

Scottish Environment LINK response to
Scottish Land and Estates report
The Way Ahead for Constructed Private Tracks

11th April 2014

On behalf of:

Association for the Protection of Rural Scotland
Cairngorms Campaign
John Muir Trust
North East Mountain Trust
Ramblers Scotland
Royal Society for the Protection of Birds
Scottish Campaign for National Parks
Scottish Wild Land Group
National Trust for Scotland

and supported by the Mountaineering Council of Scotland



Scottish Environment LINK position

We welcome Scottish Land and Estate's response to the Scottish Environment LINK report *Track Changes*. We believe this response, *The Way Ahead for Constructed Private Tracks*, provides final confirmation of the need to bring all tracks under planning control by removing Permitted Development Rights (PDRs) from tracks constructed for agricultural and forestry purposes. The Scottish Land and Estates (SLE) response demonstrates how rapidly track construction can take place in sensitive landscapes and reinforces the need for the Scottish Government to remove PDRs as soon as possible to ensure that no further unnecessary damage is done to Scotland's natural heritage. In this document we respond to the general points and specific comments made by SLE.

We note that SLE have been selective in their response, choosing to ignore the bulk of the evidence of damage to landscapes and environments across Scotland, and instead focusing on examples of good practice. We are more than happy to acknowledge that many estates and land managers construct tracks to high standards, and that some (such as Glenfeshie) have worked hard to improve previously-constructed tracks at their own expense. However, no number of examples of this kind justify or lessen the impacts of poorly constructed tracks, of which there are many.

Nevertheless, the examples presented by SLE demonstrate that bringing such tracks under planning control should present no difficulties to land owners where it has been agreed that it is in the public interest to permit such developments to go ahead. Adherence to the Code of Good Practice should be made a condition of planning approval. Where tracks are constructed to a standard which falls below that required by the Code then enforcement action can follow in a straightforward way as a breach of the planning conditions. Trying to take retrospective action outwith the framework of the planning system is much more difficult and time consuming for local authorities.

The Way Ahead for Constructed Private Tracks also ignores the issue of public oversight, and our contention that all of those affected by track developments (people living and working in the local area in particular) should have the right to comment on these potentially major new developments, whether in support or in opposition. As highlighted in *Track Changes*, we know of no other comparable situation in which those with legitimate interests in developments of this scale are so disempowered.

Our main conclusion is that the introduction of planning control over track construction will prove readily acceptable to all those landowners who are sensitive to landscape and other environmental considerations, will not unduly burden planning authorities, and will be welcomed by the majority of public opinion. The alternative is endless controversy with those landowners who disregard public opinion and damage the reputation of the landowning and land-managing community as a whole. This has been the situation over the last 50 years and it is time it was brought to an end, if Scotland is to live up to the democratic standards that we aspire to in the 21st century.

We find Scottish Land and Estates' statements in their report about scrutiny and LINK's charitable status strange and inappropriate. The issues raised in the *Track Changes* report fully comply with LINK's charitable purposes and funding for the report was received from member contributions and charitable trusts. It is entirely proper that LINK uses its funds for this purpose.

We would be pleased to meet with SLE to discuss our proposals for change further.

Criticisms of *Track Changes* – general points

The Way Ahead for Constructed Private Tracks makes a number of specific criticisms of our report, and we respond to these below. Scottish Land and Estates (SLE) claim that *Track Changes* contained ‘fundamental misconceptions’, ‘incorrect information’, ‘out of date photographs’ and ‘misleading’ points. These claims are baseless, and are not supported by anything in *The Way Ahead for Constructed Private Tracks*. It is unfortunate that Scottish Land and Estates have simply sought to discredit *Track Changes* without engaging with its main arguments, and while ignoring much of the evidence it contains. The basis for our campaign remains unaltered by their response, and is briefly set out below.

Our campaign to remove PDRs from agricultural and forestry tracks is motivated by the damage caused by many of these tracks, over several decades, and by a fundamental principle:

- That developments with the potential to cause substantial aesthetic, economic and environmental damage should be subject to oversight, to:
 - ensure that they are justified;
 - allow those with legitimate interests in the development to express their views; and
 - ensure that, if approved, development proceeds in such a way that the balance of interests is respected and appropriate standards are met.

This principle would apply to modern hill tracks even in the absence of the overwhelming documentary evidence of the problems associated with the existing system. We are not aware of any other present-day situation where developments of this scale are exempted from such oversight, and note with frustration the continuing failure to justify this exemption for agricultural and forestry tracks (indeed, the constraints imposed on forestry tracks by EIA regulations – which are inadequate in our view - imply a recognition that a wholesale exemption is not justifiable, as does the earlier removal of PDRs from agricultural and forestry buildings). SLE themselves do not attempt to justify the principle of PDRs, but only their application by their own membership. We believe it is unacceptable that decisions about the existence and standards of major developments should be left entirely to the developer, while none of those affected directly or indirectly have the right to object.

Scottish Land and Estates insist that only voluntary standards are appropriate for track construction. Their opposition to regulation appears to be partly based on a desire, which we all share, to keep the regulatory burden on landowners, land managers and local authorities to a minimum. However, the planning system exists in order to ensure balance between legitimate interests in developments (many of which are far less substantial than hill tracks), and such a balance is urgently required here. Furthermore, voluntary standards have effectively been applied since the *Town and Country Planning Act 1947*, and good-practice guidance relating to track construction has been readily available since 1978, when the Countryside Commission for Scotland published *Vehicular Tracks in Upland Scotland*. This guidance, and its successors, have clearly failed to have any lasting widespread impact, given the evidence of poor construction methods we have illustrated. SLE repeatedly point out that many landowners voluntarily construct tracks to high standards, and they have now had many years to consult good-practice guidance. As SLE tacitly acknowledge, however, not everyone follows good practice guidelines, even when directly informed of them (as in the case of the Ledgowan track that we highlight).

It is clear, and understandable, that some landowners will continue to exercise their rights to build tracks wherever and however they see fit as long as those rights exist, and the problem is therefore not one of lack of awareness of guidance but lack of adherence to it. If further proof is needed of the obvious limits of a voluntary approach, it is supplied by the lack of consistent improvement in standards following long-running campaigns by environmental groups, the publication of a number of reports calling for change, a public petition and parliamentary debate, a consultation on the removal of PDRs, a great deal of press attention, and the announcement by the Minister for Local Government and Planning that he would be keeping the situation under review. The updating and re-publication of existing guidance will have no significant impact where all of these have previously failed.

The evidence clearly shows that tracks are frequently built to very low standards, and that the damage caused in these cases and the detrimental impacts that accrue to the wider community are far too substantial to be ignored, or to be treated as a price worth paying to preserve the freedoms of more responsible landowners. Scottish Land and Estates have not challenged this evidence.

Finally, practical difficulties in implementing regulations do not alter the justification for those regulations. In any case, practical difficulties need not be significant. Forestry tracks are subject to PDRs but are already regulated by the Forestry Commission; an arrangement that the Forestry Commission and forestry companies strongly support. There is no reason why standards should be possible to enforce for forestry tracks but impossible to enforce for any track with a claimed agricultural purpose. In fact, although Scottish Environment LINK favours the outright removal of PDRs for all tracks as the simplest and most workable solution, there are several possible ways of introducing some form of regulation. We would be happy to engage in constructive discussion of these options, and this would be a more realistic 'way ahead' than a refusal to countenance any formal consideration of the legitimate public interest in hill track construction.

Track Changes – specific criticisms

Below we respond to the specific criticisms of *Track Changes* made in the SLE report.

Purpose of the report

It may be worth reiterating the clearly stated purpose of *Track Changes* – to “provide further evidence of the damage done by hill tracks under the current legislative framework”, as invited by the Minister for Local Government and Planning. The report is not intended to provide an exhaustive summary of the application of PDRs or a balanced survey of tracks constructed under them (this would be a huge task; nobody knows how many such tracks there are or where they are), but a presentation of Scottish Environment LINK’s position on hill tracks. It is not the purpose of the report to criticise individual estates, and indeed we make it clear – and stress again here - that none of these estates have done anything wrong under the current system (although some of the damage shown in our case studies cannot be and has not been justified). The primary aim of *Track Changes* is to criticise the system, not those who operate within it.

Objectivity

Track Changes represents an objective summary of some of the damage caused by tracks built under PDRs. We happily acknowledge the voluntary construction of tracks to high standards by some estates, but this does not and cannot compensate for the immense damage caused by others. As such it is not relevant to the arguments we make. We also note that Scottish Land and Estates have not attempted to provide an objective overview of track construction either, but have consistently attempted to justify PDRs by ignoring anything other than the best examples of good practice. The damage caused by poor track construction is real, demonstrable, and unacceptable, and it is to be regretted that *The Way Ahead for Constructed Private Tracks* does not engage with this core issue.

Expertise

It is important to realise that *Track Changes* represents the position and knowledge of the entire LINK hill tracks campaign group, which comprises many organisations. Individuals involved in the campaign have expertise in, for example, planning, forestry, tourism and visitor enjoyment, engineering and agriculture, and many have been intimately acquainted with the areas concerned for many years (indeed for longer than the current landowner in some cases). The evidence and arguments in *Track Changes* are strongly grounded in this expertise, and cannot be dismissed as ‘assumptions’ or ‘misconceptions’.

Lack of input of landowners

It is certainly important that landowners should have their say, and so we expected and welcome the involvement of Scottish Land and Estates in this debate. We would only point out that landowners are currently the only truly empowered group in this situation, having the freedom to construct tracks to any standards with or without giving their reasons, and that concerns about engagement may be better focused on others affected by track development (for instance, the people of Achnasheen) who currently have no formal opportunity to register their opinions or interests.

Purposes of tracks:

We did not attempt to ascertain the purposes for which tracks were constructed: this is impossible, especially in the context of legislation that does not define agriculture or forestry. It is to be expected that landowners constructing tracks under agricultural PDRs claim agricultural purposes, and we are not in a position to challenge or verify those claims. We would, however, respectfully point out that asking the landowners responsible for track construction, as SLE have done, does not necessarily establish the purposes of track construction either, given that agricultural purposes must be claimed in order for the tracks to be legal.

Planning authorities are, of course, the appropriate bodies to assess the justifications for developments of this sort, and the system should be changed so that they can decide whether agricultural purposes justify developments (we know that many planning authorities have expressed doubts about this in the past). Objective information about where tracks run (as provided in *Track Changes*) is relevant, as are other publications such as the earlier Herriot-Watt report, which found evidence of sporting tracks being built under PDRs, and the 2006 survey of planning authorities that found widespread concern about the use of agricultural PDRs for non-agricultural purposes.

In fact, the discussion about purposes underlines our point that the existing legislation is no longer workable. As Scottish Land and Estates (and *Track Changes*) point out, many tracks have a number of different uses and purposes, and this makes it impossible for planning authorities to ensure that the limits of PDRs are observed. Far from suggesting that the use of tracks should somehow be limited, we argue that their multi-functionality should be recognised and the case for them should be based on their full range of benefits and their full range of impacts, rather than on whether or not the developer claims that they serve some notional single purpose. We believe we may share some common ground with Scottish Land and Estates in regarding the distinction made in the legislation as artificial and unenforceable.

Use of photographs:

Photographs are clearly labelled in the report. As is made clear, those of case studies are all recent, while those elsewhere in the report were taken over a number of years. These were used to illustrate particular points and that the problems identified are long-standing, as clearly stated in the

report. Some photographs are old, but these are certainly not 'out of date' because the legislation has not changed since they were taken and the same issues still arise.

Construction methods

We agree that modern construction methods can be used to produce better tracks with smaller environmental impacts than some older techniques. However, modern machinery can also be hugely damaging when used inappropriately, and the relative ease and low cost with which it can be used ensures that such damage is fairly common, and often associated with very long, quickly-constructed tracks. We entirely support the implication that enforcement of minimum standards would cause very little difficulty for developers. As pointed out in *Track Changes*, there is nothing necessary about much of the damage caused by the tracks we highlight.

Changes following construction

The great majority of photographs used in *Track Changes* were of established tracks that were not under construction (note, though, that some photographs are explicitly of tracks under construction and are labelled appropriately). In several cases, claims that tracks were still under construction at the time they were photographed appear to be based on the fact that planning authorities or other bodies subsequently insisted on changes being made; this is obviously a separate process.

The evolution of tracks over time is carefully dealt with in *Track Changes* through a number of photographs and references which show that impacts actually increase over time when construction standards are poor (as is visible in several of the case studies, particularly where tracks are dug deep into peat with large volumes of detritus spread over the surrounding land). Many of the tracks pictured in the report suffer from continuous erosion due to inadequate construction practices, and this eventually makes some tracks impassable during some or all of the year. Every stage of this process is detailed in *Track Changes*, from construction through to the steady increase of landscape-scale impacts over several decades.

Safeguards

We welcome the clarification of the status of these designated areas, but note that it does not invalidate the original statement. In fact it would have been misleading to suggest that these designations are protected when that protection depends entirely upon the extent to which they overlap with other designations, or on who owns or manages them. We agree that SNH, at least, is likely to be involved in track construction in National Nature Reserves (although it is not guaranteed), but we are very concerned about the lack of consistent protection for SSSIs and National Parks (note that the Ledgowan track highlighted in *Track Changes* was constructed through an SSSI; SNH only became involved once work was underway, when it would have been impossible to rectify damage to the notified geomorphological features). It is also important to recognise that Natura sites and SSSIs are not landscape designations, so that SNH would only be asked to advise on

mitigating any impacts on the species or features for which the site was designated, and not necessarily the wider landscape impact (which is of great concern to us). In any case, comment from government agencies like SEPA and SNH on specific elements of track construction does not meet the requirement for wider public scrutiny of track construction which we are calling for. We suggest that this discussion clearly demonstrates the need for simplification of the planning legislation.

The system is ‘working as intended’

It is difficult to understand how Scottish Land and Estates reach this conclusion. In several cases of which we are aware (and in some of the *Track Changes* case studies), tracks have been happened upon and reported to the relevant planning authority by members of the public, at which point the planning authority has either decided that they are powerless to act because of PDRs, or have decided (sometimes with SEPA or SNH) to require planning permission to be sought and/or alterations to be made. For all concerned, this process is considerably more costly in terms of time, finance and inconvenience than a planning application in the first case would have been, and is extremely unlikely to result in such a satisfactory outcome (many of the impacts of track construction cannot simply be ‘undone’). The tracks that Scottish Land and Estates refer to that were not for agricultural or forestry purposes should have been the subject of a planning application before work commenced; an application made after work has been completed actually shows the system *not* working as intended.

LINK’s publication of the report

We find Scottish Land and Estates’ statements about scrutiny and LINK’s charitable status strange and inappropriate, and certainly not in the spirit of a constructive discussion of the issues. We can confirm that LINK receives funding from a range of sources, including charitable trusts, membership fees, the Scottish Government and Scottish Natural Heritage. However, the *Track Changes* report was funded from three sources: contributions from member organisations involved, a grant from the Scottish Mountaineering Trust, and a proportion from LINK’s Discretionary Project Fund, allocated from membership subscriptions and funding from a charitable trust.

As SLE is aware, all charities have to set out their charitable purposes and these can be freely viewed on the OSCR website. Raising environmental issues falls within LINK’s charitable purposes, and it is entirely proper that LINK uses its funds for this.

Value of *Track Changes*

We are unsure why Scottish Land and Estates finds *Track Changes* unhelpful. It provides clear evidence of damage caused under the current system, as invited by the Minister for Local Government and Planning.

The report was closely scrutinised and we stand by it. There is nothing in Scottish Land and Estates’ response that calls its validity into question.

Individual tracks

Dinnet track (Cases Study 2)

We appreciate the further information, but our concerns about the design and impact of the track, particularly on peat, stand.

Bealach Horn track (Case study 3)

These further details demonstrate the favourable outcome that could more easily have been achieved were the track subject to a planning application prior to construction.

Glendye tracks (Case study 5)

We stand by the description given in *Track Changes*, which includes references to other sources. We would query the definition of 'repairs' used here (we understand that the track was, in places, built along the line of an old path), and would also suggest that the Council were not 'happy' with the track, but accepted that it was covered by PDRs and so had no further role to play. In any case, we are certainly not happy with this track, for all of the reasons given in *Track Changes*. Some photographs do indeed show one of the tracks during construction, in order to demonstrate the impacts that occurred during construction. Remedial work subsequently carried out on the insistence of SEPA was not part of the initial construction and has not successfully mitigated all of the impacts of the poor practices used initially. Again, none of this justifies the very substantial damage caused by these tracks.

Kyllachy track (Case study 7)

These points are not relevant to the concerns we raise.

Lynwilg track (Case study 8)

We accept these assurances, but remain concerned about the problems of re-vegetation and possible erosion downhill of the track, as shown in the photographs. The improvements could have been more sympathetic in terms of landscape impacts.

Dell/Glenbrein track (Case study 4)

We include below pictures of the track before and after the 'upgrade'; we believe these speak for themselves. It remains to be seen whether the upgraded track will be used to access future renewable energy developments.

BEFORE¹



AFTER



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North Esk track (Case study 9)

We understand that since (and partly as a result of) *Track Changes*, Midlothian Council and the Pentland Hills Regional Park Joint Committee have initiated attempts, with the landowner, to mitigate some of the impacts of this track. This does not form part of the initial construction phase and began, at the behest of these bodies, several months later. We strongly dispute the assertion that the track is safer than the original footpath (especially given the abrupt, unmarked and unannounced cutting of the footpath several feet above the track surface), and decisions about removing and re-routing footpaths are surely better taken in advance and in consultation with relevant bodies. The 'alleged' slip was clearly worse a matter of weeks after track construction, with erosion of newly-exposed rock and vegetation occurring above the track. In its current form this track will not 'settle and re-vegetate' but will continue to erode. Whatever the eventual outcome, it would have been far better for this track to go through the planning process and be constructed to appropriate standards from the start.

Pykestone Hill track (Case study 10)

Given the problems the landowner encountered with the older, unobtrusive track and the obvious concerns about visual impact and erosion of the repaired track (as photographed), we suggest that this track would also have benefitted from the involvement of the planning authority.

Glenfeshie

We have been in touch with Glenfeshie and support their work to improve the standard of existing tracks on the estate. The Estate was not criticised in *Track Changes* and the photographs included in the report (submitted by members of the public) were used to illustrate specific points.

Beinn Bhuraich

The impact of this track was, and remains, very substantial and worrying. The scale of the track and the immense ditch pictured on p.9 of *Track Changes* are not justifiable (they are certainly not explained by the presence of 'several hundred sheep'), and a section of the 'finished product' is shown on p.13. It is not clear what point Scottish Land and Estates are making here, but if they feel that construction standards like these are acceptable, we would welcome an explanation of their reasoning (and we suspect that the planning authority, local people and other interested parties would join with us in strongly disagreeing with them).

Mar Estate

The track in question is explicitly referred to as 'historic' in *Track Changes* - although its age does not excuse its poor design or its impacts on the landscape. It is discussed in Adam Watson's 2011 book

(referenced in *Track Changes*), and we suggest its route is clearly sub-optimal for timber extraction, including a spur running uphill from the zigzags on the right-hand side of the photograph that does not approach any forestry.

Good Practice case studies

We welcome these excellent examples of good practice in track construction. These demonstrate that most of the environmental and aesthetic damage caused by the tracks highlighted in *Track Changes* need not have occurred, and that far higher standards can quite reasonably be enforced.

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