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CAIRNGORMS LOCAL OUTDOOR ACCESS FORUM

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- Title:** Update on Dalwhinnie Railway Crossing: Closure by Network Rail
- Prepared by:** Adam Streeter-Smith, Outdoor Access Officer
- Purpose:** 1. To update members on progress to facilitate public access.



### Background

1. Network Rail convened a stakeholder meeting on Tuesday 21 September to update all on why the crossing was closed and to explore potential solutions with stakeholders (see annex 1).
2. Network Rail highlighted that after identifying a hazard at the crossing they had considered options including a “miniature stop light” (MSL) system as an upgrade. Complexities due to the proximity to Dalwhinnie station meant at the time this was not possible because:
  - A MSL crossing needs a protecting signal, one of which would be situated between the crossing and the station, meaning trains departing the station would be accelerating towards a (potentially) red signal – this is a hazard
  - Additionally, the lights at the crossing must show red for a specified amount of time before the train can arrive. When there is a station in the vicinity, controls have to be added to account for trains that stop at the station and will be moving slowly and trains that go through at full line speed. There are a range of ways this can be achieved, however none of the options work at Ben Alder.
3. Having considered engineer options and discounted them this led Network Rail to the position that the crossing had to be closed.
4. Network Rail confirmed that Transport Scotland had asked Network Rail to review alternative crossing options, including paths adjacent to the railway to alternative crossing points at the nearby underbridge and to Dalwhinnie station.

5. A number of attendees suggested the current situation was more dangerous than before with potential for users to continue to use the crossing that had been 'open' for decades but they would now have to negotiate two locked gates slowing down their crossing. Scotways consider that the crossing may be a right of way regardless of Network Rails assertion that it was not a right of way.
6. While it was not established at the meeting that the crossing could be reopened Network Rail have committed to further engagement with stakeholders to continue to study all possible options for the crossing.
7. CNPA offered to continue to work with Network Rail to find a safe solution.
8. The Dalwhinnie crossing was also discussed at **National Access Forum** on 22<sup>nd</sup> September 2021 with Network Rail presenting their reasoning for closure. Members reiterated to Network Rail that the route was used by walkers, cyclists and canoeists (the latter accessing the loch); with those crossing with bikes or canoes adding to the risk.

### **Proposed next steps**

- CNPA to continue to press Network Rail to investigate further options and confirm when they will meet with stakeholders.
- Further discussion with LOAF once further information becomes available

November 2021

**Annex I**

OFFICIAL

**Note of meeting with stakeholders regarding Ben Alder private level crossing,  
Dalwhinnie**

Tuesday 21 September 2021, 1200-1400

Microsoft Teams

**Attendees:**

Adam Streeter-Smith, Cairngorms National Park Authority

Brendan Paddy, Ramblers Scotland

Helen Brown, office of Kate Forbes MSP

Gavin Musgrove, Strathspey and Badenoch Herald

Jen Dickinson, Dalwhinnie Community Council

Inspector Bryan O'Neill, British Transport Police

Mark Tate, Cairngorms Business Partnership

Dave Morris, Dalwhinnie Community Council

Stewart Easthaugh, The Highland Council

Tim Atkinson, Ben Alder Estate

Richard Barron, Scotways

Niamh Hegarty, Network Rail

Innis Keith, Network Rail

Linda Bowers, Network Rail

Heather Noller, Network Rail

**Apologies:**

Janet Ault, Network Rail

Laura Mitchell, Network Rail

**Note of meeting**

1.1 Niamh Hegarty thanked everyone for attending and gave an overview of why the meeting had been called, reiterating that Network Rail wanted to listen to stakeholders about the possible options for the future of Ben Alder level crossing.

1.2 Linda Bowers gave a presentation of an overview of the safety measures at the level crossing, previous upgrade options that had been considered and an explanation as to why these options couldn't be installed at that time:

A user worked crossing has only one upgrade option – miniature stop lights (MSL). Design engineers considered this option for Ben Alder level crossing, but complexities due to the proximity to Dalwhinnie station meant this was not possible:

- A MSL crossing needs a protecting signal, one of which would be situated between the crossing and the station, meaning trains departing the station would be accelerating towards a (potentially) red signal – this is a hazard
- Additionally, the lights at the crossing must show red for a specified amount of time before the train can arrive. When there is a station in the vicinity, controls have to be added to account for trains that stop at the station and will be moving slowly and trains that go through at full line speed. There are a range of ways this can be achieved, however none of the options work at Ben Alder.
- When the engineering upgrade solution was discounted this took us back to closure and diversion.

Linda confirmed that Transport Scotland had asked Network Rail to review alternative crossing options, including paths adjacent to the railway to alternative crossing points at the nearby underbridge and to Dalwhinnie station. She also explained the safety concerns in detail and that Network Rail have a duty to ensure the crossing is fit for purpose. It was also explained to the group that the crossing is private and provided for use of the authorised user only.

1.3 Niamh invited input from meeting attendees.

2.1 Jen Dickinson said that Dalwhinnie Community Council did not believe any of the alternative options to be explored to be viable, and reiterated the desire to unlock the crossing gates for public use, and to improve safety by installing Miniature Stop Lights (MSLs), with automatically locking gates. Noting that a crossing attendant had previously been in place for the passage of the daily LNER Azuma Inverness-Kings Cross service, Jen stated that in the Community Council's opinion a crossing attendant could continue to be in place or that this service should pass the crossing site under caution. The Community Council further noted that longer term the Azuma trains could call at Dalwhinnie station so that their approach to the crossing will be slower, which would be a positive PR move for LNER, NR and Dalwhinnie. Signage on the level crossing gates should also be updated to encourage caution and use of the crossing telephone for pedestrian users. Jen also stated that local businesses have seen a significant reduction of over 50% in passing trade due to the locking of the gates, and that the identified vulnerable user of the level crossing is more than willing to telephone the signaller for permission to cross.

In the last 25 years, the purchase of land and work completed by Ben Alder Estate to put a road in under the underpass to connect with the historic route between Dalwhinnie and Loch Rannoch.

2.2 Jen said that members of the community cannot recall any incident at the Ben Alder crossing in the last 67 years, that The Land Reform (Scotland) Act 2003 secured access rights to land on either side of the crossing and the Scottish Outdoor Access Code places an obligation on Network Rail, as the owner of land which is contiguous to land where access rights apply, to facilitate access. The Code requires Network Rail “to respect any rights of way or customary access across your land or water” (para.4.25). The historic use of this route since before the railway was built confirms this obligation on Network Rail. The Community Council feel that Network Rail are demonstrating a total disregard for the 2003 Act and Code and are looking for a pragmatic solution to unlock the gates and restore access for all locals and visitors. Visitors are stunned at the locked gates and will continue to climb over the gates to connect the longstanding path they have used for many years. Circular walks and all Dalwhinnie trails are now impossible with the locked gates and signs locally, online and in guidebooks are still pointing to this heritage path that has been used since the 1700's. Cyclists, walkers and adventure goers will all continue to use the crossing, climbing gates or fences at will.

2.3 Dave Morris indicated that he was participating in the meeting as an adviser to DCC and endorsed the points which Jen had made and said that members of the public who continued to use the crossing would not be committing a trespass offence as there is ‘implied consent’ to use it. Dave also noted that there are no procedures in place in Scotland (unlike England and Wales) which require Network Rail to consult with anyone before locking gates or closing private level crossings. This had been a controversial issue for nearly 20 years, since the establishment of Network Rail, and would continue to be so unless legislation is passed by the Scottish Parliament to compel Network Rail to consult in advance of any proposed closure. Dave also noted that the southbound Azuma trains should continue be cautioned over the crossing, and during the upcoming winter months with less daylight this should be extended to include the northbound Azuma which comes through Dalwhinnie at around 7pm. He indicated that he would shortly make these points to the Office of Rail and Road in addition to the formal complaint that he made to the ORR in August.

2.4 Brendan Paddy said that he also believed the crossing was now less safe as pedestrians were climbing over the locked gates, noting that there had been over 9,000 signatures on the Ramblers’ Association Scotland online petition to unlock the crossing gates, and this has been the biggest response they have received to any petition with 90% of signatories not Ramblers, showing the strength of feeling from the local community, many aspects of the outdoor community and access groups regarding access to the wildest and most spectacular hills, mountains and landscapes. Brendan suggested that the installation of MSLs should be revisited and that deterring the use of the crossing was not appropriate due to its frequent use by hillwalkers, cyclists, and outdoor goers. He stated that a private level crossing is a legal fiction under Scots Law and that Network Rail should look back at their own recommendations as they appear to be looking for a reason to close the crossing, and there is some common ground amongst stakeholders and Network Rail so we should work towards a solution using the MSLs.

2.5 Richard Barron agreed with previous points made and said that there is evidence that a Right of Way exists over the crossing, and that the diversionary signs put in place following the locking of the gates were not appropriate particularly on the west (down line) side for those approaching from open moorland who may have timed their journey to board a train at Dalwhinnie. Richard stated that what has been done increases the health and safety risk and is not convinced that the health and safety risk of locking the gates has been taken into account fully. He also noted that some level crossings are operated by train drivers and asked if this was a potential solution: MSLs seen working at Kirknewton where driver presses a button and operates the level crossing – would require human input but it works and there are high speed trains on that line too.

2.6 Stewart Easthaugh confirmed that the Highland Council were supportive of the community asking to reopen the crossing gates and said that public access should be permitted, as the crossing is an asserted public right of way, therefore Network Rail should have gone through appropriate processes to divert or stop a public right of way. This is not Network Rail's position as the legal advice received does not consider there to be a public right of way over the crossing. Stewart stated that the diversion should have been consulted on. He asked that a copy of the original legislation quoted by Linda in her presentation that informed of the status of the crossing to be provided, alongside the presentation given by Linda explaining why urgent action was required to improve safety at the crossing. He also asked what were the mitigation measures, and what other resources need to be considered in order to unlock the level crossing.

2.7 Mark Tate supported the comments made by others in the meeting, stating immediately the impact on local businesses has been commented on and will only increase, and noting that covid taught us we cannot manage visitor behaviour, noting that visitors to the area (climbing the gates) could not be controlled and that NR need to recognise this. Mark further noted that the reasons for not progressing with an upgrade of the crossing to MSL-controlled was not compelling.

2.8 Adam Streeter-Smith said the crossing is more unsafe now, that he supported the statements made by Dalwhinnie Community Council and said the crossing risk assessment should be revisited based on the current actions of level crossing users, and reiterated that a quick solution needed to be found recognising the historic nature of this route for the local village, estate and visitors.

2.9 Tim Atkinson thanked Niamh for the clarification by email on other blue signed/private crossings including those over Drumochter, specifically Dalnaspidal, not being reviewed for closure. Tim noted that the Ben Alder Estate's use of the Dalwhinnie crossing had practically stopped in recent years, but the crossing was still needed for larger vehicles, as the tunnel is not suitable for large vehicles and the forestry track on the west side is not suitable for many vehicles. Tim was saddened he no longer sees any locals passing his offices which previously was a daily occurrence. Local people are not walking through the estate and down the loch because of the restrictions at the level crossing. He noted that the quality of their lives will have deteriorated. The visitor problem will not go away and the threat of prosecution will not deter people to cross the crossing, further noting that soon people climbing the gates with winter equipment such as skis as well as bikes would potentially take longer to cross. He called for NR to come up with a pragmatic solution

and as part of the local community Ben Alder Estate were in full support of community calls and other stakeholders to unlock the gates and reopen the crossing to the public.

3.1 Niamh thanked everyone for their input and invited Innis Keith and Linda Bowers to respond to the points made.

3.2 Innis noted that he would respond to a few of the key comments raised, and advised that the legal opinions over whether the crossing was a Right of Way could not be discussed competently in this meeting, stating that the legal advice received by Network Rail was that there is no public access, or 'implied consent' for access, over the crossing. Innis said that the issue with the Azuma trains was a well-known issue but is not a factor in the decision to lock the crossing gates and is being dealt with separately. The previous decision to not install MSLs at the crossing, and the recent decision to appoint a sponsor to examine further options, shows a willingness to find a solution, and Innis reiterated that Transport Scotland has asked Network Rail to examine whether an alternative is possible. NR want to work with the local community and stakeholders for a solution, committing to pass on the points made about signage and timetabling of the LNER service to the project sponsor.

3.3 Dave Morris asked why the LNER service could not proceed under caution and further asked whether the known issue with the Azuma horns had prompted the closure of the crossing. In relation to MSLs and supposed difficulties close to stations he asked why a southbound train that has stopped at Dalwhinnie cannot leave the station slowly until it reaches the crossing. He had observed this recently at Newtonmore station where the southbound Azuma stops there on the Sunday service. He was stood at the crossing about 100 metres south of the platform as the Azuma accelerated quite slowly from the platform. If it works at Newtonmore why cannot the same arrangement be applied to Dalwhinnie for any southbound train that has to stop at the station? Dave further noted that vehicle use across the Dalwhinnie crossing had reduced significantly over the past twenty years, partly because the new road link described by Tim had greatly reduced estate use but also because the public were no longer allowed to drive over the Dalwhinnie level crossing, so in his opinion the levels of risk had decreased significantly at this crossing in recent years primarily because of the elimination of private vehicular use and reduction in estate vehicular use. And he was not aware of any substantial changes in non motorised use, either through changes in visitor or local patterns of use, including no great increase in the resident population of Dalwhinnie. He was also concerned that a large part of the Network Rail case for locking the gates was based on the observation of one vulnerable user, and considered the obvious solution, rather than locking the gates, was surely for NR to reach an agreement with the vulnerable person to the effect that when they wanted to cross the line they would ring the signal box from the trackside phone to check when the next train was due. If such an agreement was not possible then Network Rail, as a last resort, could seek an interdict to prevent the vulnerable user from using the crossing.

3.4 Innis agreed that the risk profile of the crossing had changed, as could be the case between assessments, but stated that the risk assessment carried out in February 2020 had also identified changes in use, and the identification of the vulnerable user had further spotlighted the unsafe use of the crossing, noting that the statutory duty to protect the

public and the knowledge of similar risks in other regions of the UK had prompted the need for urgent action.

3.5 Brendan Paddy said it was good to hear that a wide range of options were under consideration, suggesting the MSL solution was the preferred one and that any MSL solution that is viable should be considered with the project sponsor being assigned to this. Innis Keith reiterated that all options would be examined, as the current situation could mean that prior reasons for not upgrading the crossing needed to be re-examined. Niamh Hegarty stated that NR would be engaging with stakeholders to discuss the options.

3.6 Tim Atkinson said that the risk assessment should be carried out again as people who climbed the fence rather than the gate would be crossing track and ballast, rather than the level surface of the crossing. Innis confirmed that the risk assessment would be revisited, and that enhanced fencing was in consideration to discourage climbing the gates and fence. Tim reiterated people will move along fences to the point where they can be easily climbed and have been doing this already. He didn't think the suggestion for paths to be created along the underpass, etc is possible as there are other parties with legal interests in the land. Tim noted that there was fundamental disagreement between Network Rail and the community on the status of the crossing as a Right of Way, noting that if no resolution was possible then it would need to be resolved through legal means.

3.7 Jen Dickinson said that the options for pathways adjacent to the rail line were difficult to progress due to the respective landowners having already agreements with service providers that stopped a planning application in 2020, with the second landowner not viable at all due to ongoing plans. On the west side, adjacent to the station, the landowner although accepting use currently, will not agree to a footpath long term. Innis said that the role of the project sponsor was to speak with all stakeholders, including the landowners, and establish the facts and possibilities to progress the options, and an update from the project sponsor will be provided once there is sufficient information to report back on; however it was mentioned by NR on more than one occasion that there are no funds for such developments.

3.8 Helen Brown said that Kate Forbes MSP was in full support of the community position and asked if the crossing would remain closed, and for timescales for the risk assessment and options review to be carried out. Innis said that this was not currently known but that follow-up information would be provided. Innis said it would remain closed until the options were fully researched.

3.9 Dave Morris said that the Network Rail and ORR on going policy to reduce risk by closing as many level crossings as possible was in conflict with the UK Government's formal response in 2018 to the Law Commission/Scottish Law Commission joint report on level crossings published in 2013. The UK Government (Minister of Transport, Jo Johnson MP, to Nicholas Paines QC, Law Commission, 25 May 2018) stated: *"Network Rail expects to focus less on closures in the future and is looking instead at making increasing use of technologies such as roadside enforcement cameras and overlay warning systems where these are appropriate. These technological developments offer scope for a step-change improvement in safety at level crossings as they become simpler and cheaper to install, enabling Network Rail to cover a higher proportion of the of level crossings on the UK mainline rail network than has been possible in the past. They should also help to reduce the operational impacts of the crossings on rail services. This is, in turn, expected*



*to reduce the need for closures and major improvement works, which can often be disruptive to local communities as well as being bureaucratic and costly to administer.”*

3.10 Dave further noted that by adjusting the criteria used for risk assessments NR could move level crossings into the “high risk” category, enabling them to continue closing level crossings which had previously been below the high-risk bar, so the situation at Dalwhinnie could then be repeated at other level crossings as revised criteria enabled more crossings to be classified as high risk even though public use patterns at the crossing had not changed.

3.11 Innis said that there is no safe way to cross the railway following the locking of the gates and that the nearby underbridge was the only safe accessible route, and further reiterated a commitment to look at improving signage. Dave disagreed, indicating that most hill users in Scotland were well used to climbing over locked gates and high fences, especially deer fences, and this was fully compliant with the SOAC, and that many would have no difficulty in overcoming any new gates or fences that NR might chose to install at Dalwhinnie. From observations at Dalwhinnie after the gates were locked it appeared to him that 90% of those climbing over the gates were doing it safely, at no greater risk than before locking, and he had a series of photos which showed two cyclists lifting their bikes over the locked gates and quickly crossing the line. He considered that around 10% were at greater risk, either because they were climbing the fences rather than the gates, were family parties with young children, or were carrying large rucksacks or other equipment that impaired their mobility. He also felt that the signage at the gates was inadequate and suggested that when the gates are unlocked there should be signage improvements, as there was a need to emphasise that fast, quiet trains are in operation on the line and adverse weather conditions, especially low mist, high winds and heavy rain or snowstorm, can restrict the ability to see or hear trains. He also said that the instructions for use of the trackside phone were not fit for purpose as they lay undue emphasis on the use of the phone for persons with large vehicles or animals, and that this needed to be changed so that anyone who had any doubts about crossing due to their own mobility constraints, darkness or adverse weather, would have no hesitation in using the phone to check whether it was safe to cross at that time. He suggested that the Dalwhinnie crossing might be a good location to erect new signage on an experimental basis, and the feedback from local people and outdoor recreation enthusiasts would help NR decide if such improved signage should be used more widely on the Scottish network. Innis agreed on the need to look at improving signage in the Dalwhinnie situation as a whole.

3.12 Jen Dickinson observed that a crossing census had been taken from 22<sup>nd</sup> July 0545-2230 until midday 28<sup>th</sup> July, in the week before the closure, after the decision to lock gates was already made. Jen further noted that she had observed the gate to the down line side being left unlocked by contractors, and reported this to the signaller; she also observed that a crossing attendant had been present again recently for the passage of the LNER service only, and when that supervision was not possible the Azuma/LNER service had travelled under caution, asking why a permanent caution could not be put in place to enable reopening of the crossing. She asked if Azuma trains are not your concern why are these provisions in place only for the one train for 30minutes each day? Train horns are louder on all other trains. Jen also highlighted footage on BBC Alba showing people using the crossing by climbing the gate. She reiterated points made about the impact of the crossing closure on local businesses, residents and visitors, and that local landowners would not make land available for the

construction of alternative pathways adjacent to the railway, and she added her personal experience following a hip operation. Because local paths were completely iced up in winter rehabilitation through exercise was only possible by the use of the crossing and key to her ability to return to work fully in the outdoors.

3.13 Richard Barron asked about the risk assessment process. Innis Keith said that there is a regular risk assessment for each individual level crossing, every 1.5 to 2.5 years, but they can be done at other times, and that algorithmic systems were used to monitor crossings and generate the risk assessment process, alongside observations from operational staff.

3.14 Inspector Bryan O'Neill was invited to comment on behalf of the British Transport Police; he confirmed that it is very difficult to prevent public access across rail lines in the Highlands and any solution at Dalwhinnie needs to take this into account. BTP were aware of issues at the crossing they were not able to monitor continuously, and observed that police presence at the crossing would deter trespass at that exact time but not at other times. Safety is of paramount importance and must be a key consideration in any solution. Bryan also confirmed that climbing the gates or fence and crossing the railway is an offence of trespass and would be pursued if evidenced. He is aware that people will continue to climb the gate or fence as they do elsewhere in the Highlands, but safety is key so we need to find a solution.

4.1 Innis Keith thanked all attendees for their contributions and promised that a follow-up session with the project sponsor and Director of Health and Safety would take place in the near future.

## 4.2 Action points

- Project Sponsor to continue study into all possible options for the level crossing, as required by Transport Scotland, and to commence engagement with stakeholders before any further works are carried out by network rail at the crossing – Laura Mitchell (Sponsor, Network Rail) - **ongoing**
- Further engagement to be undertaken on current crossing signage advising the diversionary route and improved signage at the crossing– Linda Bowers/Innis Keith/Laura Mitchell - **ongoing**
- Further risk assessment of level crossing - **ongoing**
- *Send original legislation quoted by Linda as having informed the status of the crossing to Stewart Easthaugh, Highland Council. **Completed***
- *Contact details of meeting attendees to be provided to Project Sponsor for further engagement – Niamh Hegarty/Laura Mitchell **Completed***
- *Information on the authorising legislation to close the crossing to public use to be provided to the Highland Council – Roddy McDougall (Legal Counsel, Network Rail) **Completed***
- Project Sponsor and Director of Health and Safety to attend a meeting with stakeholders as soon as practicable – Laura Mitchell/ Innis Keith/Linda Bowers/Heather Noller – **to be convened ASAP**

