

## Report to the Scottish Ministers



### LAND REFORM (SCOTLAND) ACT 2003 SECTION 22

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Report by Ronald W Jackson, a Reporter appointed by the Scottish Ministers

- Case reference: Kinrara Estate Draft Path Order
- Site Location: Kinrara Estate, Badenoch and Strathspey
- Draft Path Order made by Cairngorms National Park Authority
- Date of hearing by Reporter: 17 and 23 August 2011

Date of this report and recommendation: 15 November 2011

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## Directorate for Planning and Environmental Appeals

### Summary of report of hearing into the Kinrara Estate Draft Path Order



• Case reference	Kinrara Estate Draft Path Order
• Case type	Path Order under section 22 of the Land Reform (Scotland) Act 2003
• Reporter	Ronald W Jackson
• Order made by	Cairngorms National Park Authority
• Participants in hearing	As listed in Appendix 1 of the report
• Method of consideration and date	Hearing: 17 and 23 August 2011
• Date of report	15 November 2011
• Reporter's recommendation	Confirm

## Background

The Order relates to a proposed extension of the Speyside Way Long-Distance Route over Kinrara Estate between Kinakyle, south of Aviemore and the boundary of Kinrara Estate with Alvie and Dalraddy Estate at Dalraddy.

### The case for Cairngorms National Park Authority (CNPA):

CNPA have been unable to reach agreement with the owners of Kinrara Estate to extend the Speyside Way over the Estate along the route already approved in principle by the Minister for Environment. CNPA have therefore promoted the above Order. Objections to the Order have been made by the McLaren Webster Partnership (MWP) the owners of the Estate and Network Rail. Scottish Water have refused to consent to the Order. CNPA have therefore submitted the Order to Ministers for confirmation.

Objectors have expressed concerns regarding flooding at a point where the route uses a railway underpass. It is felt that walkers and other may be tempted to cross the railway line. CNPA would monitor the underpass and in any event of flooding, would post information on the Speyside Way website advising of the temporary closure of the underpass and diverting people along the B9152. Signage would also be erected advising that section of the route was closed and diverting the public onto the verge of the B9152. By diverting the public along the road verge before they head down to the underpass any temptation to cross the railway line will be removed.

Based on the views of SNH CNPA have concluded that through appropriate management and conditioning of the construction there will be no adverse effect on the integrity of the River Spey SAC or on the integrity of Alvie SSSI. The route would not be fully accessible to all disabled people because of topography but is intended to be used by the widest possible range of users including walkers, cyclists and horse-riders. In line with national best practice, the design approach is to avoid features that would discriminate against certain users – for example, avoiding 'cattle creeps' and culverts which may well be impassable to horse-riders.



The alternative route proposed by MWP is not a feasible route option and has no public support.

### **The case for the McLaren Webster Partnership (MWP)**

MWP's concerns can be summarised as follows:

- The alternative route proposed by MEP has not been given due and proper consideration by CNPA.
- The mitigation measures proposed by CNPA in the event of flooding are insufficient to overcome the inherent health and safety risks of the route.
- The proposed route is unsuitable for the disabled because of the problems at the railway underpass and the steep approach to the Allt Dibheach Burn.
- There would be adverse impacts upon the River Spey SAC, the integrity of Alvie SSSI and on ospreys.
- MWP also propose a variation to the proposed route which they submit has a number of benefits in comparison to the route proposed by CNPA.
- Expenses are sought from KEP and CNPA.

### **The case for the Kinrara Estate Partnership (KEP)**

KEP are the owners of the land adjacent to Kinrara Estate through which MWP's alternative route runs. They submit that the first part of this alternative route was subject to full public consultation in 2006, was objected to by residents, and there was no support for the route. By way of contrast, the route proposed by CNPA was supported by a significant number of individuals, is regularly used by members of the public, and appears to be a natural continuation of the Speyside Way.

### **The case for Network Rail**

Network Rail are concerned that the route floods at the railway underpass south of Kinakyle and that in such an event, users of the proposed route would seek to cross the railway line at the nearby private level crossing. This would jeopardise the safety, reliability and efficiency of rail infrastructure because level crossings can be subject to user error or abuse. An alternative route that would minimise the risk of use of the level crossing is therefore proposed.

**The position of Scottish Water** is that they cannot consent to the proposed route because of a contractual obligation to MWP from whom they purchased land at the railway underpass south of Kinakyle which the proposed route would traverse.

### **Reporter's conclusions**

The consultation process leading up to the submission of the report to Scottish Ministers in 2008 was robust and comprehensive. It also exceeded what was required by statute. Various routes were considered, including a route across Alvie Estate proposed by MWP. A route on the east side of the Spey was considered on two different occasions and

rejected because of it would involve long sections of track through dense forest, it would impact upon capercaillie, and it was not direct.

The alternative route proposed by MWP may have support from various individuals and bodies and does have some attractions, especially where it runs past Loch Alvie. However, it also runs close to the A9 in part, with consequent adverse impact from traffic noise. It is not my role to choose the best route for the extension to the Speyside Way. Safety concerns and the proximity to traffic of the MWP proposed variation to the route make this proposal unattractive.

The mitigation measures proposed by CNPA should be sufficient to address the concerns expressed by Network Rail. The alternative route suggested by Network Rail is unsatisfactory because of the need to construct a path or causeway within the bed of the Allt na Criche burn, which is part of the River Spey SAC. Such a proposal might also give rise to problems in time of flood. In view of the foregoing I am satisfied that in this case the consent of Network Rail has been unreasonably withheld.

I am not persuaded that the fact that parts of the route are unsuitable for disabled use means that it would not be expedient to delineate the path as proposed. No professional or technical evidence has been produced by MWP to justify the assertion that the route would have an adverse effect of the integrity of the SAC or the SSSI. The expression of general concerns regarding impacts on shooting or farming operations does not render delineation of the path inexpedient.

The proposed path would be delineated over land in which there is apparatus belonging to Scottish Water but there is no evidence that delineation of the path would interfere with that apparatus. Paragraph 10 of Schedule 1 to the 2003 Act leaves it to Ministers to decide whether the consent of Scottish Water has been unreasonably withheld. In the clear absence of any technical or operational reason for the withholding of such consent I am of the opinion that Scottish Water's consent has been unreasonably withheld in this case.

There is no provision in the 2003 Act that would allow me to make an award of expenses in this case.

## **Recommendation**

The Order be confirmed.

The Scottish Government  
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File reference: Kinrara Estate Draft Path Order

15 November 2011

The Scottish Ministers  
Edinburgh

Ministers

1. I have the honour to report that, in accordance with my minute of appointment, I held, as directed, a hearing on 17 and 23 August 2011 to consider the Kinrara Estate Draft Path Order (the Order) made by Cairngorms National Park Authority (CNPA) and against which Order objections had been lodged and not withdrawn. The hearing took place in the Cairngorm Hotel, Aviemore.
2. The Order relates to a proposed extension of the Speyside Way Long-Distance Route between Kinakyle, south of Aviemore and the boundary of Kinrara Estate with Alvie and Dalraddy Estate at Dalraddy. I made an accompanied inspection of the land affected by the Order and of the surrounding area. That inspection included the land affected by the alternative routes proposed by the McLaren Webster Partnership (MWP), owners of Kinrara Estate, who objected to the Order, and the proposed route advanced by Network Rail who, as a statutory undertaker with an interest in the land in question, also objected to the Order.
3. This report contains a summary of the evidence presented to the hearing and that contained in written submissions. I asked for separate legal submissions on the status of the Minister for the Environment's decision in principle in May 2009 in favour of the proposed route with regard to the scope of the evidence to be considered at the hearing. In particular, I wished submissions regarding the effect of that decision on my ability to take into account evidence relating to alternatives to the proposed route and the consultation process leading up to the current proposal. These legal submissions are attached separately. The report is concluded by my findings and related conclusions, and my recommendation. Appearances at the hearing are listed in Appendix 1, while Appendix 2 lists the productions.

## Introduction

4. The Speyside Way currently runs south westwards from Buckie on the Moray Firth to Aviemore, a distance of some 105 kilometres. Scottish Natural Heritage (SNH) has a statutory power under section 39 of the Countryside (Scotland) Act 1967 to prepare proposals for long distance routes for submission to Scottish Ministers and CNPA 6 is a report from SNH to Ministers, dated December 2008, containing advice on proposals for extending the Speyside Way from Aviemore to Newtonmore. Section 40 of the 1967 Act provides that Ministers may either approve such proposals, with or without modifications, or subject to such conditions as may be thought fit, or reject the proposals. Proposals approved by Ministers must be implemented by the local planning authority as soon as maybe after such approval. On 21 May 2009 the Minister for Environment approved, in principle, the proposed extension of the Speyside Way from Aviemore to Newtonmore in accordance with the recommendations made by SNH (CNPA 13). That approval in principle was subject to the satisfactory completion of the Path Order and planning processes.

5. Under the provisions of the Land Reform (Scotland) Act 2003 a path order can be created in one of two ways: by agreement (section 21), or alternatively in a compulsory manner (section 22). If it appears to the local authority to be impracticable to delineate a path by means of a path agreement, section 22(1) of the 2003 Act provides that local authorities, where they consider it expedient having regard to the rights and interests of the owner of land, may delineate a path within that land by order (a “path order”).

6. CNPA have held discussions with MWP in order to try and reach agreement to extend the Speyside Way over Kinrara Estate along the route approved in principle by the Minister for Environment but agreement has not been reached. CNPA have therefore promoted the above Order. As stated in paragraph 2 above, objections to the Order have been made by MWP and Network Rail. Scottish Water have refused to consent to the Order. CNPA have therefore submitted the Order to Ministers for confirmation.

7. Since the alternative route proposed by MWP passed through land in the ownership of the Kinrara Estate Partnership (KEP), KEP sought to participate in the hearing in order to address me on the merits of that alternative proposal. I took the view that if I was to listen to arguments from MWP as to why that alternative route was a preferable route to that proposed in the Order, KEP would be entitled to say why, insofar as their interests are concerned, it was not. I therefore agreed to allow KEP to participate in the hearing but made clear that it would not be open to me to make any recommendation in respect of approval or otherwise of any alternative route. My role was limited to making recommendations to Scottish Ministers on whether or not it was expedient that the Order delineating the path be confirmed as submitted and with or without modifications.

8. The maps contained in MWP 62 show the route of the proposed path, the alternative routes proposed by MWP and Network Rail, and a variation of the proposed route which was also put forward by MWP.

## **The case for Cairngorms National Park Authority (CNPA)**

### Background

9. A specific priority within the National Park Plan for the Cairngorms National Park is to extend the Speyside Way to Newtonmore (CNPA 27c, page 104, 1(e)). The Outdoor Access Strategy, approved in 2007, sits under the National Park Plan and includes the completion of the Speyside Way and its effective management, together with the need to make the route more suitable for multi-use (CNPA 28a, page 84). These reflect general Policies 3 and 4 in the Outdoor Access Strategy (CNPA 28b, pages 35 and 36). The extension of the Speyside Way south to Newtonmore is also set out as an achievement in the current Corporate Plan for CNPA (CNPA 29, page 11).

10. There has been a long held community desire to extend the Speyside Way south from Aviemore to Newtonmore (CNPA 8). CNPA employed a Development Officer who was tasked with providing a report on route options (CNPA 7, page 6-7). In 2004 the Speyside Way Management Group considered these options and proposed a wide-ranging public consultation on a single 'preferred' route. This approach was endorsed by the CNPA Board (CNPA 9d, page 4, para. 7(a)). That preferred route left Aviemore on the west side of the A9 trunk road, skirted Craigellachie and headed south west above Loch Alvie before going under the A9 at the Allt an Fhearna and thence across farmland to Dalraddy Caravan Park.

### The consultation process

11. That public consultation took place between December 2004 and March 2005 and highlighted that there was little support shown for the 'preferred' route. The responses also highlighted a further two options that had previously not been considered, namely (1) the Wade Road through Kinrara Estate and (2) the north shore of Loch Alvie. Further public consultation on both these route options took place over a 6 week period ending in October 2006. As a result of that consultation the CNPA Board agreed to support the route through Kinrara Estate (CNPA 12). SNH, in their report to the Minister also concluded that this route should be the recommended route (CNPA 6, page 12, para. 3.4). In that report (page 13) SNH also highlighted that Network Rail had concerns relating to the possible use of an unmanned level crossing on occasions when there may be flooding on the route. However SNH stated that in discussions, Network Rail had agreed (MWP 47) that any risk could be satisfactorily managed by the design of the path, by the monitoring of water levels, and diversion of users onto a planned alternative route when necessary, as already happens on other parts of the Speyside Way.

12. A route by way of Rothiemurchus/Inshriach (CNPA 9b) was rejected because it did not go through Kinrara, which could not therefore benefit from the extension to the Speyside Way. That route would also impact on an area considered to be crucial to the recovery of capercaillie, was not visually attractive as it would involve long sections of track through dense forest plantation, and it was not direct. In December 2006 when the CNPA Board decided to support the route through Kinrara Estate and asked SNH to take forward the proposal to Scottish Ministers, they also asked that a route on the east side of the Spey be reconsidered (CNPA 6 page 10). The Speyside Way Management Group re-evaluated the route through Rothiemurchus and Inshriach/Invereshie Estates on the east of the Spey and concluded that the original reasons for rejection of this option still applied. It should also be noted that, despite strong public demand for the inclusion of such a route in the CNPA Core Paths Plan, SNH's concern about the potential adverse impact on capercaillie remained consistent, which resulted in the omission of the route from the plan. CNPA are unaware of any petition supporting the Rothiemurchus/Inshriach route or how, when and if it was lodged formally on the Parliamentary petitions website.

13. After the approval in principle by the Minister, the CNPA Board met on 10 July 2009 to approve a project brief for implementation of the Speyside Way extension. It was not therefore appropriate to open up discussion over the Kinrara section. However, at the meeting on 14 May 2010 which discussed the proposals for a Path Order the CNPA Board gave Major McLaren of MWP the opportunity to speak.

14. In attempting to address the land management concerns of MWP, CNPA offered to construct a new path south from North Kinrara Drive to the Allt Dibheach to avoid the existing track. Fencing was offered across the fields between Mid and South Kinrara Drive. CNPA were not prepared to fence the path on both sides through the area of semi-natural woodland between North Kinrara Drive and the Allt Dibheach as there were no stock issues to justify such fencing. CNPA were also not prepared to pay for the instalment of electric gates across all three drives to the estate because a general right of responsible access applies to the drives and appropriate signage and way-marking would be more appropriate.

15. Two new bridges would be required on the route through Kinrara Estate, one of which requires the digging of trial pits to assess the load bearing capacity of the ground for bridge supports but permission for this has been refused by MWP. MWP has insisted that CNPA follow the procedures for making a Path Order (CNPA 18, para. 3). In view of this, CNPA concluded that it was impracticable to delineate the path by means of a path agreement and resolved to make the Path Order.

#### Response to objections by MWP

16. In relation to the issue of flood risk at the railway underpass to the south of Kinrara, this section of the route will use a vehicle access track currently under construction by Scottish Water. Although the track on the other side of



the underpass lies within SEPA's 1 in 200 year flood risk area, the underpass itself lies outwith the flood risk area. There is therefore a very limited likelihood of the underpass being flooded. Given Scottish Water's intended daily use of the track, there is little cause for concern in relation to flooding there. Staff from SNH and CNPA have been monitoring the underpass during and after heavy periods of rain over the last four years and have observed it being flooded on only one occasion. Network Rail expressed the same concern about flooding as MWP but still gave permission to Scottish Water to construct a vehicle access track through the underpass. In any event, it is submitted that use of the route is likely to be less during periods of prolonged rainfall.

17. Notwithstanding the foregoing, at times of flood risk CNPA would monitor the underpass and in any event of flooding, would post information on the Speyside Way website advising of the temporary closure of the underpass and diverting people along the B9152 to the North Kinrara Drive entrance. There is a verge along the B9152 which is wide enough for a path (already subject to a path specification survey) from Aviemore to Kinakyle and a verge from Kinakyle to North Kinrara Drive, which is wide enough for people to walk along on either side of the road. Signage would also be erected at the Kinakyle crossing and at North Kinrara Drive advising that section of the route was closed and diverting the public onto the verge of the B9152. By diverting the public along the road verge before they head down to the underpass any temptation to cross the railway line will be removed. The length of road verge walked amounts to a little over one kilometre.

18. In relation to concerns regarding impact upon ospreys, the closest nest is in excess of half a kilometre from the line of the route and due to topography and trees is not visible from the route. The second nest is at an even greater distance from the route and is similarly obstructed by trees and topography. The birds are habituated to a degree of human disturbance from use of the Kinrara Drives by vehicles, walkers and cyclists as well as human activity associated with nearby pheasant pens and the various dwellings on the estate.

19. MWP 33 shows that the male osprey uses a variety of perches, one of which is close to the proposed route. If that perch is not available the osprey will use another one. SNH have given consideration to this factor and have recommended the route to Ministers. Good quality paths and tracks with appropriate signage and waymarking are a very effective mechanism for managing people. Experience has shown that users generally stay on a marked route unless particular attractions are promoted off it. The existing Speyside Way passes close to other areas of species sensitivity with little apparent difficulty. There is no intention to promote the presence of either of the two osprey nests on Kinrara Estate. The RSPB in their response to the consultation did not highlight any concerns over the proposed route (CNPA 11e) and there are other locations in the area where ospreys nest successfully in closer proximity to popular recreational routes such as adjacent to a right of way between Feshiebridge and Glen Feshie and close to recreational routes in Inshriach Forest.

20. In relation to the impact of the path on designated sites, the River Spey SAC and its tributaries have four qualifying interests namely, Freshwater Pearl Mussel, Sea Lamprey, Atlantic Salmon and Otter. The advice received from SNH indicates that the construction of a bridge will have no significant effect on both Freshwater Pearl Mussel and Sea Lamprey (CNPA 32, page 5). Construction of a bridge would have a significant effect on Atlantic Salmon and Otter (CNPA 32, page 6). SNH appraised the impacts on these latter two species and concluded that any adverse impacts arising from the construction of the bridge could be avoided by applying appropriate conditions (CNPA 32, pages 6 – 9). Bridges have been constructed before in SACs and what is required is to ensure that no sediment results from construction works. SNH have a standard set of conditions to be applied to ensure such works have no effect on the integrity of the site. CNPA have therefore concluded that through appropriate management and conditioning of the construction there will be no adverse effect on the integrity of the River Spey SAC.

21. Part of the route through Kinrara Estate lies within Alvie SSSI and there are popular routes elsewhere in the national park that go through SSSIs such as Craigellachie. The route through the Alvie SSSI is peripheral and in a grassland area that already has a track. The construction of a path and bridge will require permission from SNH. Consent can only be issued when the Order is in place and therefore the application will follow if the Order is confirmed. Since MWP have refused permission to allow trial pits to be dug the detailed nature of the bridge structure over the Allt Dibheach and its full impact on the SSSI cannot be determined until the Order is confirmed and a final survey carried out. SNH, in recommending the route through Kinrara Estate drew to the attention of the Minister (CNPA 6, page 20) the SSSI designation and the requirement for it to be dealt with as a planning consideration. After the Ministerial decision, CNPA commissioned an Ecological Survey to assist in the preparation of a detailed planning application because it was anticipated that natural heritage issues in relation to the proposed route would have to be addressed and micro adjustments to the route carried out to mitigate any effects. The survey addresses how the impacts on species identified on Kinrara Estate can be mitigated (CNPA 35, pages 18-20). Based on that survey, CNPA have concluded that through appropriate surveying prior to construction and management and conditioning of the construction there will be no adverse effect on the integrity of Alvie SSSI.

22. In relation to concerns regarding impact upon land management operations, there is a general right of responsible access throughout Scotland and the Scottish Outdoor Access Code (the Code) makes clear that Land Managers have a duty to manage land or water responsibly for access (CNPA 36a, Part 4, page 53). Extensive sections of the existing Speyside Way go through areas that are farmed for livestock, and woodland and forest sections that are used for low ground shooting. This is also true of the other three official Long Distance Routes in Scotland and for many other promoted paths in the Cairngorms National Park. The section of the route from Kinakyle to approximately 100 metres north of the Allt Na Criche will follow a vehicle track

that has been constructed by Scottish Water. On occasion, sheep are grazed in these fields and advice is already contained about responsible behaviour in entering areas with livestock within the Code (CNPA 36b) and on the Speyside Way website. From the end of the track to the Allt Na Criche the route follows an existing track and the same guidance applies. From the Allt Na Criche to North Kinrara Drive a new path will be constructed along the field margin to cause minimum disruption to any agricultural operation.

23. The new section of path required from North Kinrara Drive to the Allt Dibheach would go through semi natural woodland where no livestock have been observed. It may be that shooting takes place in this location but commercial shooting takes place in close proximity to the existing Speyside Way and is managed safely and avoids conflict. The Code provides guidance for both land managers and recreational users on how to enable both activities take place without interfering with the others' enjoyment (CNPA 36c, page 103). The pheasant shooting season is from 1 October to 1 February, and annual usage figures for the Speyside Way indicate that less than one quarter of the usage is within November to March.

24. No path currently exists between Aviemore and Dalraddy and therefore any proposal will involve costs including the construction of new paths, upgrading of existing paths and tracks, and the construction of bridges across water courses. Cost is not the sole determining factor in route selection. The proposed route is the one that best meets the needs of users, has least impact for land managers and should provide a high quality access facility. It will also provide an attractive route, capable of use by a wide range of people, and close to communities and accommodation providers.

25. The cost of construction of the proposed route has been estimated at £337,700 (CNPA 37, Sections 1 to 14). However, Scottish Water are currently constructing the track between the railway underpass to within approximately 100 metres of the Allt na Criche and this will reduce the overall construction costs to £302,200. Since this route is the only one that has been fully costed it is a matter of conjecture whether it is the most expensive.

26. MWP 13 does not show that Highland Council rejects the proposed route. CNPA 43 shows that from a roads safety perspective the proposed route, located largely to the east of the railway line, is the most appropriate in that it would have least impact on the public road network and result in less potential for conflict between route users and vehicular traffic.

27. It has never been claimed that the route would be fully accessible to all disabled people. That is because of the topography along much of the route. The aim of the route is to be as free of barriers and obstructions as possible to ensure that it can be used by the widest possible range of users including walkers, cyclists and horse-riders. In line with national best practice, the design approach is to avoid features that would discriminate against certain users – for example, avoiding 'cattle creeps' and culverts which may well be impassable to horse-riders.

28. The alternative route proposed by MWP has not been subject to any public consultation as it was not identified as a feasible route option by the Development Officer and Speyside Way Management Group. Part of the route was, however, subject to a limited consultation by SNH in 2008 and residents who live along the line of the route expressed their opposition at that time (CNPA 6, page 11). The alternative route south from North Kinrara Drive is sandwiched between the railway line and the B9152 and would have to move on to the road to avoid a private house and garden. The route would also require to move onto the road where it crosses the Allt Dibheach approximately 200 metres south west of the Rowan Tree Hotel.

29. The lack of sight lines at the bridge means that Highland Council have serious safety concerns about bringing route users on to the road. The route would also have to utilise a cattle creep to cross under the railway line. SNH considered this route but concluded that safety concerns and its proximity to traffic made it an unattractive route for users.

30. The section of the route between Aviemore and Lynwilg Farm Cottages was part of the Loch Alvie route and was subject to full public consultation in 2006 (CNPA 11a). The route would pass very close to a number of properties whose residents expressed concern about loss of privacy during the consultation. Overall there was no public support for the Loch Alvie route (CNPA 11d). The section of the route from Lynwilg Quarry to the Rowan Tree Hotel is on a neighbouring estate and they have also expressed implacable opposition to that route on their ground. The neighbouring estate's opposition and the fact that the proposal presents more privacy and safety concerns than the route now proposed by CNPA, makes it a far poorer option for a Long Distance Route.

## **The case for the McLaren Webster Partnership (MWP)**

### The consultation process

31. MWP's objection to the route and subsequent proposals for variation are supported by a number of other parties (MWP 5-15). The consultation process for the proposed route has been flawed because the Rothiemurchus/Inshriach route was not consulted on or promoted by SNH despite strong public support (MWP 19, MWP 22). The route now proposed by CNPA was only supported by 12 respondents. A total of 16 respondents suggested alternative options (CNPA 6 page 25). CNPA 6 states that Highland Council TEC Services support the route which is not true (MWP 13). CNPA 10(b) (pages 2 and 8) discloses that 28 respondents supported alternative routes, of which the Rothiemurchus/Inshriach route was one, in comparison to only 6 respondents supporting the route now proposed and 18 respondents giving it only qualified support.

32. The CNPA Board proposed that SNH should give further consideration to the Rothiemurchus/Inshriach route but that was not properly investigated by SNH. CNPA directed SNH to undertake further consultation on this route (CNPA 11(a) and 12). There is no evidence that SNH did anything in

response to that direction. CNPA 6 at page 10 simply concludes that the route should be rejected with no supporting evidence for the “*original reasons*” (see paragraph 7 above). No evidence is provided to justify these “*original reasons*”. The proximity of the Rothiemurchus/Inshriach route to the capercaillie is disputed (MWP 25).

33. The alternative route supported by MWP has been marginalised throughout the process. Alternatives were not subject to full public consultation or were never properly considered. The MWP alternative route was supported by members of the Highland Council (MWP 9 to 12), TEC Services of the Highland Council (MWP 13), Community Councils (MWP 5 - 8) and Network Rail (MWP 16, 17 and 54). At the SNH Board Meeting on 10 December 2008 (MWP 21), a vote in favour of the proposed route had been influenced by the Chairman who stated that the views of Councillor Fallows did not “necessarily” reflect the views of the Highland Council, which was incorrect (MWP 18). The Chairman also incorrectly advised that there were technical matters that favoured the route which he subsequently admitted was inaccurate (MWP 48). This demonstrates that there has been an improper consultation which has led to a fundamentally flawed decision by SNH.

34. Board Meetings held by CNPA on 10 July 2009 (MWP 23) and 14 May 2010 (MWP 24) did not permit the opportunity for submissions to be made by MWP to make CNPA fully aware of the facts so that a fair assessment could be made. In particular, at the meeting of 10 July 2009, the Convener of the CNPA Board refused to permit a submission prepared on behalf of MWP to be distributed to members on the basis that a decision had already been reached by the Environment Minister following the meeting of SNH of 10 December 2008. The CNPA meetings were simply a “rubber stamping” exercise (MWP 26).

### The proposed route

35. There is a serious flood risk at the railway underpass at the northern end of the proposed route (MWP 27, MWP 28) and water has risen 10 feet up the embankment in the past. During times of flooding and snow this would lead to users of the route crossing the railway line by the nearby level crossing because it is a quicker route. In the past, people have left the gate open and sheep and cattle have been found on the line on several occasions. The line is on a bend where trains travel at 75mph. CNPA 6 at page 13 claims that Network Rail is of the opinion that the risk could be satisfactorily managed but MWP 54 shows Network Rail specifically deny that this is the case and maintain their objection to the proposed route. The proposal presents a significant health and safety concern for users of the route. The mitigation measures proposed by CNPA in the event of flooding are insufficient to overcome the inherent health and safety risks of the route. In particular, it is unlikely walkers would have access to a website during use of the route. Diverting walkers on to the B9152, which has no verge, has safety implications, as has the first part of the route from Aviemore to Kinakyle, which would also need to go along the B9152.

36. The proposed route is unsuitable for the disabled because of the problems at the railway underpass and the approach to the Allt Dibheach Burn which is far too steep despite the proposed construction of a zigzag path to ensure safe descent (MWP 29, MWP 49). MWP 24 also highlights that the route is not suitable for multi-use throughout its length.

37. The proposed route is unnecessarily close to the River Spey SAC and is within the Tor Alvie SSSI, the integrity of which will be affected by the route. Three previous public inquiries involving the Tor Alvie SSSI demonstrate the importance of protecting the area from overuse and the importance of the Kinrara Estate in contributing to the SSSI (MWP 30). A Visitor Management Plan for Dalraddy Holiday Park, imposed with the support of SNH (MWP 56), approved measures to prevent and discourage public access to the estate. The proposed route would encourage the exact opposite (CNPA 6 page 27). Forestry Commission Scotland are preparing a Habitat Management Plan for the Tor Alvie SSSI (MWP 61). This is one of only five sites selected for this survey and highlights the significance of the site.

38. The proposed route is close to two osprey nests, accounting for 20% of the osprey population in Badenoch and Strathspey, and risks serious disturbance to them. One nest is beside the Bogach (MWP 33) and the male bird perch is adjacent to the route. Kinrara Estate is important for osprey conservation (MWP 30-32) and the Bogach is an important foraging loch for other ospreys because it contains pike. It is important to protect wildlife sites from increased public access (MWP 34 – 41) and people appearing on the far bank of the Bogach would cause disturbance to ospreys fishing.

39. The Ecological Survey (CNPA 35) which seeks to justify the route is not a survey which was carried out to help assess the suitability of the proposed route. It was carried out after the route had been confirmed, as an attempt to justify a decision already taken. It is fundamentally flawed because it was conducted during a limited timeframe (between March and April 2010) and not at the optimum time of the year. The Survey makes clear that it is not an Appropriate Assessment (page 20). It could not adequately assess the impacts on flora; for example, the grassland habitats were not surveyed at the "optimum timeframe". It recommends that further surveys are undertaken and cannot, therefore, be relied upon. Given the risks to these sensitive areas, promotion of this route is premature and SNH accept that the route may have significant effects on Atlantic Salmon and otter (CNPA 32).

40. The route passes through areas of the Kinrara Estate which are used for stalking and game shooting, which will be adversely affected with a consequent loss of income to, and depreciation in the value of, the estate (MWP 42). The proposed route would interfere with the sheep grazing on the SSSI (MWP 46). A renewal of the management agreement with SNH regarding the Tor Alvie SSSI is currently being applied for to graze sheep. This would assist in removing the difficulties the estate are encountering with an infestation of ticks, which present health and safety issues for users of the proposed route. Fencing would be required throughout the length of the route but CNPA will not provide it (MWP 26). The proposed route is also the most

expensive option, being four times more expensive per kilometre than the rest of the route.

#### Consent from Scottish Water

41. Scottish Water entered into a contract with MWP in January 2010 under which Scottish Water purchased areas of land at Kinakyle from MWP. In terms of that contract, Scottish Water undertook not to agree to nor encourage public access through any part of the subjects purchased by Scottish Water from MWP or through any part of the subjects retained by MWP. Scottish Water cannot consent to the proposed route because of the terms of the contract between Scottish Water and MWP.

#### Alternative route

42. The alternative route proposed by MWP (Route C) (MWP 1) was rejected by CNPA without proper consultation and for unfounded reasons. This route has been supported by a number of individuals and bodies (MWP 16, 17, 5 – 15, 51-53, 57). This route has a number of benefits namely:

- It is the cheapest and would save £115,000 on bridges alone (CNPA 37) since the proposed route requires two bridges whereas Route C only requires one bridge.
- It is capable of multi-use, including by the disabled, throughout its length since most of the route is level.
- The route avoids the railway level crossing, the B9152 road, the pylon line and the waterworks.
- As subsequently modified, it avoids Craigellachie SSSI, the bed of the Allt-na-Criche burn, the osprey nests and the Craigellachie and Tor Alvie SSSI.
- It can make use of existing refreshment and toilet facilities.
- It does not interfere with the agricultural and sporting activities of the estate.
- It links up with the proposed Aviemore orbital path in the Craigellachie NNR.
- It is not subject to flooding.
- The route exists for most of the way already and would make use of existing bridges, tracks and underpasses.
- The old road does not require improvement and Highland Council have agreed to install a 50mph speed limit either side of the Rowan Tree Hotel (MWP 60).
- It enjoys far better views than the proposed route.

43. The objections to the route (MWP 59) are refuted on the following grounds as is the comparison of Routes A, B and C shown in CNPA 6 at Appendix 5:

- There is a sufficiently wide verge for a suitable path to be created along the A9 at this point similar to the one that exists at Moy.

- The peregrine falcon nest is over a mile away on a cliff face, up a hill.
- The route does not enter the Craigellachie SSSI at any point.
- All private residences can easily be avoided by a minor variation.
- The route need not pass a working farm steading.
- The adjacent tarmac road is a public road and the proposed holiday cottages are a mile away.
- Objections 6, 7 and 8 can all be easily avoided by minor variations.
- The underpass was constructed for vehicular access, not to hold stock.

44. The substance of the arguments advanced by KEP relate to this alternative route and not to the route proposed in the Order. It is therefore submitted that since the alternative route is not before the Reporter the KEP submissions in respect of it are wholly irrelevant. MWP only seek to object and influence the course of any route to the extent that it affects land in their ownership. The land subject to the variation proposed by MWP is entirely within the ownership of MWP. In any event, the KEP submissions are factually inaccurate. The peregrine falcon's nest referred to is two miles from the route between Cairn Dearg and Craigellachie. At no point does the route enter the Craigellachie SSSI. Other issues such as proximity to private residences can be dealt with by minor variations.

#### Variation to the route proposed by CNPA

45. MWP has advanced a variation or deviation (MWP 2) of the route proposed by CNPA, whereby at the northern drive entrance to the Kinrara Estate the route would cross over the railway bridge, then through the wood between the road (B9152) and railway until reaching the Kinrara Estate centre drive. Thereafter it would continue along the top of the Croft Kinrara fields as far as the cattle creep where it would rejoin the route proposed in the Draft Path Order.

46. This variation to the proposed route has a number of benefits in comparison to the route proposed by CNPA including:

- It is a cheaper option than the proposed route albeit not as economical as Route C.
- It avoids the users of the route having to walk along the B9152 and under pylons.
- It is capable of multi use including use by the disabled (from the north drive entrance southwards) throughout its whole length and all year round, provided the cattle creep is avoided. That would involve a further minor variation by continuing along north of the railway from the cattle creep to the Dalraddy Holiday Park. That would also give users ready access to the Park shop.
- It takes the route out of the SSSI and away from sensitive protected areas including the osprey nests.
- A route already exists for most of its way making use of existing bridges, underpasses and tracks.



- It generally has far better views and a better user experience than the route proposed by CNPA, albeit not as good as Route C.
- It is the most direct route avoiding built up areas. It provides existing refreshments and toilet facilities along the route.

47. MWP 49 is a site visit appraisal by Paths for All Partnership which concludes at paragraph 6 that this variation to the proposed route presents the easiest technical challenges with the only disadvantage being the need to make the route run beside the road carriageway where it passes a private house. The appraisal demonstrates that the site could feasibly accommodate the route and Highland Council confirms (MWP 55) the viability of construction of a bridge for a variation to the route.

#### Claim for expenses

48. It is submitted that the challenge by KEP to the relevance of the grounds of objection advanced by MWP constitutes a new issue that was not raised in any of the pre-hearing exchanges. Expenses are therefore sought for that part of the hearing taken up with this matter and the cost of preparing the legal submissions referred to in paragraph 3 above. After the conclusion of the hearing a further submission was received from the agents for MWP seeking an award of expenses against CNPA on the grounds that the Order should not have been promoted in the absence of consent from both Network Rail and Scottish Water as statutory undertakers. MWP seek to recover from CNPA their entire costs in respect of the promotion of the Path Order and the hearing.

#### **The case for the Kinrara Estate Partnership**

49. KEP are the owners of the land adjacent to Kinrara Estate through which MWP's alternative route (Route C) runs. They submit that the first part of this alternative route was subject to full public consultation in 2006, was objected to by residents, and there was no support for the route. By way of contrast, the route proposed by CNPA was supported by a significant number of individuals, is regularly used by members of the public, and appears to be a natural continuation of the Speyside Way.

50. The suggested alternative Route C is unsuitable because:

- It runs next to a cliff and alongside Lynwilg Quarry. Widening of the A9 trunk road would adversely impact upon the user experience of this part of the route.
- A pair of peregrine falcons nest close to the route and would be disturbed by users.
- The route enters Craigellachie SSSI and passes a number of private residences, a working farm steading and a workshop housing items such as circular saws.
- Beyond the workshop is a rifle range where high velocity rifles are tested daily. This would pose a health and safety concern and would

also alarm users of the route, which passes within 20 metres of the range.

- A cattle creep affected by the by-product of cattle and sheep would have to be used to cross under the A9.
- The route would entail a crossing of the B9152 which currently has a 60mph speed limit.

51. The Land Reform (Scotland) Act 2003 does not allow the Draft Path Order to be modified to provide that the path would follow the proposed alternative route. While paragraph 6 of Schedule 1 of the Act allows Scottish Ministers to confirm the Order with modification, these modifications cannot be such that the path would then pass through land owned by a third party. Any arguments in favour of alternative routes such as those advanced by MWP are therefore irrelevant to the decision as to whether or not to approve the Order. Similarly, detailed consideration of other routes (other than minor variations within the land ownership of MWP) is not relevant as to whether there has been proper procedure in making this Order. Any alternative routes (other than the minor variations) have not been properly consulted upon and considering arguments for or against alternative routes at a hearing cannot take the place of proper consultation. It would therefore be improper to base any decision in relation to the Order on consideration of arguments for or against alternative routes.

### **The case for Network Rail**

52. The position of Network Rail as a statutory undertaker with an interest in the land in question is set out in their letter of objection of 29 July 2010. They are concerned that the route proposed by CNPA floods at the railway underpass south of Kinakyle and that in such an event, users of the proposed route would seek to cross the railway line at the nearby private level crossing known as Lynwilg 1. This would jeopardise the safety, reliability and efficiency of rail infrastructure because level crossings can be subject to user error or abuse. The works being carried out by Scottish Water to the track at the underpass are not expected to significantly reduce the risk of the track flooding. An alternative route (MWP 62) that would minimise the risk of use of the level crossing is therefore proposed.

### **The position of Scottish Water**

53. The position of Scottish Water is set out in their letter of 5 May 2011 (MWP 57). They submit that they cannot consent to the proposed route because of a contractual obligation to MWP from whom they purchased land at the railway underpass south of Kinakyle which the proposed route would traverse.

## **REPORTER'S FINDINGS AND RELATED CONCLUSIONS**

### Statutory background and scope of the matters before me

54. Section 39(1) of the Countryside (Scotland) Act 1967 sets out the circumstances in which SNH may prepare and submit a report to the Scottish Ministers on the creation or extension of a long distance route. Section 39(2) of the Act covers what should be contained in such a report and section 39(4) makes clear that before submitting such a report SNH should consult with every local planning authority through whose area the route passes. Section 39(5) requires that the report should also contain an estimate of the capital outlay and annual expenditure of any such proposal and any representations made by any authority consulted under section 39(4). Section 40 of the Act provides that on receipt of such a report Scottish Ministers may either approve the proposals with or without modifications or subject to such conditions as they think fit or reject the proposals. Proposals approved by the Scottish Ministers either as originally set out in the report or as modified shall be implemented by the local planning authority as soon as maybe after their approval.

55. Section 22 of the Land Reform (Scotland) Act 2003 provides that where it appears to the local authority to be impracticable to delineate a path within land by agreement with a landowner the local authority may, if it appears expedient, delineate such a path by order (a “path order”). Schedule 1 to the 2003 Act provides that if objection is made to a path order and not withdrawn, the order shall not have effect unless confirmed by Ministers. Ministers can either confirm or decline to confirm the order and, where they do confirm it, may do so with modifications. Paragraph 9 of Schedule 1 states that no path order shall be made which would delineate a path over land in or over which there is apparatus belonging to or used by any statutory undertaker for the purpose of the undertaking unless the undertaker has consented to the making of the order. Paragraph 10 of Schedule 1 states that such consent shall not be unreasonably withheld and any question whether it is so withheld shall be determined by Ministers.

56. On 21 May 2009 the Minister for Environment approved, in principle, the proposed extension of the Speyside Way Long Distance Route from Aviemore to Newtonmore in accordance with the recommendations made by SNH (CNPA 13). That approval in principle was subject to the satisfactory completion of the Path Order and planning processes. Following on from that, and having concluded that it was impracticable to delineate the path by means of a path agreement, CNPA made the Order.

57. It is against that background that the scope of the evidence that can be taken into account by me in determining the matter before me must be considered. It is submitted by KEP that in light of the decision by Scottish Ministers, the general line of the long distance route is no longer the issue. All that I am being asked to report on is the delineation of a path. The merits or otherwise of the line of the route or any other route are not at issue. The merits or otherwise of alternative routes would only be relevant if it was suggested that in arriving at the decision to make the Order CNPA were acting in some way which amounted to “Wednesbury” unreasonableness. It is submitted that my function in this case is simply to consider the procedural

propriety of the process to date, to consider questions of safety which may amount to modification of the delineated path and whether the circumstances set out in section 22(1) of the 2003 Act have been satisfied so as to give CNPA the power to make the Order.

58. I note that unlike, for example, the grounds of appeal against an enforcement notice, Schedule 1 to the 2003 Act does not prescribe or restrict the grounds upon which objections to a path order may be made by the owner of the affected land. This is understandable since section 39(4) of the 1967 Act only requires SNH to consult with the local planning authority on the creation or extension of a long distance route. Landowners have no statutory right to object to such a proposal before it is submitted by SNH to Scottish Ministers in accordance with section 39(1) of the 1967 Act. It follows that an objection to a path order made under paragraph 2 of Schedule 1 to the 2003 Act provides the first statutory right to a landowner to object to the creation or extension of a long distance route over his land.

59. Section 22 of the 2003 Act provides that in deciding whether it is expedient to delineate a path the local authority must have regard to the rights and interests of the owner of the land affected. In the absence of any statutory restriction on the grounds of objection I consider it only logical that an affected landowner would be entitled to object to a path order on the grounds that the local authority had not had proper regard to his rights and interests. If I am right in this it must also follow that the grounds of objection to a path order should not be restricted or constrained as suggested by KEP. Otherwise the result would be an effective confiscation of rights over property with no opportunity for meaningful objection.

60. What is before me is the objection by MWP to the proposed extension of the Speyside Way over the land in their ownership and for the reasons set out in the two preceding paragraphs I am satisfied that MWP must be allowed to make their case, as stated, against the Order. In support of their objection MWP suggest an alternative route, part of which crosses land in the ownership of KEP. My remit is not to choose the best route but to consider whether there is evidence to support a conclusion that it would not be expedient to make the Order sought. In that context it is right and proper for me to hear arguments from MWP as to why their suggested alternative route is a preferable route to that proposed in the Order.

61. Similarly, I consider that it is open to MWP to argue that the consultation process has been flawed and that other better options may be available such as the Rothiemurchus/Inshriach route. Having said that, given the limited scope of the matter before me I am clear that it would not be open to me to make any recommendation to approve any alternative route (including the suggested alternative over land in the ownership of KEP). The matter before me is not to choose the best path, but to determine whether or not it is expedient to delineate the path as proposed by CNPA and to recommend that the Order be confirmed as submitted and with or without modifications, which by definition cannot involve major deviations involving some distance.

## The consultation process

62. CNPA 6 dated December 2008 is the report submitted to Scottish Ministers by SNH on proposals to extend the Speyside Way Long Distance Route between Aviemore and Newtonmore. Section 3 of the report provides details of the consultation process undertaken prior to submission of that report. It is clear that the consultation process extended much more widely than was required by section 39(4) of the 1967 Act. Various routes were considered, including a route across Alvie Estate proposed by MWP. A route on the east side of the Spey was considered on two different occasions and rejected because of it would involve long sections of track through dense forest, it would impact upon capercaillie, and it was not direct.

63. Contrary to the assertion by MWP, CNPA 11(a) and CNPA 12 do not show that CNPA directed SNH to undertake further consultation on the Rothiemurchus/Inshriach route. The CNPA Board simply asked SNH to give further consideration to that route which CNPA 6 at page 10 shows was done. I have no hesitation in accepting the evidence of SNH and CNPA regarding the extent of the consultations undertaken prior to the submission of the report to Scottish Ministers. I am also satisfied with reference to CNPA 6, CNPA 11a and CNPA 12 that SNH properly investigated the suggested Rothiemurchus/Inshriach route. Having regard to the evidence before me as set out in this and the preceding paragraph, I am satisfied that overall, the consultation process leading up to the submission of the report to Scottish Ministers in 2008 was robust and comprehensive. It also exceeded what was required by statute.

64. It may well be that the alternative route proposed by MWP has support from various individuals and bodies. Indeed, based on my observations on my site visit, I can see that the alternative route as now proposed has some attractions, especially where it runs past Loch Alvie. However, it also runs close to the A9 in part, with consequent adverse impact from traffic noise. In any event, as already stated, it is not for me to choose the best route for the extension to the Speyside Way. It has been suggested by MWP that Highland Council do not support the extension to the Speyside Way proposed by CNPA. CNPA 43 shows, however, that Highland Council TEC Services regard *“the proposed route located largely to the east of the railway line to be the most appropriate in that it will have the least impact on the public road network and result in the least potential for conflict between route users and vehicular traffic.”*

65. MWP 23 shows that at the CNPA Board meeting on 10 July 2009 (after the Minister for Environment had approved in principle on 21 May 2009, the proposed extension of the Speyside Way) it was noted that one land manager (whom I assume to be MWP) had significant concerns regarding the route chosen by Ministers and was continuing to promote an alternative route over land owned by others. That alternative route had been considered by the SNH Board before advising Ministers and rejected because of technical challenges, significant additional costs and many other (unspecified) difficulties. MWP 24 shows that at the meeting of the CNPA Board on 14 May

2010 Major McLaren of MWP was invited to address the meeting. He outlined what he saw as the drawbacks of the proposed route and suggested an alternative route. The minute of the meeting states that it was important to note that there were objections from other landowners and members of the public to his alternative route. The minute makes clear that Major McLaren's points were addressed, although obviously not to his satisfaction. In particular it is noted that many elements of the route proposed by Major McLaren had been considered earlier in the long process of consultation on the various options.

66. My reading of MWP 23 and MWP 24 does not support the assertion by MWP (paragraph 29 above) that the CNPA Board were not fully aware of the position being advanced by MWP at the time or that they did not give that position due and proper consideration. The outcome of any consultation process regarding alternatives inevitably means that there will be those whose preferred option is not ultimately chosen. That does not mean that the consultation or decision making process has been flawed or is in some way unfair. Choices require to be made. The CNPA Board were seeking to give effect to the Ministerial decision. In my view any dissatisfaction with the conduct of the CNPA Board should have been raised judicially or otherwise with the Board at the time. I do not consider that it is appropriate for me at this point in to seek to go behind the actions of the Board in coming to their decisions and, in any event, I find no reason to do so.

#### The objection of Network Rail

67. It is not in dispute that the railway underpass at the northern end of the proposed route floods from time to time. I accept that in such an event walkers would be discouraged from using the underpass. To address such an eventuality CNPA propose to post information on the Speyside Way website advising of the temporary closure of the underpass and diverting people along the B9152 to and from the North Kinrara Drive entrance. More importantly, in my view, it is also proposed to erect signage on the B9152 at Kinakyle and at North Kinrara Drive to divert people onto the verge of the B9152.

68. Based on my observations on my site visit, I am satisfied that the road verge along the relevant section of the B9152 (approximately one kilometre) is wide enough for people to walk along. There is also an adequate roadside verge between Aviemore and Kinakyle and Highland Council intend to construct a proper path along the side of the road. The private level crossing known as Lynwilg 1 which Network Rail fears would be used by walkers in the event of the underpass being flooded is not readily visible from the B9152. In view of all of the foregoing, I consider that, on balance, the mitigation measures proposed by CNPA should be sufficient to address the concerns expressed by Network Rail.

69. I find the alternative route suggested by Network Rail to be unsatisfactory because of the need to construct a path or causeway within the bed of the Allt na Criche burn, which is part of the River Spey SAC. Such a proposal might also give rise to problems in time of flood. In view of the foregoing I am

satisfied that in this case the consent of Network Rail has been unreasonably withheld.

#### Other potential constraints associated with the proposed route

70. As far as the suitability of the route for disabled persons is considered, I agree that the bank on the north side of the Allt Dibheach Burn is steep but the construction of a switchback or zigzag for this stretch of path would considerably lessen the gradient. I accept the evidence of CNPA that the topography along much of the route means that it would not be fully accessible to all disabled people. In my view that would be an unrealistic goal to try and achieve and the best that can be obtained is to try and ensure that the route is as free of barriers and obstructions as possible in order that it can be used by the widest possible range of users including walkers, cyclists and horse-riders. I accept the evidence of CNPA that in line with national best practice, the design approach is to avoid features that would discriminate against certain users – for example, avoiding ‘cattle creeps’ and culverts which may well be impassable to horse-riders. Although the MWP route may be capable of disabled use, given the other disbenefits associated with the route such as potential pedestrian/vehicle conflict, which I consider to be a particularly important issue as far as disabled people are concerned, the need to use a cattle creep which would prevent use by horse-riders, and also for the reasons set out in paragraphs 28 - 30 above, I am not persuaded that that is sufficient to lead me to conclude that it would not be expedient to delineate the path as proposed.

71. It is not in dispute that the proposed route may affect the River Spey SAC and Alvie SSSI. The evidence of CNPA and SNH (paragraph 15 above) is that any adverse impacts on Atlantic Salmon and otter arising from the construction of a bridge in the SAC could be avoided by applying appropriate conditions (CNPA 32, pages 6 – 9). No professional or technical evidence has been produced by MWP to justify the assertion that the route would have an adverse effect of the integrity of the SAC.

72. In relation to the effect of the proposal on the SSSI it is not in dispute that the Kinrara Estate has many outstanding qualities and is important in contributing to the SSSI. However, there are popular routes elsewhere in the National Park that go through SSSIs such as Craigellachie. The route through the Alvie SSSI is peripheral and in a grassland area that already has a track. Since MWP has refused permission to allow trial pits to be dug the detailed nature of the bridge structure over the Allt Dibheach and its full impact on the SSSI cannot be determined until the Order is confirmed and a final survey carried out. SNH, in recommending the route through Kinrara Estate drew to the attention of the Minister (CNPA 6, page 20) the SSSI designation and the requirement for it to be dealt with as a planning consideration. CNPA have commissioned an Ecological Survey to assist in the preparation of a detailed planning application. It is perhaps important to note here that the survey was not prepared in order to justify the proposed route. The survey addresses how the impacts on species identified on Kinrara Estate can be mitigated (CNPA 35, pages 18-20). Based on that

survey, CNPA have concluded that through appropriate surveying prior to construction and management and conditioning of the construction there will be no adverse effect on the integrity of Alvie SSSI. No professional or technical evidence has been produced by MWP to justify the assertion that the route would have an adverse effect of the integrity of the SSSI.

73. In relation to the impact of the proposed route upon ospreys, my site inspection confirmed that the nearest nest to the proposed route was some 500 metres away on the other side of the loch known as the Bogach and because of topography and intervening trees was not visible from the proposed route. That nest is however close to two driveways on the Kinrara Estate and I accept the evidence of CNPA and SNH that, as a result, the birds must be used to a certain amount of human disturbance caused by vehicles and human activity associated with use of the drives and the nearby pheasant pens.

74. The loch is surrounded by marshy ground that would be unattractive to walkers and I consider it unlikely that walkers would be tempted off a well marked path to try and cross such terrain. Ospreys are protected from intentional or reckless disturbance by law (Wildlife and Countryside Act 1981) and although it has been suggested that the route runs close to an osprey perch that exact spot has not been identified, although I note that MWP33 indicates that the off-duty bird perches on Kinrara Hill or on posts on the west side of the loch. Based on my observations on my site visit I am satisfied that the proposed route should not impinge upon these locations. I also note that there are a number of locations in the area where ospreys nest successfully in closer proximity to popular recreational routes such as adjacent to a right of way between Feshiebridge and Glen Feshie and close to recreational routes in Inshriach Forest.

75. I have taken note of the concerns that users of the proposed route would interfere with or be at risk from agricultural operations, farm animals or shooting and related pursuits such as game bird rearing. The Scottish Outdoor Access Code (CNPA 36) recognises that outdoors is a working environment and provides guidance to members of the public regarding the exercise of access rights in situations where members of the public may encounter any of the foregoing situations. The Code clearly envisages that responsible access and the carrying out of land management and related operations are not necessarily incompatible, provided appropriate steps are taken by land managers and the public. The expression of general concerns regarding such matters would not, therefore, of itself, render delineation of the path inexpedient. I have approached the consideration of the objections in relation to such matters against that background. I find no distinctive site specific aspects in this case to persuade me that the general presumption outlined above should not apply. In particular there is no evidence that the issue of ticks is exceptional to Kinrara. They are encountered almost everywhere in Scotland's countryside.

76. Provisional costs for the construction of the whole of the Speyside Way extension are outlined in CNPA 37. Neither SNH nor CNPA have undertaken complete comparative costings for the any of the routes that were consulted



upon. I have seen no details of costings prepared by MWP. I find therefore that it is a matter of conjecture that the proposed route, agreed by the Minister, is the most expensive one. I accept that it is reasonable for alternative routes not to be costed if they were unsuitable for various other reasons.

#### The position of Scottish Water

77. I accept that the proposed path would be delineated over land in which there is apparatus belonging to Scottish Water. There is no evidence whatsoever that delineation of the path would interfere with that apparatus. Scottish Water have certainly made no representations to that effect. Scottish Water have simply intimated that they cannot consent to the proposed route because of a contractual obligation to MWP from whom they purchased the land. Paragraph 10 of Schedule 1 to the 2003 Act leaves it to Ministers to decide whether the consent of Scottish Water has been unreasonably withheld. In the clear absence of any technical or operational reason for the withholding of such consent I am of the opinion that Scottish Water's consent has been unreasonably withheld in this case.

#### The variation to the proposed route suggested by MWP

78. Paragraphs 41 and 42 above set out the advantages claimed by MWP for varying the proposed route from the Kinrara North Drive to Kinrara South Drive behind the Lynwilg Railway Cottages. This variation to the proposed route would run between the railway line and the B9152. It is submitted that the only disadvantage is the need to make the route run beside the road carriageway where it passes a private house. From my observations on site I consider that, because of lack of space between the railway line and the B9152, the route would also require to move onto the road verge opposite the Rowan Tree Hotel and at Alvie Bridge. Alvie Bridge is located between two bends in the road and I agree with CNPA that the lack of sightlines here is a serious concern. CNPA 43 highlights that there is a significant accident history for the short section of the B9152 between Lynwilg and Dalraddy because of the geometry of the road and the high vehicle speeds. It may be that a reduction in the speed limit to 50 miles per hour will improve the situation but obviously there is potential for conflict between vehicles and route users. I share the view of SNH that safety concerns and the proximity of the route to traffic make this proposed variation unattractive.

#### The claims for expenses

79. There is no provision in the 2003 Act that would allow me to make an award of expenses in this case.

80. Drawing all these matters together I am satisfied that CNPA has put forward a compelling argument for delineation of the proposed path as an extension to the Speyside Way Long Distance Route. I have taken into account all other matters raised but find none that would alter my findings and conclusions.

**Recommendation**

81. I recommend that the Kinrara Estate Draft Path Order be confirmed.

*R W Jackson*

Reporter

## **APPENDIX 1**

### **APPEARANCES AT THE HEARING**

#### For Cairngorms National Park Authority

Murray Ferguson, Director of Sustainable Rural Development  
Bob Grant, Senior Outdoor Access Officer  
Fran Potheary, Outdoor Access Officer  
Cattie Anderson, Area Officer SNH

#### For the McLaren Webster Partnership

Bruce Smith, Solicitor, Paull and Williamsons LLP Solicitors  
Ross Mackenzie, Solicitor, Paull and Williamsons LLP Solicitors  
Major Robin McLaren

#### For Kinrara Estate Partnership

Peter Paterson, Solicitor, Tods Murray LLP Solicitors  
Kevin Fletcher

## APPENDIX 2

### DOCUMENTS

#### For Cairngorms National Park Authority

CNPA 1	Map 1 of proposed route
CNPA 2	Map 2 of proposed route
CNPA 3a	Letter of 12 July from P & W to CNPA
CNPA 3b	Letter of 7 July from P & W to CNPA
CNPA 3c	Letter of 9 July from P & W to CNPA
CNPA 3d	Map of Kinrara Estate route proposal 3 July 2010
CNPA 3e	Map of Kinrara Estate route proposal 4 July 2010
CNPA 4	SNH Policy Paper
CNPA 5	Countryside (Scotland) Act 1967 (extract)
CNPA 6	SNH report to Scottish Ministers
CNPA 7	CNPA Board paper Nov 2003
CNPA 8	Letters from MSP and Newtonmore CC
CNPA 9a	CNPA Board paper Oct 2004
CNPA 9b	Map of route options
CNPA 9c	Map of preferred route
CNPA 9d	Minute of CNPA Board meeting Oct 2004
CNPA 10a	CNPA Board paper Sep 2005
CNPA 10b	CNPA Board paper Sep 2005 Annex 1
CNPA 10c	CNPA Board paper Sep 2005 Annex 2
CNPA 10d	Minute of CNPA Board meeting Sep 2005
CNPA 11a	CNPA Board paper Dec 2006
CNPA 11b	CNPA Board paper Dec 2006 Annex 1
CNPA 11c	CNPA Board paper Dec 2006 Annex 2
CNPA 11d	CNPA Board paper Dec 2006 Annex 3
CNPA 11e	CNPA Board paper Dec 2006 Annex 4
CNPA 11f	CNPA Board paper Dec 2006 Annex 5
CNPA 11g	CNPA Board paper Dec 2006 Annex 6
CNPA 11h	Minute of CNPA Board meeting Dec 2006
CNPA 12	Letter dated Dec 2006 from CNPA to SNH
CNPA 13	Letter of approval from Minister for the Environment
CNPA 14a	CNPA Board paper July 2009
CNPA 14b	Minute of CNPA Board meeting July 2009
CNPA 15a	Letter from Turcan Connell to SNH
CNPA 15b	Letter from SNH to Turcan Connell
CNPA 15c	Letter from CNPA to Turcan Connell
CNPA 15d	Letter from Turcan Connell to CNPA
CNPA 15e	Letter from Leasingham Chalmers to Turcan Connell
CNPA 16a	Letter from CNPA to Kinrara Estate 8 Feb 2010
CNPA 16b	Letter from CNPA to Kinrara Estate 12 Feb 2010
CNPA 16c	Letter from Kinrara Estate to CNPA 15 Feb 2010
CNPA 16d	Letter from CNPA to Kinrara Estate 19 Feb 2010
CNPA 17a	Letter from CNPA to Kinrara Estate 30 March 2010
CNPA 17b	Letter from Kinrara Estate to CNPA 3 April 2010
CNPA 18	Letter from Turcan Connell to CNPA

CNPA 19	Land Reform (Scotland) Act 2003 Extract
CNPA 20	Letter from CNPA to Turcan Connell
CNPA 21a	CNPA Board paper May 2010
CNPA 21b	Minute of CNPA Board meeting May 2010
CNPA 22a	Letter to Turcan Connell
CNPA 22b	Draft Path Order
CNPA 23	Letter from Turcan Connell to CNPA
CNPA 24	Letter from CNPA to P & W
CNPA 25	Letter for Leadinghalm Chalmers to Turcan Connell
CNPA 26	National Parks (Scotland) Act 2000 extracts
CNPA 27a to 27c	Cairngorms National Park Plan extracts
CNPA 28a to 28b	CNP Outdoor Access Strategy extracts
CNPA 29	CNPA Corporate Plan
CNPA 30	Core Path Plan extract
CNPA 31	Guidance for National Park Authorities
CNPA 32	Letter from SNH to CNPA
CNPA 33a	Alvie SSSI Citation
CNPA 33b	Alvie SSSI Map
CNPA 33c	Alvie SSSI List of Operations Requiring Consent
CNPA 34	Nature Conservation (Scotland) Act 2004 extract
CNPA 35	Ecological Survey
CNPA 36a to 36c	Scottish Outdoor Access Code extracts
CNPA 37	Preliminary construction costs
CNPA 38	Letter from CNPA to statutory consultees
CNPA 39	Letter from SSE
CNPA 40	Letter from Scottish Water
CNPA 41	Letter from Network Rail
CNPA 42	Speyside Way Extension – timeline
CNPA 43	Letter from Highland Council

#### For the McLaren Webster Partnership

MWP 1	Copy Letter to CNPA from Paull & Williamsons LLP dated 9 July 2010 with enclosure.
MWP 2	Map showing alternative route submitted by the Partnership
MWP 3	Copy letter to Jamie McGrigor MSP from Michael Russell MSP dated May 2008
MWP 4	Copy letter to Ian Jardine, Scottish Natural Heritage from Fergus Ewing MSP dated 12 November 2008
MWP 5	Copy letter to Cattie Anderson, Scottish Natural Heritage from Audrey Mackenzie, Aviemore & Vicinity Community Council dated 15 October 2008
MWP 6	Copy letter to Cattie Anderson, Scottish Natural Heritage from J L Anderson, Kincaig & Vicinity Community Council dated 27 September 2008

- MWP 7 Copy letter to Cattie Anderson, Scottish Natural Heritage from J L Anderson, Kincaig & Vicinity Community Council dated 27 September 2008
- MWP 8 Copy letter to Fergus Ewing MSP from John L Anderson, Kincaig & Vicinity Community Council dated 13 November 2008
- MWP 9 Copy letter to Cattie Anderson, Scottish Natural Heritage from Councillor David Fallows dated 15 October 2008
- MWP 10 Copy letter to Cattie Anderson, Scottish Natural Heritage from Councillor Stuart Black dated 16 November 2008
- MWP 11 Copy letter to Cattie Anderson, Scottish Natural Heritage from Councillor Jaci Douglas dated 11 November 2008
- MWP 12 Copy letter to Cattie Anderson, Scottish Natural Heritage from Councillor Gregor Rimell dated 24 October 2008
- MWP 13 Copy email to Cattie Anderson, Scottish Natural Heritage from Fred McIntosh, TEC Services, The Highland Council dated 8 August 2008
- MWP 14 Copy letter to Kristin Scott, Scottish Natural Heritage from Roy Dennis dated 28 June 2004
- MWP 15 Copy email to the Minister for Environment from Jamie McGrigor MSP dated 24 April 2008 enclosing copy email to David Green, Convenor, CNPA dated 24 April 2008
- MWP 16 Copy letter to Cattie Anderson, SNH from Ron McAulay, Network Rail dated 21 October 2008
- MWP 17 Copy letter to George Hogg, SNH from Ron McAulay, Network Rail dated 11 August 2008
- MWP 18 Copy e-mail exchange with Andrew Thin, SNH and Councillor David Fallows, Badenoch and Strathspey Ward, The Highland Council dated 17 November 2008
- MWP 19 Example of Public Petition dated 18 December 2006
- MWP 20 Minute of CNPA Board Meeting dated 1 December 2006
- MWP 21 Minute of SNH Board Meeting dated 10 December 2008
- MWP 22 Statement by Councillor Basil Dunlop dated 4 June 2008
- MWP 23 Minute of the CNPA Board Meeting dated 10 July 2009
- MWP 24 Minute of the Board Meeting of the CNPA dated 14 May 2010
- MWP 25 Map showing location of Capercaillie
- MWP 26 Copy letter to Major Robin McLaren from Bob Grant, CNPA dated 19 February 2010
- MWP 27 Photographs of flooding at railway crossing and Underpass 212 with explanatory note from Major Robin McLaren
- MWP 28 Copy letter to Major Robin McLaren from SEPA dated 14 December 2006 with Extract of Indicative River and Coastal Flood Map in respect of Railway Underpass
- MWP 29 Map showing location of steep slope to the Allt Dibheach crossing
- MWP 30 Decision Reference P/PPA/270/168 dated 23 January 2002 in connection with the Visitor Management Plan at Dalraddy Holiday Park
- MWP 31 Decision Reference P/PPA/HA/96 dated 14 February 1996 in connection with an Appeal by Mr J Bruce in respect of a Golf Driving Range at Dalraddy, Kincaig, by Aviemore

- MWP 32 Decision Reference P/PPA/HA/97 dated 1 July 1996 in connection with an Appeal by Mr D Mackenzie in respect of an Off-Road Kart Track and Car Park at Dalraddy Moor, Kinraig
- MWP 33 Confidential Copy Letter from Roy Dennis MBE, Director of Foundation for Wildlife dated 12 March 2011 with enclosures
- MWP 34 Copy letter to Andrew Thin, CNPA Board from Roy Dennis dated 7 May 2006
- MWP 35 Copy letter to Bob Grant, CNPA from Roy Dennis dated 14 October 2006
- MWP 36 Copy letter to John Partridge, Badenoch & Strathspey District from Stuart Benn, RSPB dated 1 February 1995
- MWP 37 Copy letter to Scottish Office Inquiry Reporter's Unit from Stuart Benn, RSPB dated 20 September 1995
- MWP 38 Copy letter to Robert Cameron, Highland Council from Stuart Benn, RSPB Scotland dated 15 December 1999
- MWP 39 Copy letter to Alan Simpson, Highland Council from Colin Crooke, RSPB Scotland dated 1 March 2000
- MWP 40 Copy letter to Robert Cameron, Highland Council from Colin Crooke, RSPB Scotland dated 12 December 2000
- MWP 41 Copy letter to Robert Cameron, Highland Council from George Campbell, Regional Manager, RSPB Scotland dated 4 April 2001
- MWP 42 Copy letter to George Hogg, SNH from William Simpson dated 26 September 2008
- MWP 43 Background papers in connection with Lyme Disease
- MWP 44 Copy letter to Major Robin McLaren from Scottish Natural Heritage dated 8 February 2000
- MWP 45 Copy letter to CNPA from Network Rail dated 29 July 2010 with map enclosure and e-mail clarification.
- MWP 46 Papers in connection with Kinrara Estate/SNH Management Agreement
- MWP 47 Letter to Cattie Anderson, SNH from Terry Boyle, Network Rail dated 10 October 2008
- MWP 48 Email exchanges between Jamie McGrigor MSP and Andrew Thin dated between 8 and 11 December 2008
- MWP 49 Copy letter to Major McLaren from Cattie Anderson dated 10 March 2011 with site appraisal enclosures.
- MWP 50 Papers relating to the consent of Scottish Water
- MWP 51 Copy e-mail to Andrew Thin, SNH from Jamie McGrigor dated 27 June 2008
- MWP 52 Copy e-mail to the Minister of Environment from Jamie McGrigor dated 28 May 2009
- MWP 53 Copy e-mail to Minister of Environment from Jamie McGrigor dated 25 June 2009
- MWP 54 Copy letter to Helen Jones, The Scottish Government from Cattie Anderson, SNH dated 21 January 2009
- MWP 55 Copy e-mail to Major McLaren from Andrew MacIver, Highland TEC Services dated 24 February 2011
- MWP 56 Letters from Scottish Natural Heritage in connection with the Dalraddy Holiday Park

MWP 57	Letter to CNPA from Scottish Water dated 5 May 2011
MWP 58	Letter to David Green, CNPA Convenor from Jamie McGrigor MSP dated 3 July
MWP 59	Letter of Objection by Tods Murray on behalf of Kinrara Estate Partnership
MWP 60	Letters in connection with 50 / 40 mph speed limit on B9152
MWP 61	Faxed copy of letter from Forestry Commission Scotland to Major McLaren dated 17 May 2011
MWP 62	Maps (2) showing proposed route and alternatives