differing interpretations. Any document that does not address these considerations will lead to undesirable outcomes such as inappropriate hilltrack construction and stakeholder disputes together with the time-consuming resolution actions and frustrations that would ensue.

The document must be in keeping with the intentions of the legislation. It is not considered that this draft achieves this. The draft is a legalistic interpretation of the amendments with minimal policy guidance. Several key considerations are omitted. On several points there is a lack of depth, so that there is a consequent lack of clarity. All of this is unhelpful to stakeholders.

The final document will not be statutory but the aspiration should be to make it comparable in clarity and status to other Scottish guidance documents such as the Scottish Outdoor Access Code [SOAC]. The SOAC is clear and authoritative and also balanced in its consideration of legitimate interests to the extent that it is treated as an essential reference and working manual.

Guidance of this kind will not on its own be sufficient to instil the sort of understanding and encourage the level of best practice that is envisaged. Links to supplementary guidance available from other sources will have to be included. Throughout this response there is reference to the helpful and carefully composed interim the Highland Council [HC] document "Permitted Development Rights: Guidance for Agricultural and Forestry Private Ways" [December 2014]. This document includes clear expectations and defined procedures for developers and other stakeholders for guidance. For convenience, a copy is attached.

General Observations

1. The document does not state to whom it is directed or what its purpose is; it should do so.

2. The document should start with an introduction that briefly summarises why it was felt necessary to change the law, as the HC interim guidance document does. By including this and also fully detailing the known problems that can be associated with hilltrack construction in fragile upland environments [visual and various types of environmental degradation] a developer would better appreciate why the controls have been introduced, the interests they have been designed to safeguard and what they require to address in their prior notification submission. The document should also indicate throughout the practices and behaviour that all parties seek to encourage.

3. The proposed guidance is too superficial. Some issues need to be explored in some depth [the situation re designated areas, how "agriculture" should be defined, the importance of building tracks to the highest standards and especially the requirement to comply with conditions and restrictions]. The HC document does address most of these issues in depth so it is much more useful. Scottish Government may feel its role lies in laying out basic

requirements and processes and it is then up to individual planning authorities [PA] to produce separate local guidance. This would not be satisfactory at all in this context. It would be much better to have standardised Scotland-wide guidance [and a few Hilltracks cross local authority boundaries in any case] for fairness and clarity. Another consideration is the fact that local authority planning departments have been very much depleted in recent years and there is widespread concern over the adequacy of their capacity and consequent delays in the system. This further supports the view that there should be a centrally produced document that is precise and clear for all stakeholders to use.

4. A major omission is that the draft does not engage with the issue of what information the PA needs to help it decide whether a track is actually for agricultural or forestry purposes when it receives a prior notification. This will be commented on more fully in context below, but this point is critical from the perspective of this stakeholder group. The developer's word that, for example, they need to use a bit of remote hillside for sheep should not be taken at face value. Attention must be drawn to the need to expect an independent "Operational Needs Assessment" as in the HC interim guidance, and it is strongly recommended that this should be incorporated here. There is less concern regarding forestry. Prior notification of tracks outside existing forests will, presumably, be linked to new plantings or to specific requirements for existing plantings and this should be fairly clear.

5. A very serious omission is any full consideration of designated areas and features. This must include all appropriate cultural, built heritage, landscape and natural heritage designations. It must not be taken for granted that all developers will know about these, their relevance and how to approach their protection. Again, reference is made to the HC guidance where most of these have been detailed [pages 10 to 13]. This is much more helpful to developers.

6. There is no reference to the SNH Wild Land map. This has no legal status but the reference to Wild Land in NPF3 regarding how it is used and its purpose is considered to be an essential material consideration.

7. It is recommended that some guidance is given to PAs concerning the issues to consider in determining whether prior approval with accompanying conditions is required. This is necessary in order to achieve consistency in approach on this point throughout Scotland. This was addressed in the LINK proposed Guidance of November 2014, where ten bulleted considerations were included. This document is attached for reference. A similar list, along with supporting explanations, should be incorporated into this document.

8. A further omission is any process whereby the democratic deficit should be addressed in guidance procedures, although the need to do this has been stressed in LINK communications and discussions with SG, including at the Stakeholder meeting in Glasgow last December. This is not compatible with the stated aims regarding engagement as described in the Scottish Planning Policy.

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9. The consultation document should ideally have listed all consultees, for reasons of transparency. For example, is Scottish Natural Heritage [SNH] to be asked to comment? Considering that it has produced what is considered to be a very useful and appropriate practical guidance document for developers [Constructed Tracks in the Scottish Uplands, 2nd edition, June 2013] it would be expected that it should be asked for an evaluation of the suitability of the SG draft guidance.

Detailed comments on the SG draft guidance

For ease of cross reference, the draft guidance document has been discussed below on an order of paragraph basis. It should be pointed out that this by no means indicates that the document in its existing format and text is supported, considered suitable for its purpose or endorsed; indeed it is considered that considerable redrafting is necessary.

Introduction, Paras 1 and 2: see comments above. It might be better to locate the legislative background in an Appendix so that the document will be more focussed on actual guidance, which is its purpose.
In the first sentence of para 1 it should be stated that it was designed also to ensure that only developments which are indeed necessary for agricultural and forestry purposes benefit from permitted development rights. Again, reference should be made to the HC guidance [pages 5 and 6] where there is precise coverage.

The last sentence of para 2 requires some clarification. Does this paragraph indicate that a PA can refuse a prior notification? If the track is deemed to be permitted development, then it cannot be refused; prior approval, however, may mean that what is finally approved may differ substantially from the original application. Is this a correct interpretation?

Para 3: the phrase "long-term conservation objectives" needs some explanation or clarification. Whose objectives? What type of objectives? The purpose of this paragraph may be to achieve a balance between the considerations of development against those of environmental conservation and the aims of cost avoidance. This comes across as too developer centric and the last sentence in particular is far too weak. It is recommended that this paragraph is rethought and the THC guidance is referred to as an example.

Previously, the reasons for wanting to prevent the "inappropriate construction of private ways" have not been spelt out. The guidance should *at an early stage* detail the damage that poorly sited and designed tracks can have on ecological and landscape interests. These are after all the prime reasons for having the Amendment Order and consequently, the guidance. Attention needs to be given to the impacts of farming and forestry activities in fragile environments. If such activities can be well managed their impacts can be reduced; although not eliminated.

This is where there needs to be full guidance for applicants regarding what are considered to be agricultural purposes. The core of the problem is not tracks for genuine agricultural purposes, it is hilltracks claimed to be for agriculture which are in reality no such thing. Prior notifications should lay out the exact purposes for which the track is required, including what agriculture will take place and why a track is needed. Tracks are often not needed to put sheep up a glen, but some estates will claim that they are needed for this or similar purposes. If this is the stated purpose then the developer should be expected to give the reasons why the track is needed, how often it will be used, the number of sheep involved etc. to support their prior notification. The HC includes this in its interim guidance [page 5] by stating that "permitted development only applies to ways which

serve a clear and demonstrable agricultural or forestry purpose *and* are reasonably necessary". Should tracks ever be considered as being for agricultural purposes if the developer proposes to put them on land which has never previously been used for agriculture? There is obviously a requirement for the guidance to spell out precisely what is meant by agricultural land in this context. Definitions could include "land which had been previously cultivated" and "land which has been prepared and planted specifically to provide pasture for rearing animals or planting crops", although these two suggestions would not be adequate for all eventualities, and more would be required. Including some definition of agricultural land early in the finalised guidance document is an absolutely essential component, and would remove doubt for all stakeholders.

Critically also, the HC's interim guidance outlines circumstances when permitted development does not apply [page 5], in particular this is the case when: "the use of proposed or altered private way includes significant non-agricultural or non-forestry access". This point must be included as it addresses the likely scenario where a track is claimed to be for agricultural purposes [possible reasons being given as a few sheep being moved every so often, or a track to be used for taking supplementary fodder onto the hill] while in reality it is used regularly for sporting purposes [which are exempt from permitted development rights and therefore require planning permission].

Para 5: the status and definition of "footpaths" should be clarified. Do they now come under prior notification or is a full planning application required, as seems to be the case at present? This has implications for path work in the hills where path repairers might take a different line to an eroded path.

Para 7: See also the comments on para 3 above. There is a need to define agricultural land precisely. Is a remote glen to be considered as being "agricultural land" just because sheep can graze there? How is "agricultural unit" defined? Precision at this stage may save lengthy disputes and maybe court cases [if enforcement procedures have to be invoked] in the future.
4th bullet: "classified road" should be defined in this context
5th Bullet: the proposals that would require an EIA should be stated, or referred to in an appendix, as a reminder and to make the document more comprehensive.

Para 11: the last phrase covers a key point which would be better registered much earlier and more prominently in the document.

Para 14: A fuller explanation would be useful here, as in the more extensive treatment of alteration and maintenance in the interim HC guidance. Distinctions have to be clearly made and examples of each given. This is essential to avoid doubt and misinterpretation in implementation. After the first sentence insert "Prior notification would not be required for purely maintenance activities. This latter term should, however, be interpreted as covering only such work as is necessary to keep the way serviceable in essentially its present form". There is a need to give an explanation for the last point; simply adding "This is because these would be considered to change the character of the road and/or upgrade it and such work would constitute an alteration and would require prior notification" would suffice.

This paragraph should, however, despite the suggestions above, be deleted and instead these points should be dealt with much more fully and precisely as in the THC interim guidance.

Para 16: As above, a more informative account is needed. The developer must be required to state the reasons for the track and include detailed supporting information [preferably in an Operational Needs Assessment] describing why it is necessary for the purposes stated in addition to a route, description and details of design and of the mode of construction as mentioned here. To enable the PA to be acceptably rigorous in ascertaining the purpose of the hilltrack a set of guidance criteria for track use must be produced to inform this stage. At this point an additional paragraph should be inserted stating "it is strongly recommended that both the PA and the

developer adhere to the 2013 SNH Guidance "Constructed Tracks in the Scottish Uplands" [and any future further review of this guidance] in all cases where a hilltrack is proposed".

Para 19: change "ofvalidated" to "of validation". Is a box necessary here?

Para 20: The statement regarding the route of the hilltrack should be strengthened by noting that its visual and environmental impact will be factors in the final PA decision and based on the information given. The degree to which the developer can be required to amend the proposed route is a critical issue. At the very least a "reasonableness" test should be included here. After "setting" add the phrase "and amenity value and ambience of an area used for local and visitor recreation".

Para 21: This requires clarification. It has caused doubt and concern as we do not consider that the amended order is as restrictive as is suggested here [please see also our comments on para 2 above]. Firstly, as discussed above, the PA must investigate fully to ensure that the proposed track is actually permitted development. This will entail detailed scrutiny of the justification for the track before the "principle of development" can be established as being permitted. It must not be assumed that the proposed development is required for the purposes stated just because the developer says so. If, after full consideration, the PA considers that the proposal is permitted development , then it must decide whether aspects of the proposals need to be altered including possible significant re-routing, changes to construction etc. This para could also be improved by, after the word "apply", inserting "providing that they satisfy the requirements specified in paragraphs 7 and 8 above".

Para 23: In the second box down of the flow chart [fig 1], there is nothing here or elsewhere [apart from a mention of requirements for EIAs] to state that full planning consent is needed if a hilltrack is proposed for construction that would be in or would impact on certain designated sites. The HC guidance includes this, and it would help developers if the implications and requirements of designations were laid out in the document in a dedicated section. The THC document, pages 10 to 13, offers an example of an approach to this.

[**Heading:** "Efficient handling etc" at this point should be in bold]

Para 25: As it stands this paragraph gives the impression that SG wants prior notifications to be rushed through with minimal oversight. This is not at all acceptable. This is imbalanced as it does not also emphasise that responding quickly must not result in or involve PAs failing to give adequate scrutiny to prior notifications.

Additionally, the second sentence is not acceptable; this suggests that the developer is not able to plan in advance adequately; there is no realistic occasion that could be envisaged when a hilltrack has to be built rapidly [in this timescale] for market expediency. These are not construction projects that are undertaken with a minimum of prior planning; they tend to take weeks or months to achieve even with heavy equipment, which in most cases, has to be advance booked for hire. The onus here should be on the developer to plan ahead and lodge prior notifications in good time. Any competent business should be perfectly capable of this.

In order to effect a modicum of democracy, the following sentence should be added: "The date of validation and the prior notification documents from the developer should also be recorded in an easily accessible way by the PA on the weekly planning notices, perhaps in a separate section from full applications". This simple requirement would achieve some public accountability and involve little additional workload. If preferred, this point re the timing of the recording for public availability and scrutiny could be added to paragraph 33 instead.

It has to be pointed out that the presentation of the new measures is seen as being very one-sided in its sensitivity to and accommodation of land managing interests. While the concerns expressed

over the possible impacts of the new controls on businesses are understandable, the fact remains that these same controls have only been introduced to protect [to a minimal degree] equally legitimate public interests. It is vital to the credibility of this document, and indeed ultimate effectiveness, that these interests are given comparable prominence and weight in the guidance.

Para 26: The first sentence is not acceptable and must be removed as it undermines the democratic process. The PA should wait until the statutory time has elapsed before informing the developer that prior approval is not required. This is so that any representations received from third parties can be considered and their merit evaluated by the PA. It is in any case anticipated that PAs will require at least the full statutory 28 days to achieve what is required of them due to various foreseeable circumstances, so no undue delay would be incurred, especially considering the length of time it takes to construct hilltracks, even using modern machinery.

Para 27: The last two sentences lead to ambiguity regarding what has actually been approved unless the PA puts everything that has been discussed and agreed with the developer into its written statement of prior approval. With this in mind, the last sentence should be changed to "the authority must give its written approval to the modification[s].....".

Para 36: The following compliance matter should be made clear and this is a possible location for it. There should be clarification in the guidance that once a prior notification has been accepted by the PA [in cases where prior approval is not required] or prior approval has been given, the developer cannot depart from the agreed written details. There is a need to enforce the point that non-material amendments cannot be made to prior notification or prior approval and any changes subsequently deemed to be desirable by the developer will have to go back through the prior notification process.

Para 37: This requires some clarification. The paragraph needs to be clearer about the contingency that it is addressing. Does this refer to a situation where a PA has been notified of a hilltrack which is claimed to be for agricultural or forestry purposes but then judges it not to be and can therefore legitimately ask for a planning application [as in para 11]? Or does it cover a situation where a developer has claimed permitted development rights and has built a track which is then shown to be using it for essentially other purposes? It would appear that it must be the latter example, in which case the enforcement action would be to require a retrospective planning application. It should be noted that the matters in the text in para 37 do not cover the often encountered situation where minimal agricultural use is the cover for predominant use for other purposes and this illustrates some of the difficulties in clear interpretation and implementation with the legal situation all stakeholders have to work within.

Additional Points

- Much more specific guidance is needed on the standards of construction in this document. Full reference should be given to the SNH guidance document, referred to earlier.

- It is unfortunate that on site borrow pits and quarries used for sourcing materials for track maintenance and construction are excluded from consideration as these are visually intrusive, can lead to further environmental damage, and remedial work is rarely carried out after use.

- In various places conditional verbs are used. This has presumably been done on the basis of legal input but this has resulted in a weakening of the document. There are several

examples in the text where there is a need to strengthen the document, in order to achieve clarity and reinforce expectations. Some examples [but by no means all] are:

i. Para 14, sixth line: "may be considered" should be changed to "would be considered"
ii. Para 15, first line "should check" should be changed to "must check" or "are advised to check", and line 3 "may consider" should be changed to "should consider" [although Scotland wide definitions set out in this document would be preferred].
iii. Para 20, second sentence: "may require" should be changed to "will require"
iv. Para 37, last line: "may be taken" should be changed to "will be taken"

Finally, should you require any clarification on any of the points raised in this response please contact us using the details below. Thank you for giving us this opportunity to comment and we would be equally happy to comment on a subsequent draft.

The Mountaineering Council of Scotland, while not a member of LINK, also supports this campaign.

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