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25 April 2022

Dear Messrs. Donald, MacLeod, Ferguson and Prest,

1. The Lifescape Project is a charity that, amongst other activities, seeks to hold decision makers to account in relation to their duties to protect and restore nature.
2. We are writing to you to set out our concerns about works being undertaken to expand parking areas on road verges on the north side of Loch Morlich in the Cairngorms National Park which appear to be causing damage to a number of Caledonian pine trees (the “**Works**”).
3. As far as we can tell, no relevant assessments, consents nor planning permission have been completed or given for the Works. We therefore consider these Works to have been undertaken unlawfully.
4. We are writing to each of you as organisations with different roles and interests in the Works, to set out our current understanding of the issues and request that steps are taken immediately to

stop any further works pending the carrying out of the required assessment and consent procedures, if at all.

Details of the Works and their ecological impact

5. The Works have been completed on the verges of the road running along the north shore of Loch Morlich.
6. It appears that the Works aim to facilitate roadside parking. The photos below show that verges have been excavated and hard-filled (Photo 1). Some tree roots have been dug up and removed as part of this process (Photo 2), being discarded on the loch shore; and roots of Caledonian pine trees have been buried by the gravel used to infill the excavated verges (Photos 1 and 3). Significant pressure must have then been applied to these tree roots using rollers in order to compact the gravel. Wider damage such as the removal of branches from Caledonian pine trees also appears to have been caused (Photo 3).



Photo 1: excavation and infill



Photo 2: roots from excavation dumped beside Loch



Photo 3: burying of tree roots

7. The Works have damaged these trees and if left un-remediated will likely destabilise and potentially kill these trees. Such significant damage and potential death of these veteran trees has been caused in particular by:
 - direct damage to their roots;
 - compaction and pressure on the root protection zone of the trees during the Works themselves (by way of the infill and rolling with heavy plant machinery) and long-term vehicle parking; and
 - removal of native soil surrounding the roots.

8. In addition, the compacted loose sediment material used to undertake the infill appears to be liable to leach silt and other foreign material into the freshwater environment of Loch Morlich, thus creating a clear pollution risk which has apparently neither been assessed nor mitigated against.
9. It appears from evidence of large gravel piles on other section of the verges (Photo 4) that the intention is to undertake similar work more widely along the side of Loch Morlich.



Photo 4: gravel piles

Breaches of Town and Country (Scotland) Planning Act 1997

10. The Works constitute “development” for the purposes of section 26 of the Town and Country (Scotland) Planning Act 1997 (the “**Planning Act**”) as they result in a change of use of land into an area for parking. The Works therefore require planning permission pursuant to the Planning Act. Furthermore, the Works trigger obligations pursuant to Schedule 2(10(b) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (the “**EIA Regulations**”) to at a minimum require a screening opinion which, in our view would likely have resulted in an obligation to undertake a full Environmental Impact Assessment (“**EIA**”), given the clear potential impact of the Works on biodiversity and the wider environment within the Protected Areas (see paragraph 14 below).
11. The relevant roads authority cannot rely on its Class 31 Permitted Development Right (“**Class 31 PDR**”) in relation to the Works. The Class 31 PDR permits “*The carrying out by a roads authority on land outwith but adjoining the boundary of an existing road of works required for or incidental to the maintenance or improvement of the road.*” The effective creation of parking bays is not “*incidental to the maintenance or improvement of the road*”. The Works constitute separate development activity related to visitor management rather than relating to the road itself. To suggest otherwise would lead to an absurd position where Class 31 PDR could be relied on by road authorities to build significant parking areas without planning permission, simply on the basis that the parking adjoins the boundary of an existing road.
12. Similarly, the powers granted to local roads authorities under section 1(1) of the Roads (Scotland) Act 1984 to “*reconstruct, alter, widen, improve or renew*” public roads do not encompass the Works which relate to the creation of parking spaces. The creation of parking spaces is an entirely separate development and the simple fact that such parking spaces are adjacent to the public road does not mean they are somehow included within the general power of the 1984 Act.
13. As far as we are aware, no planning permission or screening opinion or EIA was sought nor otherwise granted. **Please confirm this is correct by Friday 29 April 2022. Should any permission**

have in fact been sought or granted, please provide copies of those and all associated documents without delay (pursuant to the Environmental Information (Scotland) Regulations 2004 (“EIR”)).

Breaches of legal obligations relating to Protected Areas

14. The land in question is immediately adjacent to the Cairngorm Special Area of Conservation (“**Cairngorm SAC**”), the Glenmore Forest Site of Special Scientific Interest (“**Glenmore Forest SSSI**”), the River Spey Special Area of Conservation (“**River Spey SAC**”) and the Cairngorm Special Protection Area (the “**Protected Areas**”).
15. Caledonian forests and Caledonian pine trees are protected characteristics of both the Cairngorm SAC and Glenmore Forest SSSI respectively.¹
16. As you will be aware, any activities which may affect the protected characteristics of such protected areas (whether or not those activities take place within the protected area itself) are subject to strict assessment and consent requirements.
17. In relation to any SAC or SPA, pursuant to Regulations 48 and 49 of the Conservation (Natural Habitats, &c.) Regulations 1994 (the “**Habitats Regulation**”), the competent authority must undertake a Habitats Regulation Appraisal (“**HRA**”) for any plan or project which (i) is likely to have a significant effect on any SAC or SPA; and (ii) is not directly connected with or necessary to the conservation management of the site.
18. As part of this HRA, the competent authority must consult with NatureScot as the national conservation body. The competent authority is not permitted to authorise the project unless it can show beyond reasonable scientific doubt that it will not adversely affect the integrity of the protected site. The only caveat to this prohibition is where there are no alternative solutions, the project is imperative and there is an overriding public interest in granting consent. As Caledonian forests are a priority habitat in Scotland under the Habitats Regulation, the only public interests that can be taken into account are human health and public safety.
19. The Works clearly engage this obligation to undertake an HRA as any damage or long-term destruction to Caledonian pine trees immediately adjacent to the Protected Areas has a real potential to negatively impact the integrity of the Caledonian Forests existing within the SAC. Without an HRA, there is no reliable way of formally concluding that there will be no adverse effect on the integrity of the Cairngorm SAC. In contrast, given that the Works appear likely to result in the loss of a large number of mature pine trees it seems a very definite possibility that the Works will negatively impact the integrity of the Caledonian Forests in the SAC.
20. Furthermore, the likely leach of silt and other foreign material into Loch Morlich (see paragraph 8 above) presents a risk of negative impact on the protected characteristics of the River Spey SAC of which Loch Morlich forms part. This risk in itself triggers a standalone requirement to undertake an HRA for the Works.

¹ See <https://sitelink.nature.scot/site/8217> (Cairngorms SAC) and <https://sitelink.nature.scot/site/1665> (Glenmore SSSI).

21. In relation to these obligations, we also wish to draw your attention to Regulation 69(1)(b) of the Habitats Regulations which provides that *“Regulations 48 and 49 ... apply in relation to any plan or project ... by a local highway authority or local roads authority, to carry out within the boundaries of a road any works required for the improvement of the road”*. While we would not accept that the Works constitute *“works requirement for the improvement of the road”*, this provision clarifies that any such works would still require an HRA.
22. As far as we are aware, no HRA has been conducted for the Works. If true, this alone makes them unlawful. **Please confirm by Friday 29 April 2022 whether an HRA was completed for the Works and if it was, please provide copies of the assessment without delay. Should no HRA have been requested, please explain by the same date why you did not consider it necessary to comply with Regulations 48 and 49 of the Habitat Regulations.**
23. Should consent in fact have been granted following an HRA, we cannot see how authority for the Works could have legally been granted, particularly given the very strict legal obligations and tests in place to protect priority habitats such as Caledonian Forests. **Should consent have been granted, please confirm this by Friday 29 April 2022 and provide copies of such consent and all associated documents and correspondence without delay.** Should it be determined by the relevant parties that they wish to proceed with the Works via Regulations 48 and 49, **we would ask that a copy of any HRA as well as any advice from NatureScot in relation to such assessment be shared with us directly so we are able to consider our position promptly.**
24. In relation to the Glenmore SSSI, the Nature Conservation (Scotland) Act 2004 (the **“Nature Conservation Act”**) requires that consent (either from NatureScot or in the form of local authority planning permission or written permission from a designated regulatory authority) is needed for any activity that could damage the natural features for which the site is designated which in this case includes native pinewood. For the reasons described above, the Works are likely to damage those features even though they occur outside the SSSI boundary.
25. The Works explicitly fall within the *“Operations Requiring Consent from Scottish Natural Heritage”* for the Glenmore SSSI which include:
- *“...The destruction, displacement, removal or cutting of any plant or plant remains, including tree, shrub, herb, dead or decaying wood, moss, lichen, fungus, leaf-mould, turf etc. ...*
 - *Construction, removal or destruction of roads, tracks, walls, fences, hardstands, banks, ditches or other earthworks, or the laying, maintenance or removal of pipelines and cables, above or below ground. ...*
 - *Modification of natural or man-made features, clearance of boulders, large stones, loose rock or scree and battering, buttressing or grading rock-faces and cuttings, infilling of pits and quarries.”²*
26. NatureScot in its own guidance about public authorities undertaking any activities in a SSSI advises that *“all activities that may affect a SSSI – either on the land or connected to it – [need] to be considered. In some situations [the public authority] must apply to NatureScot for a consent*

² <https://sitelink.nature.scot/site/1665>

*whereas in others they must just consult NatureScot.*³ This guidance stems from sections 12 and 13 of the Nature Conservation Act. This legal obligation on public authorities clearly applies to the Works and the apparent non-compliance with the requirements of the Nature Conservation Act suggests that an offence under section 19(1) of the Nature Conservation Act has been committed.

27. As far as we are aware, no such consent from NatureScot was obtained (nor was it consulted) nor was any local authority planning permission or written permission from a designated regulatory authority granted for the Works. **Please confirm by Friday 29 April whether or not such permission or consent was granted for the Works and whether NatureScot was consulted as required by the Nature Conservation Act.** Should such permission or consent have been granted or such consultation have been undertaken, **please provide (pursuant to the EIR) copies of such permission, consent or consultation response and all associated documents and correspondence without delay.**

Breach of Section 9(1) National Parks (Scotland) Act 2000

28. Section 9(1) of the National Parks (Scotland) Act 2000 (the “**National Parks Act**”) sets out that “*the general purpose of a National Park authority is to ensure that the National Park aims are collectively achieved in relation to the National Park in a co-ordinated way*”. The National Park aims are defined in section 1 of the National Parks Act. Of particular relevance to the Works are the aims “*to conserve and enhance the natural and cultural heritage of the area*” and “*to promote sustainable economic and social development of the area’s communities*”.
29. In relation to the Works, it appears that the CNPA may have prioritised the second of these aims as it is assumed that the parking created by the Works may support economic development by way of tourism. However, such a prioritisation is in breach of the Sandford Principle codified in section 9(6) of the National Parks Act which requires that “*... if, in relation to any matter, it appears that there is a conflict between the National Park aim set out in section 1(a) [conserve and enhance the natural ... heritage of the area] and other National Park aims, the authority must give greater weight to the aim set out in section 1(a)*”.
30. By allowing the Works (which are destroying rather than conserving and enhancing nature) to be undertaken within the Cairngorm National Park, the CNPA has failed to comply with its statutory purpose and the Sandford Principle. The CNPA must use its planning powers to put a stop to the Work in order to avoid this breach continuing.
31. **We ask that the CNPA confirm by Friday 29 April 2022 that it will prohibit any further Works being undertaken or otherwise confirm why it does not consider that it is required to take this course of action.**

Section 1 Natural Heritage (Scotland) Act 1991

32. Similarly, sections 1 and 1A of the Natural Heritage (Scotland) Act 1991 establish that NatureScot’s general aims and purposes are “*to secure the conservation and enhancement of ... the natural heritage of Scotland; and [NatureScot] shall have regard to the desirability of securing that*

³ <https://www.nature.scot/professional-advice/protected-areas-and-species/protected-areas/national-designations/sites-special-scientific-interest-ssis-consents>

anything done, whether by SNH or any other person, in relation to the natural heritage of Scotland is undertaken in a manner which is sustainable”.

33. Although NatureScot may not have been aware of the Works prior to them being undertaken, now that they are aware of them and have seen the damage that they are causing to the trees themselves and can understand the likely adverse impact on the integrity of the Protected Areas, they must investigate properly and put a stop to the Works or risk being in breach of at least their statutory purpose.
34. **We ask NatureScot to confirm by Friday 29 April that it will use its enforcement powers (eg under section 45 of the Nature Conservation Act) to prohibit any further Works being undertaken or otherwise confirm why it does not consider that it is required to take this course of action.**

Breach of public body duty to further the conservation of biodiversity

35. More generally, we note that pursuant to section 1 of the Nature Conservation Act, *“it is the duty of every public body and office holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions”* (emphasis added).
36. The completion of the Works is in clear breach of this duty to further the conservation of biodiversity.

Next steps

37. Given the urgency and need to prevent further damage being caused, we ask that each organisation provide the specific confirmations and information requested of them above by **Friday 29 April 2022** and also provide any associated documents without delay pursuant to the EIR.
38. We separately ask that Highland Council and Forestry Land & Scotland confirm by **Friday 29 April 2022** that no further activity in relation to the Works will be conducted given that none of the required assessments have been undertaken nor have any of the required consents or permissions been granted. Should such confirmation not be forthcoming, we will consider bringing an action for interdict to prevent such unlawful activity continuing and we would invite NatureScot to use its powers of enforcement to the same effect.
39. Significant damage has already been caused by the Works. It may be possible, however, that further longer-term damage can be avoided even in areas where the Works have already been completed, if swift and proper remediation is undertaken. NatureScot should therefore consider issuing a restoration notice proposal pursuant to section 20A of the Nature Conservation Act or otherwise consider pursuing prosecution of all relevant offences committed in relation to the Works. **We ask NatureScot please to confirm by Friday 29 April 2022 what action it intends to take in relation to remediation and investigation of the potential offences outlined in this letter.**
40. Finally, we wish to make the general point that the provision of additional parking facilities around Loch Morlich cannot represent a long-term viable solution for managing the increased number of visitors to this environmentally sensitive area. The organisations addressed in this letter must together agree a solution to deal with these issues that does not further negatively impact the

environment, especially in an area supporting a priority habitat under the Habitats Regulation. Compliance with the protections offered by environmental law is not optional and it is concerning to see many of the organisations which are meant to uphold and enforce such obligations not only clearly lacking in their conviction and dedication to performing such a role, but in fact actively participating in unlawful behaviours.

41. Please send all responses to Elsie Blackshaw-Crosby of the Lifescape Project (elsie.blackshaw@lifescapeproject.org).

Yours sincerely

A handwritten signature in black ink that reads "Elsie Blackshaw-Crosby". The signature is written in a cursive style with a long horizontal flourish.

Elsie Blackshaw-Crosby

Managing Lawyer

The Lifescape Project

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