

Cairngorms National Park Authority ("CNPA")

Mr Hugh Niven ("Appellant")

Land at Glen Clova Estate, Angus

Appeal against Enforcement Notice reference 2017/001/ENF ("Enforcement Notice")

DPEA reference ENA-001-2003

Supporting Statement referred to in CNPA's Planning Authority Response Form

Introduction

Explanation of Planning Functions of CNPA

- (A) Cairngorms National Park is the UK's largest National Park at 4,528 square kilometres, comprising about 6 per cent of Scotland's land area. The National Park spans the boundaries of five local authority areas: Highland, Moray, Aberdeenshire, Angus, and Perth & Kinross, bringing co-ordinated management to a special area otherwise fragmented by administrative boundaries.
- (B) Cairngorms National Park was designated for three reasons.
- The area is of outstanding national importance because of its natural and cultural heritage;
 - The area has a distinctive character and coherent identity;
 - Designation as a National Park meets the special needs of the area and is the best means of ensuring that the National Park aims are collectively achieved in a co-ordinated way.
- (C) There are four aims for the National Park, set out by the National Parks (Scotland) Act 2000.
- To conserve and enhance the natural and cultural heritage of the area;
 - To promote sustainable use of the natural resources of the area;
 - To promote understanding and enjoyment (including enjoyment in the form of recreation) of the special qualities of the area by the public;
 - To promote sustainable economic and social development of the area's communities.
- (D) These aims are to be achieved collectively, and in a co-ordinated way. It is their collective delivery, and the management challenges this brings, that lies at the heart of what it means to be a National Park.
- (E) At times there will be conflicts in trying to deliver these four aims. The National Parks (Scotland) Act 2000 recognises in particular that there may be conflicts between conserving and enhancing the natural and cultural heritage and the other three aims. Where it appears to the National Park Authority that there is such a conflict, the Act requires that greater weight is given to conserving and enhancing the natural and cultural heritage.
- (F) CNPA must prepare a National Park Plan that sets out how the four aims of the National Park will be delivered. The Cairngorms National Park Partnership Plan 2012-2017 (CNPA 12) is the current National Park Plan and was approved by the Scottish Minister on 30 May 2012. It provides the long-term vision and strategy for the Cairngorms National Park. The Local Development Plan will help to deliver the National Park Partnership Plan by setting out the vision and strategy. This will be delivered through the land use planning system

- (G) Planning in the Cairngorms National Park is unique. It involves CNPA working alongside the five local authorities which operate in the Park. CNPA's planning functions (among other functions) are set out in the Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003 as amended. CNPA and the five local authorities have developed a Planning Service Protocol (CNPA 14) which sets out detailed working agreements in relation to their respective functions. CNPA's functions in respect of development planning, development management, planning enforcement, and prior notification regarding proposed exercise of permitted development rights are summarised below.
- (H) CNPA must prepare a Local Development Plan covering the whole of the National Park. The current Local Development Plan is Cairngorms National Park Local Development Plan 2015 (CNPA 11). The Local Development Plan together with any Supplementary Guidance sets the detailed policies and proposals for the whole of the Park. It is the document against which all planning applications will be judged.
- (I) Planning applications are submitted to the relevant local authority in the normal manner. The local authority ensures all the necessary information is supplied and registers receipt of the application. The CNPA is informed by the local authority and then decides whether to call-in the application. Only applications which are of general significance to the aims of the Park are called in and determined by the CNPA. The local authority determines those applications not called-in. The Local Development Plan applies to all planning applications, regardless of whether they are called-in or not.
- (J) Enforcement functions under the Town and Country Planning (Scotland) Act 1997 are exercisable by each of CNPA and the relevant local authority (with the exception of Sections 150 to 155 concerning Certificates of Lawfulness which are exclusive to the local authority.) CNPA has published a Planning Advice Note: Planning Enforcement Charter (updated October 2019) (CNPA 13) which explains the respective roles of CNPA and the local authorities and describes CNPA's approach to enforcement.
- (K) The procedures in relation to prior notification of proposed implementation of permitted development rights under the Town and Country Planning (General Permitted Development) (Scotland) Order 1992, including the requirement for prior notification under Class 18 paragraph 4A in respect of formation or alteration of a private way required for the purposes of agriculture, are dealt with by the relevant local authority. In terms of the Planning Service Protocol (CNPA 14) local authorities consult the CNPA as to whether the proposed works are to an acceptable standard and indeed appropriate and CNPA's response is considered as part of the prior notification process. The final decision rests with the Local Authority.

Explanation of Structure of Supporting Statement

This statement should be read as a supporting statement to the Planning Authority Response Form submitted by CNPA.

For ease of use, for the most part this statement responds to the numbered paragraphs in the Appellant's Appeal Statement. Where CNPA's response to a particular paragraph extends to more than one paragraph, sub paragraph numbers are used.

Where this statement refers to documents submitted by the Appellant, the document numbers as per the Appellant's documents list will be used but the number will be preceded by 'APP'. For example, Document 2 as per the Appellant's documents list would be referred to as APP2. Similarly, references to the Figures within the Appeal Statement will be preceded by 'APP'.

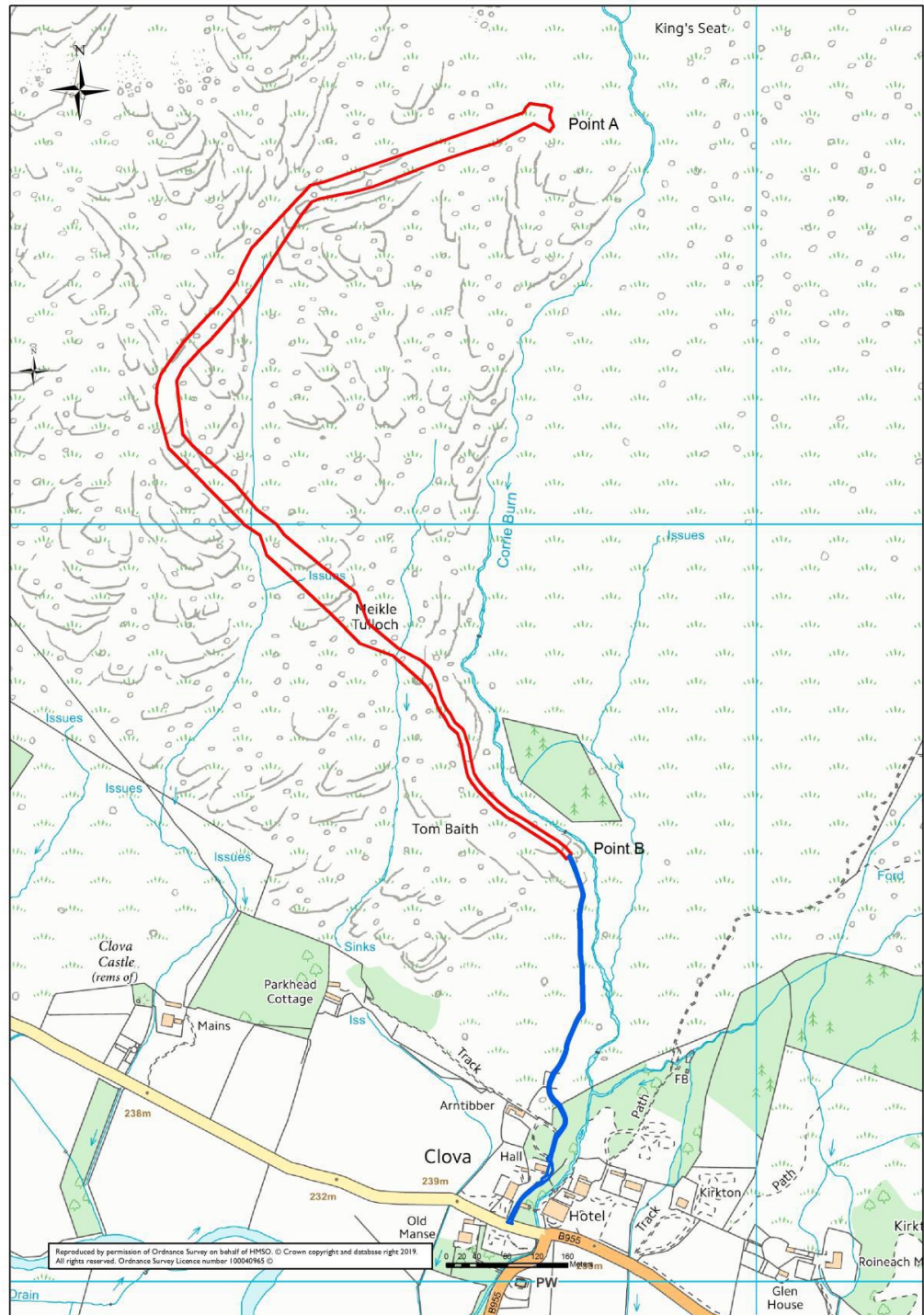
CNPA's documents are listed in the Appendix to this statement.

CNPA's Response to Appellant's Appeal Statement

1 The Enforcement Notice

1.1 Noted. The plan incorporated in the Enforcement Notice ("the Plan") is included below as Figure 1 for ease of reference as it is referred to frequently in this statement. References to point A and point B throughout this statement are to points A and B indicated on the Plan. Points A and B have also been included in some of the Figures embedded in this statement.

CNPA Figure 1



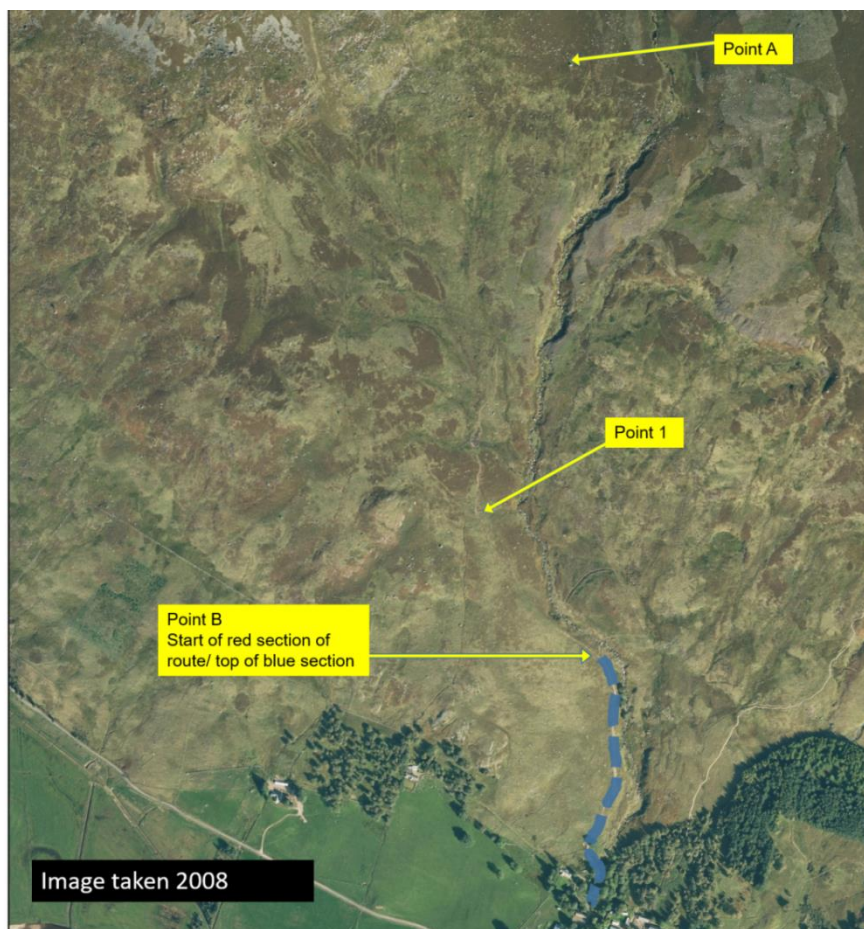
- 1.1.1 References in this statement to the blue line, blue route, blue track, red line, red route and red track refer to the sections of route/track shown on the Plan.
- 1.1.2 References to 'route' generally refer to a route established by way of repeated vehicle movements which have disturbed ground and vegetation within the width of the vehicles tyres or tracks.
- 1.1.3 References to a 'track' generally refer to a track formed by way of engineering operations. In the case of the red track, such engineering operations are believed to have involved: (a) the vegetation and topsoil layers being removed and placed to the sides of the track in spoil heaps in order to reach a harder sub-soil base; (b) further mineral rock material, presumably taken for the excavation of ditches or some other local borrow pits, having been placed and consolidated over the sub-soil base to create a hard raised plinth capable of holding heavy and/or repeated vehicle movements without vehicle wheels or tracks of heavy plant sinking into the ground; and (c) the new track being capped with finer mineral material in order to create a smoother running surface. The width of the running surface of the constructed track varies along the length of the track but is generally between 4 and 5 metres.

1.2 The Appellant's summary of the terms of the Enforcement Notice is reasonable.

2 Background

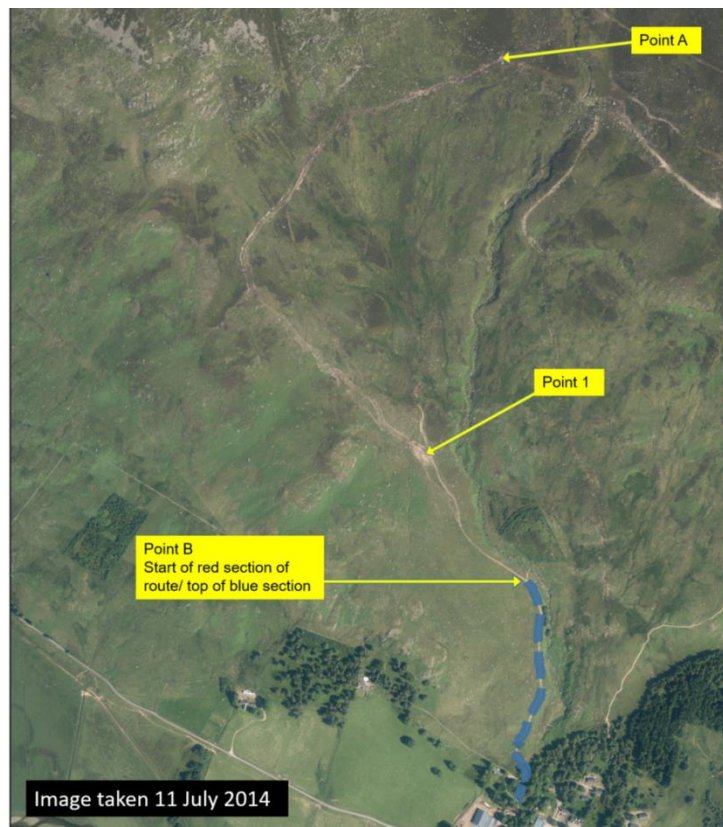
2.1 Noted.

CNPA Figure 2



- 2.2 CNPA Figure 2 is an annotated aerial image from 2008. The original aerial image is submitted as CNPA 25. A full copy of the annotated image is submitted as CNPA 26. The blue section of track (below the blue broken line in CNPA Figure 2), which leads to the last tree plantation, existed in 2008. The blue track is not subject to the Enforcement Notice but is the subject of a Section 33A Notice served by CNPA. CNPA Figure 2 does not show a track or even a distinct route extending further up the hillside following the whole of the red line (i.e. the section of track covered by the Enforcement Notice.) CNPA acknowledges however the likely existence in 2008 of an informal route, or more likely informal routes, leading further up the hill from point B on the Plan which would have been accessible by four wheel drive or light tracked vehicles. While such routes may have included some sections of the red route, the aerial photograph appears to show a route running on the west side of and roughly parallel to the Corrie Burn (heading approximately north from point 1).
- 2.3 CNPA acknowledges that historically the blue track will have been used for forestry and agricultural purposes.
- 2.3.1 In relation to the informal route or routes leading further up the hill from point B which may have existed in 2008, CNPA also acknowledges that such routes may have been used for sporting (deer stalking and game shooting) purposes and agricultural purposes. Such use is likely to have been limited to light four wheel drive or tracked vehicles. These routes would not have been used for forestry purposes as they extended beyond the last timber plantation.
- 2.3.2 The more recent uses described in paragraph 2.3 of the appeal statement (more sporting activity, tourists and hydro) appear to relate to the use of (1) a route along the red line established by more intensive vehicle usage sometime between 2008 and July 2014 (as more particularly discussed below) and/or (2) the now fully engineered section of red track which was created some time up to May 2017 (as more particularly discussed below).

CNPA Figure 3



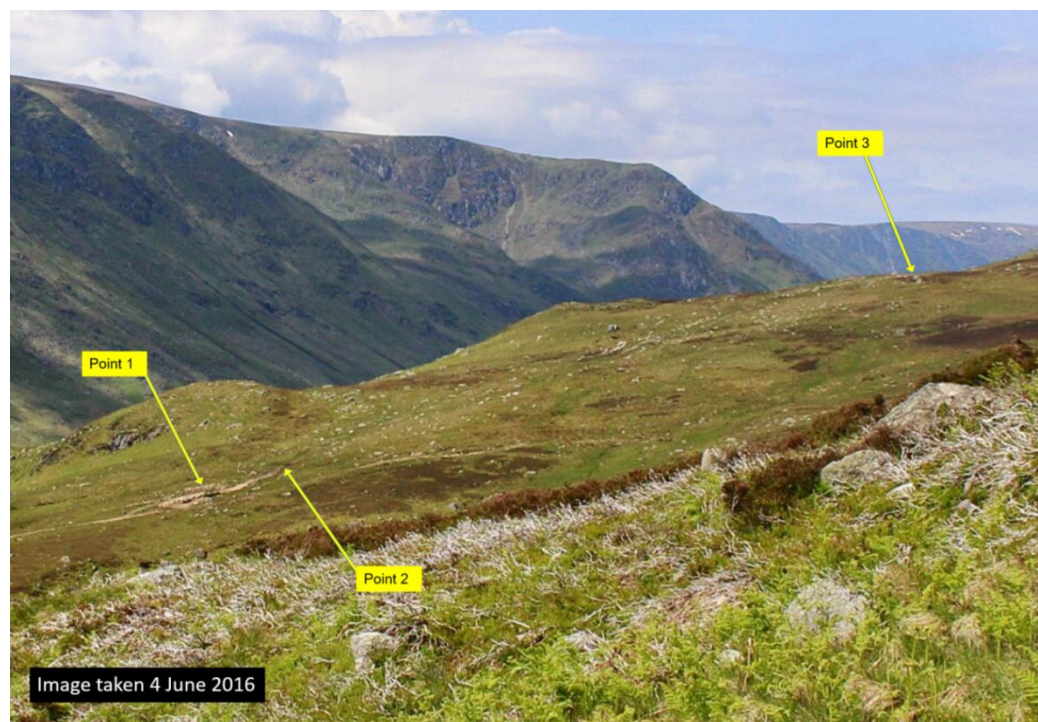
2.3.3 CNPA Figure 3 above is an aerial image from 11 July 2014. The original aerial image is submitted as CNPA 27. A full copy of the annotated image is submitted as CNPA 28. This shows the route from the 2008 aerial photographs as having significantly extended further up the hillside following the red line. The first section of such extension (from point B to point 1 and a spur forking off to the right of point 1 for a short distance) has the appearance of a track having been formed as a result of engineering operations.

The remaining section of route extending further up the hill initially forks off to the left from point 1 and then roughly follows the remainder of the red line. While obvious, this route is less defined than the section from point B to point 1. This remaining section of route is considered to have been established as result of intensification of heavy vehicle usage (as opposed to being a track formed by engineering operations). Specifically, this section of route is likely to have been established as a result of heavy vehicle movements associated the construction of the hydro scheme. Paragraph 2.2 of the Appeal Statement refers to a route having been used "...to get to the intake and header tanks and for getting materials on to the hill." This section of route appears as a corridor wider than a public road.

2.4

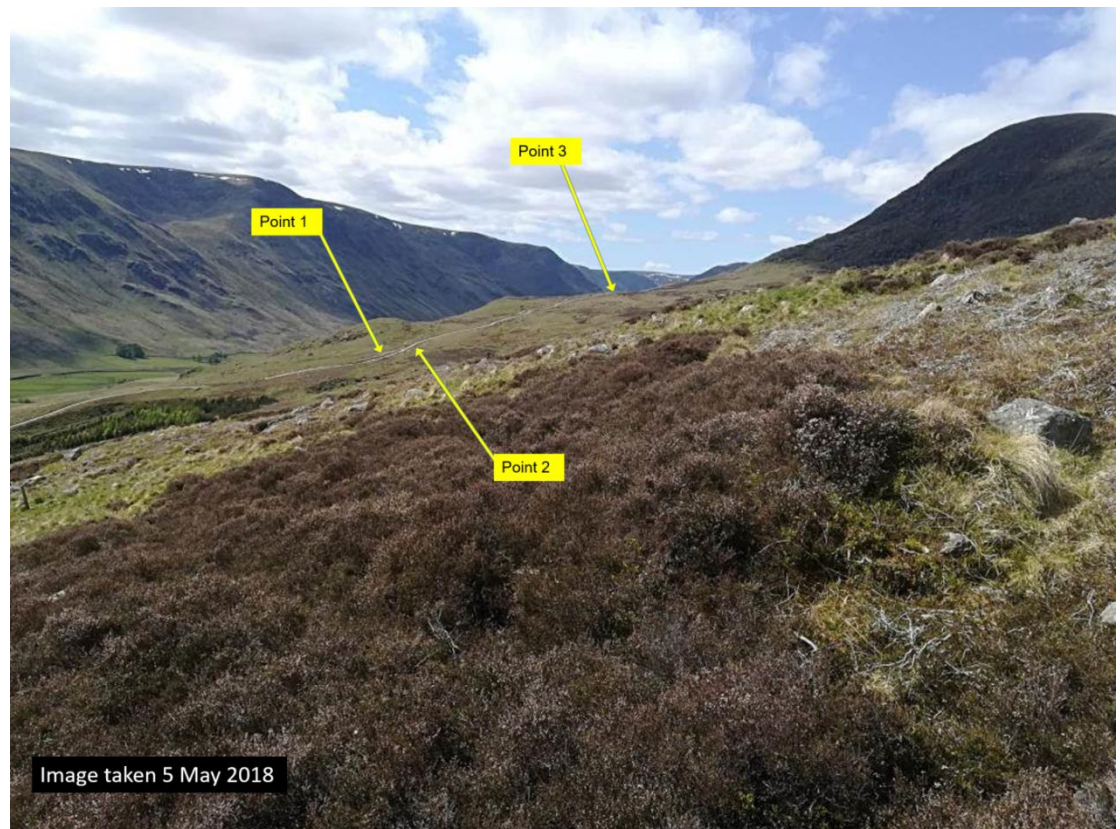
2.4.1 CNPA is accepts that engineering operations involved in the construction of the part of the track following the red route commenced in June 2014. This start date would account for the engineered section of track from point B to point 1 and the spur which forks off to the right being in existence at the time of the 11 July 2014 aerial image (CNPA Figure 3). CNPA does not however accept the Appellant's contention that the whole of the red track was substantially complete by the summer of 2015. In CNPA's view, and as more particularly discussed below, the footprint for the full length of the red track beyond was only excavated sometime between June 2016 and September 2016 with the track being fully formed by infilling with layers of mineral rock between September 2016 and May 2017.

CNPA Figure 4



- 2.4.2 CNPA Figure 4 above is an annotated version of a zoom in of a photograph taken by Samantha Grant, a Scottish travel blogger and travel writer on 4 June 2016, and is included with the kind permission of Ms Grant. The photograph was published on Ms Grant's blog on 6 June 2016. The original photograph is submitted as CNPA 31. The blog entry is submitted as CNPA 32. A higher resolution version of CNPA's annotated version of the photograph is submitted as CNPA 33 and a zoomed in version thereof is submitted as CNPA 34. It can be seen from the various versions of the Samantha Grant photograph (particularly when zooming in) that the engineered track extends a short distance beyond point 1 but then comes to an abrupt end at point 2.
- 2.4.3 As at 4 June 2016, the route as it extended beyond point 2 remained the informal route established by vehicle movements associated with the hydro scheme as described in paragraph 2.3.4 above. That extended route is difficult to discern on CNPA Figure 4. when compared with CNPA Figure 3 below but that is likely attributable to (1) the difference in perspective between the 4 June 2016 photograph and the 2014 aerial image, and (2) the relative lack of use of this route from 2014 (the hydro scheme having been fully constructed and operational by that point.)
- 2.4.4 CNPA Figure 5 below is an annotated version of a photograph taken by CNPA's Monitoring and Enforcement Officer, Ed Swales, during a site visit on 16 May 2018 (note that the caption on the figure incorrectly states the date as 5 May 2018). That photograph is submitted as CNPA 35. The photograph was taken from a similar location to the 4 June 2016 Samantha Grant photograph. A higher resolution of CNPA Figure 5 is submitted as CNPA 36.

CNPA Figure 5



- 2.4.5 This position on the ground at point 2 as at 4 June 2016 as per CNPA Figure 4 contrasts starkly with the position as at 16 May 2018 as per CNPA Figure 5. In May 2018 the engineered track can clearly be seen to have extended from point 2 point 3 (and beyond.) It is therefore very clear that as at 4 June 2016 the red track which is the subject of the Enforcement Notice was far from being substantially complete.
- 2.4.6 CNPA 37 to CNPA 56 are a series of satellite images from 29 September 2015 to 28 October 2019. Between 29 September 2015 (CNPA 37) and 23 May 2016 (CNPA 45) there does not appear to be any evidence of a defined track following the red line beyond point 1 (although a less defined route is discernible from time to time.) The image from 5 June 2016 (CNPA 46) appears to show a section of track emerging on the uppermost section of the red line as it approaches point A, but does not show the track as having been extended immediately uphill of point 1. What appears to be the outline of the whole of the remaining section of red track starts to emerge from 21 August 2016 (CNPA 47) onwards. On 20 September 2016 (CNPA 49) the whole route of the track is distinct. CNPA 50 to CNPA 56, between July 2017 and October 2019, clearly show the whole of the red track.
- 2.4.7 It is difficult to be certain or precise about timing and/or sequencing of the construction works involved in the red track, and repair and maintenance works may have been carried out from time to time, but on the evidence available CNPA considers it most likely that: (1) the section of red track between point B and point 2 was created sometime before July 2014; (2) between July 2014 and June 2016 little work was undertaken; (3) between June 2016 and September 2016 the footprint for the full length of the track beyond point 2 was established by excavation of the layers of vegetation and topsoil to reach a harder subsoil base; and (4) between September 2016 and May 2017 construction of the track was progressed (a) by mineral rock material, presumably taken from the excavation of ditches or some other local borrow pits, being placed and consolidated over the base to create a hard raised plinth, capable of holding heavy and/or repeated vehicle movements; and (b) the new track being capped with finer mineral material in order to create a smoother running surface.
- 2.4.8 The timesheets for Clova Farm employees submitted as APP 3 and APP 4 merely indicate that an employee was involved in digger work somewhere on Clova Estate in June 2014 and June 2015 respectively. Even if this digger work related to the red track (which CNPA has no reason to doubt but which is not manifest from the timesheets and Clova Estate is a relatively large landholding with many other tracks and many other potential requirements for digger work) the mere fact that the last submitted timesheet relates to June 2015 doesn't mean June 2015 was the last time employees carried out work on the red track. The Scott Mackie invoice dated 30 October 2015 and submitted as APP 6 does not contain any information which would relate the work covered by it to the red track. Indeed the final entry "fitting and labour for fusing pipes" is not obviously connected with the formation of a track. The invoice doesn't specify when the work was undertaken and it would be unusual for the contractor to wait until the end of October to invoice for work undertaken during the summer. The e-mail from Scott Mackie submitted as APP 5 similarly lacks any detail which would tie the work carried out by them in summer 2015 to the red track. Even if the Scott Mackie work to the red track was carried out in summer 2015, that doesn't necessarily mean further work wasn't undertaken by that contractor or other contractors in 2016. Indeed, APP 9 is a further invoice from Scott Mackie for work in relation to "Clova – access road" dated 29 October 2016.
- 2.5 CNPA does not accept the Appellant's contention that the formation of the red track benefitted from permitted development rights. This is addressed in more detail in paragraphs 5.2 to 5.8 below.

2.6

- 2.6.1 CNPA officers first became aware of the red track on 11 May 2017 following a complaint from a member of the public. The complaint stated that a new track had been cut into the hillside and was highly visible from miles around. This was followed by a complaint by a member of the Ramblers Association who reported seeing a digger. Shortly thereafter, CNPA contacted the Appellant by e-mail requesting further information regarding the track and its planning status. The e-mail invited the Appellant to contact the CNPA officers.
- 2.6.2 In the absence of any contact from the Appellant, and with follow up complaints being received (one of which included the image which forms CNPA Figure 6 below (the full image is included as CNPA 57)), CNPA's officer carried out a site inspection on 14 June 2017. A compendium of annotated photographs taken by the officer at the site visit is submitted as CNPA 58. CNPA 59 shows on a map the approximate location from which each of the photographs were taken (please note that the numbers on map correspond to the slide numbers on CNPA 58.)

CNPA Figure 6



- 2.6.3 The site visit revealed a clearly newly constructed track cut into the hillside, visible from the point the hill comes into view along the road, some miles away from the development. Once on site the officer walked up the length of what are now described as the blue and red tracks.
- 2.6.4 From the point where the blue track meets the red track, the track was significantly wider with large spoil heaps on either side of the track with no vegetation apparent on these heaps. The track in parts was rutted with erosion already occurring on the steeper sections. The track extended beyond the section visible from the roadside to around 1 mile from end to end, and in parts with the spoil heaps the landscape impact was up to 10 meters wide.
- 2.6.5 Slides 6, 8 and 9 from CNPA 58 illustrate the material and boulder pile up. Slide 15 shows the clear width of the track, drainage and spoil heap being up to 10 meters in width in parts. Slides 11 and 14 show the depths of vegetation stripped off the surface (up to 2ft in parts.) Slide 20 is taken from the top of the red track,

point A, with the track and material being a clear line along the lower ridge of Ben Reid.

- 2.6.6 The day after the site visit, 15 June 2017. CNPA issued a Planning Contravention Notice (CNPA 15).
- 2.7 CNPA's Planning Contravention Notice related to a section of track which starts slightly uphill of point B but otherwise approximately follows the line of the red track. The PCN did not cover any part of the blue track. The PCN sought detailed information and documentation including information and documentation regarding: the nature and extent of the works carried out; the timing of such works; the planning status of such works; information regarding the parties involved in and aware of such works; and information regarding ownership, occupancy and other land interests. The PCN stated, **"*1. Information supplied must clearly detail and annotate the works carried out in terms of type of works (e.g. extension to track, new track, formation of storage or borrow pit etc.), the dimensions (width, profile and length) of the works and any associated drainage and re-profiling works. This must be in the form of scaled drawings and supplemented by sketches and currently dated photographs to show the all works carried out; and *2 Evidence provided must be in the form of dated photographs, sworn statements and signed contracts for the works and operations carried out and must be cross referenced to a plan, if the works were undertaken on different dates."**
- 2.8 Bearing in mind that (1) failure to comply without reasonable excuse with the requirements of a PCN and (2) knowingly or recklessly giving information in response to the notice which is false or misleading in a material particular can amount to criminal offences, the Appellant's e-mail response of 20 June 2017 to the PCN (CNPA 16) was, at best, wholly inadequate. It didn't provide any of the detailed information and evidence required by the PCN.
- 2.9 Despite the paucity of the information provided in the PCN response, the response confirmed that the majority of the route had been upgraded to an engineered track some time in 2016. The Appellant now contends that the work referred to in the PCN response involved was in fact remedial work rather than upgrading work, and moreover that such work wasn't even carried out to the track to which the PCN related but rather to the blue track (which wasn't covered by the PCN.) That is simply not credible. The PCN included two plans which showed the section of track in question and these plans couldn't be misunderstood to have related to or even included the blue track. Moreover, in giving the response, did the Appellant simply forget that an extensive civil engineering exercise involved the creation of the red track been undertaken relatively recently (between June 2014 and June 2015 on the Appellant's argument; and between June 2014 and May 2017 on CNPA's argument). A far more credible explanation is that the PCN response, despite being wholly inadequate, was that it was accurate in relation to the timing of the works involved in the construction of the red track (i.e. that they continued into 2016.) For completeness, if the Appellant's contention that the PCN response actually related to the blue track rather than the red track were to be true, that would be prima facie evidence of the response to the PCN knowingly or recklessly providing information which is false.
- 2.10 The discussions, meetings and correspondence referred to in paragraphs 2.10 to 2.19 of the Appeal Statement took place in the context of CNPA being willing to consider proposals from the Appellant which might substantially mitigate the adverse landscape impacts of the red track. If it was demonstrated to the satisfaction of CNPA's officers that such mitigation was possible, and if the Appellant was willing to undertake the extensive works which would likely be involved in such mitigation, an application for retrospective planning permission for retention of the mitigated track might have been appropriate. The works referred to in the CNPA officer email of 8 September 2017 were merely a high level description of the type of works which would likely need to be included in a detailed package of mitigation works and measures to be developed by the Appellant.
- 2.11 No further comment.

- 2.12 The final sentence of the CNPA officer e-mail of 12 September 2017, "**Perhaps when the contractor is appointed and you have a site inspection planned with them it might be useful for me to come along and understand what is being proposed?**" emphasised that the responsibility for putting together a package of potential mitigation works rests with the Appellant.
- 2.13 On 5 October 2017 the Appellant e-mailed the CNPA officer (App 10) as follows: "**I have a contractor now ready to go he would like to see you first, when are you available?**" As would be expected, this communication indicated that the contractor wished to meet the planning officer before finalising the package of proposed mitigation works and before proceeding with the works. The site meeting was then fixed for and took place on 13 October 2017. CNPA's officer recalls the meeting with the contractor as being as being positive and gave further advice regarding what mitigation measures might be expected (including reducing the width of the track to between 2.5m and 3.0m with a grassed strip in the middle.) No mention was made of any mitigation works having already been carried out. The Appellant now asserts that remedial works were in fact carried out between 25 September 2017 and 4 October 2017. This is perplexing as the works are said to have been completed the day before the Appellant communicated to the CNPA officer that he had a contractor "**now ready to go**". Moreover, no such works were witnessed by CNPA's officer during his site visit on 13 October 2017. CNPA officer's expectation following the meeting was that a limited amount of remedial work (drainage work to prevent further erosion) would be undertaken before the onset of winter to avoid further damage, with the remainder of the remedial work being undertaken in accordance with an agreed specification and timetable the following year.
- 2.14 Paragraph 2.14 also proceeds on the basis that remedial works which were the subject of discussions have been carried out. Even if the Appellant's timings as per paragraph 2.13 are incorrect and such works were carried out subsequent to the 13 October 2017 site visit, that would still be perplexing to CNPA as no such works were evident to CNPA's officer during a site visit of 16 May 2018. The last sentence states, "**The only works which were not completed was the greening of the track...**" Leaving aside for the moment whether or not any such works have yet been carried out, and if so, when they were carried out, it is notable that the works are said to have been completed in a mere 10 days (between 25 September and 3 October). This contrasts starkly with the claim in paragraph 5.19 of the Appeal Statement that the time period of 1 year allowed in the Enforcement Notice to undertake the Restoration Works is considered to be insufficient and that a 2 year period would be more appropriate. In CNPA's view, the timescales for undertaking the Restoration Works required under the Enforcement notice and the potential mitigation works which were the subject of discussion would be broadly equivalent.
- 2.15 The e-mail of 16 October 2017 from the CNPA officer to Angus Council (the planning authority to which the application for retrospective permission would be submitted in the first instance before potential call in by CNPA) described in this paragraph talks about the proposed remediation works in a future tense. This is inconsistent with the assertion in paragraph 2.13 of the Appeal Statement that the works were completed on 4 October 2017.
- 2.16 Likewise, the e-mail from the Angus Council's planning officer to the Appellant of 24 October 2017 talks about completed and proposed operational development.
- 2.17
- 2.17.1 The Appellant's claimed efforts to make arrangements for an application for retrospective permission are not impressive. There is no good reason why the departure of an individual planning officer should prevent an application being prepared and submitted. It is notable that there is no mention of planning consultants or others suitably qualified professionals being engaged to prepare and submit the application. An application for retrospective planning permission, including a package of mitigation measures, would be a significant undertaking and would likely require the preparation of visualisations and other materials produced by professionals. It would not be the case of filling in some forms.

- 2.17.2 In the absence of any contact from the Appellant since October 2017, CNPA conducted a further site visit on 16 May 2018. The site visit was undertaken by CNPA's Monitoring and Enforcement Officer, Ed Swales, and CNPA's then Landscape Advisor, Graham Saunders. A focus of the visit was to identify any changes since the 14 June 2017 site visit, either as a result of remedial works or natural processes. A compendium of annotated photographs taken by the officers at the site visit is submitted as CNPA 60. CNPA 61 shows on a map the approximate location from which each of the photographs were taken (please note that the numbers on map correspond to the slide numbers on CNPA 60.)
- 2.17.3 It was evident (see slide 6) that the spoil heaps were still untreated with no vegetation growing through. Slide 8 shows the boulders and spoil heaps remained at the side with little vegetation growing through. Slide 9 shows the spoil heap, with a very bright sandy colour contrasting the green and brown vegetation in the background, along with the upper section of the track showing in clear linear fashion running along the ridge of Ben Reid. Slide 10 is an attempt to replicate slide 16 from the 14 June 2017 compendium (document 33) and shows very little difference. Slide 16 shows clearly the spoil heap and boulders that represent the track in its widest form. Slides 18 to 21 demonstrate the track is a wide track with wider material piled alongside with a surface that is obviously contrasting to the surrounding vegetation on the hillside. Slide 22 shows again the cut of the track from the landscape, with the edges left bare and exposed to further erosion.
- 2.17.4 The officers' view was that no significant works had been undertaken since the 14 June 2017 site visit. Following this visit, with the input of the CNPA Landscape Advisor who attended the site visit, it was concluded that landscape impact would be almost possible to mitigate against.
- 2.18 CNPA contacted the Appellant in July 2018 in view of the lack of any apparent progress towards completion of remediation works and/or preparation/submission of an application for retrospective planning permission. A further site visit was undertaken by Edward Swales and Gavin Miles CNPA on 2 August 2018, followed by a brief and inconclusive meeting with Mr Niven. Mr Niven said the track was mainly for use by his deer stalkers and that they had used the route for many years. He said he would apply for planning permission if he had to but would not remove the track. This paragraph seems to take issue with CNPA ultimately taking enforcement action in circumstances where there had previously been discussions regarding the submission of an application for retrospective permission. This rather misses the point that it was the continued failure of the Appellant to undertake appropriate mitigation works and submit such a planning application which ultimately left CNPA with no option but to take enforcement action.
- 2.19 This is addressed in section 5 below.

3 **The Site**

- 3.1 Agreed.
- 3.2 The final sentence seems to suggest that the Appellant considers that part of the track covered by the Enforcement Notice is also covered by the Section 33A Notice. As the Development is defined in the Enforcement Notice by reference to the red line of the plan attached to the Enforcement notice, that shouldn't be the case. It may be that the Appellant is merely explaining for completeness that the blue section of track is related to the red section (as opposed to suggesting that the blue section of track is part of the Development covered by the Enforcement Notice), but it would be helpful if the Appellant could clarify.
- 3.3 The Appellant's understanding of the e-mail exchanges contained in APP 10 is incorrect. The discussions, meetings and correspondence took place in the context of CNPA being willing to consider proposals from the Appellant which might substantially mitigate the

adverse landscape impacts of the red track. If it was demonstrated to the satisfaction of CNPA's officers that such mitigation was possible, and if the Appellant was willing to undertake the extensive works which would likely be involved in such mitigation, an application for retrospective planning permission for retention of the mitigated track might have been appropriate. The Appellant appears to have fundamentally misunderstood the nature and extent of mitigation works which would have been necessary to reduce the landscape impacts of the track (and therefore the nature and extent of works required before there would have been any likelihood of the CNPA officers supporting an application for retrospective planning permission for retention of a track.) Any such proposals would require to be judged on their own merits, but in other circumstances where tracks have been granted retrospective planning permission, the mitigation measures would result in the retained tracks having a width of between 2.5 and 3.0 metres with a vegetated strip in the middle and with no spoil bunds on either side.

3.4 As noted above, CNPA is not aware of any such remedial works having yet been carried out. Perhaps the explanation is that the Appellant has carried out some works, but due to a fundamental misunderstanding of the nature and extent of works which would likely be required to reduce the landscape impacts, the limited works which have been undertaken have not resulted in a measurable improvement from CNPA's perspective. The hot summer of 2018 does not explain why measures to green the track could not have been undertaken in spring or autumn of 2018 or indeed sometime in 2019.

3.5 CNPA acknowledges that there has been some natural regeneration of vegetation (mainly grasses) on the track and within its construction corridor. However, the nature of the width of the constructed track and its associated drainage, its detailed route based on a line of vehicular convenience, and the wide construction corridor created by drainage and spoil, means that it continues to appear as a wide and incongruous line on the hillside. The greening of the track surface will depend on the frequency of vehicle movements and width of tyres or tracking gear. The disturbed ground that is not driven over includes excavated rocks and boulders discarded in linear lines of spoil that will take decades to be recovered by vegetation and soils without the steps required under the Enforcement Notice being implemented.

3.6 Covered by comments on 3.5.

3.7 As explained above, the Appellant's understanding of the discussions and correspondence with CNPA regarding potential mitigation solutions and a retrospective application is incorrect. In any event, if the Appellant was of the understanding that a planning application would be the appropriate way forward to avoid an enforcement notice, why wasn't a planning application submitted in the almost 2 year period following the site visit on 13 October 2017 and issue of the Enforcement Notice?

3.8

3.8.1 The significant impacts of the track are the visual impacts and impacts on landscape character. In the case of the hillside the red track crosses, its distinctiveness was as a boulder strewn slope with few signs of development. It now has large track and construction corridor cutting up and across those slopes, significantly changing the character of those slopes and of view up Glen Clova from approaches on both sides of the Glen. The track has become a dominant focal point in the landscape that competes with the landscape character.

3.8.2 The track has not been sited or designed to minimise adverse effects on landscape character. It appears as an incongruous hard line of development across otherwise undeveloped slopes, possibly initiated as a route of convenience for construction vehicles during construction of the Clova Hotel hydro scheme. The route stands out as large track on rough boulder strewn and craggy slopes within a landscape of upper Glen Clova where there are no other comparable features. The footpaths that rise from the lower slopes of the glen are visible from the many locations but as narrow sinuous lines. The only other constructed vehicle tracks

within this landscape that are clearly visible from the valley floor (both up the glen to its end, and down the glen until the character changes to a wider valley) are either tracks associated with farmland of the valley floor and lower slopes or are forestry tracks associated and within forestry plantations.

3.8.3 In addition to the direct visual impacts of the track and its effects on the established landscape character, the track also changes the experience of the landscape, particularly for people travelling up the glen, at a key visual milestone and landmark of the route and stopping or slowing point. The Cloval Hotel is a distinctive landmark for travellers up the Glen, framed by woodland and the craggy and boulder-strewn slopes of the Lairds Chamber above it. The road layout of this point in the glen, where two roads meet and a narrow bridge must be crossed, emphasise a physical as well as landscape transition. The track sits sharply at odds with the established landscape, competing for the viewer's attention with the established and natural features. Indeed the corridor it creates on the hillside stands out comparable or wider than those of the public roads on the glen floor.

3.9 As explained, no remedial works of the nature and scale which CNPA indicated would have been required to potentially reduce the landscape impacts of the track have been undertaken.

4 **Additional Planning Context**

4.1 CNPA has no comment on paragraphs 4.1 to 4.5 beyond welcoming the fact that the Appellant appears to be positively engaging in respect of the Section 33A Notice.

5 **Grounds of Appeal**

5.1 The four individual grounds of appeal are considered and responded to in detail below.

That those matters stated in the notice (if they occurred) do not constitute a breach of planning control

5.2 As discussed in paragraph 2.2, CNPA acknowledges that a section of track following the blue line existed in 2008 but does not agree that at that time the route above point B followed the line of what is now the red track.

5.3 As discussed in paragraph 2.3.1, CNPA acknowledges that the informal route above point B would have been used for sporting and agricultural purposes. There would not however have been a forestry purpose as the highest plantation is at point B.

5.4 As discussed in paragraph 2.4.1 and elsewhere, CNPA accepts that engineering operations involved in the construction of part of the red track (from point B to point 1) commenced on or before June 2014. CNPA does however accept that the whole of the red track was substantially complete by the summer of 2015. In CNPA's view, the red track was likely not substantially complete until sometime between September 2016 and May 2017.

5.5

5.5.1 It is not stated, but it is understood that the Appellant is seeking to rely on Class 18 (Agricultural Buildings and Operations) and Class 22 (Forestry Buildings and Operations) of the General Permitted Development Order (CNPA 2).

5.5.2 CNPA does not accept that Class 22 (Forestry Buildings and Operations) has any relevance for the vast majority of the length of the red track as the highest plantation of trees is located approximately at point B.

5.5.3 Class 18(1) provides:

(1) The carrying out on agricultural land comprised in an agricultural unit of-

- (a) works for the erection, extension or alteration of a building;**
 - (b) the formation, alteration or maintenance of private ways; or**
 - (c) any excavation or engineering operations,**
- requisite for the purposes of agriculture within that unit.**

The stipulation that the works be "...requisite for the purposes of agriculture..." is important in the current case. In CNPA's view, the primary purpose of the red access track was for sporting and tourism purposes and for the purposes of the hydro scheme. Paragraphs 2.3 and 2.4 of the Appeal Statement confirm that all of these uses were factors in the decision to create the engineered track. In relation to tourists staying at the related Clova Hotel business, paragraph 2.3 states that the track is "...a less onerous physical route than the path to the east to Loch Brandy...." Tourism and hydro are clearly non-agricultural uses.

- 5.5.4 It is also well established that agricultural use does not include hill access for sporting activities. Scottish Planning Circular 2/2015 Consolidated Circular on Non-Domestic Permitted Development Rights considers in paragraph 1 the requirement for prior approval prior to the formation of agricultural of forestry private ways, following changes to the Town and Country Planning (General Permitted Development (Scotland) Order 1997 introduced by the Town and Country Planning (General Permitted Development) (Scotland) Amendment (No. 2) Order 2014. Paragraph 2 of Circular 2/2015 then goes on to state that, "Separate arrangements apply to development relating to private ways for any other purposes, **including sporting and recreational use.**"
- 5.5.5 The Appeal Statement refers to there being circa 1700 ewes on the Cova Estate but does not explain how many are grazed in the part of the Estate in the vicinity of the red track and what level of attention they require. Neither does it explain why the existing access arrangements via the informal routes were no longer considered to be adequate. While CNPA acknowledges that there may be grazing of sheep on the sections of Clova Estate in the vicinity of the red access track, and the new track may offer some assistance in their management, in CNPA's view this would at best have been an ancillary purpose of the track and that the primary purposes were the non-agricultural purposes referred to above.
- 5.5.6 The case of *Ross v Aberdeen County Council* [1955 S.L.T. (Sh. Ct. 65)] (CNPA 22) establishes that in an appeal against an enforcement notice the onus of proof "*rests with the party who would fail if no evidence was adduced on either side*". Consequently, as the party who has brought the appeal, it is for the Appellant to prove that track works were "**requisite for the purposes of agriculture**". For the reasons set out above, it is submitted that the Appellant has failed to meet the onus of proof.
- 5.6 Without prejudice to CNPA's arguments above, on the hypothesis that the track was requisite for the purposes of agriculture (which CNPA does not accept), CNPA would not accept the Appellant's argument that the requirement for prior notification did not apply as work on the track commenced before the requirement for prior notification only came into force on 15 December 2014. As described in paragraph 2.4.7, a section of track from point B to point 2 seems to have been completed sometime before July 2014 but between July 2014 and June 2016 little if any work on the red track appears to have been undertaken. At best for the Appellant (on the hypothesis that the track was requisite for the purposes of agriculture) prior notification wouldn't have been required for the section of red track from point B to point 2. When work commenced on extending the track uphill from point 2 on or after June 2016, the requirement for prior notification would have been engaged as that was a separate section of track from the section undertaken previously.
- 5.7 Paragraph 4A of Class 18 of the GPDO provides:

4A) Development consisting of the formation or alteration of a private way is permitted by this class subject to the following conditions—

(a) the developer must before beginning the development apply to the planning authority for a determination as to whether the prior approval of the authority is required in respect of the design, manner of construction or route of the private way;

The Appellant contends that the whole of the track was substantially complete by summer 2015. Even if that was true (which CNPA does not accept) the 'improvements' which the Appellant acknowledges in this paragraph may have been carried out following its construction would themselves have engaged the requirement for prior notification under paragraph 4A of Class 18 as this covers alteration as well as formation.

- 5.8 For the reasons stated above, no part of the red track benefitted from permitted development and as such the whole of the red track is unauthorised development which constitutes a breach of planning control.

That, at the date when the notice was issued, no enforcement action could have been taken in respect of any breach of planning control which may be constituted by these matters

- 5.9 The phrase "no enforcement action may be taken" as used un paragraph 124(1) of the 1997 Act needs to be interpreted in light of Section 123(2) as follows:

"(2) For the purposes of this Act—

*(a) the **issue of an enforcement notice, or***

(b) the service of a breach of condition notice,

under this Part constitutes taking enforcement action as does the issuing of a notice under section 33A"

In this case, the Enforcement Notice was issued by CNPA on 23 September so that is the relevant date for the purposes of the 4 year rule set out in section 124(1).

- 5.10

5.10.1 The Appellant does not explain what the Appellant means when claiming that the works were "substantially complete". As the Appellant correctly notes in paragraph 5.11, **"What is substantially complete must always be a matter of fact and degree and of the prevailing circumstances in any case"**. That said, in relation to the creation of an engineered track on what was originally an informal route, it is submitted that removing the topsoil and vegetation layers to reach a harder sub-soil base for the full length of the track (i.e. from point B to point A on the plan) would in all cases be a necessary (but not sufficient) step to establishing substantial completion.

5.10.2 As discussed in paragraphs 2.4.2 and 2.4.3 and shown in CNPA Figure 4, it can be seen from the various versions of the Samantha Grant photographs, particularly CNPA 34, that as at 4 June 2016 an engineered track only extends to point 2. Point 2 is only approximately one third of the length of the red track on an uphill heading. The difference between the 4 June 2016 position and the final position is illustrated in the CNPA Figure 5 (and CNPA 35 and CNPA 36) where the engineered track can be seen to have been extended to point 3 and beyond. It is therefore very clear that as at 4 June 2016 the red track which is the subject of the Enforcement Notice was far from being substantially complete. The route as it extended beyond point B as at 4 June 2016 remained the informal route established by vehicle movements.

- 5.10.3 This is reinforced by the satellite imagery described in paragraph 2.4.6 where the red track only starts to become clear between June 2016 and September 2016
- 5.10.4 In CNPA's submission, the red track could not be considered to be substantially complete until sometime between September 2016 and May 2017 at the earliest.
- 5.10.5 As explained in paragraph 2.4.8, the timesheets for Clova Farm employees merely indicate that an employee was involved in digger work somewhere on Clova in June 2014 and June 2015 respectively. Even if this digger work related to the red track, the mere fact that the last submitted timesheet relates to June 2015 doesn't necessarily mean June 2015 was the last time employees carried out work on the red track (though that is the impression the Appellant is seeking to create). If the Appellant wishes to maintain this ground of appeal notwithstanding the position described at 2.4.2 and 2.4.3 above, the Appellant is requested to submit timesheets for all employees from June 2015 to June 2017.
- 5.10.6 The Scott Mackie invoice dated 30 October 2015 and submitted as APP 6 does not contain any information which ties the work covered by it to the red track. Even if it does, the invoice does not specify when in 2015 the work was carried out. It would be unusual for a contractor to wait until 30 October 2015 to invoice for work which the Appellant asserts was completed in June 2015. The invoice may therefore cover work carried out after 23 September 2015. As the bottom of the invoice has been folded over, it is unclear whether other relevant work may have been covered by it. The Appellant is requested to provide a full copy of this invoice. Even if the work to which the invoice relates was carried before 23 September 2015, that doesn't necessarily mean that was the last time that or other contractors carried out work to the track (though that is the impression the Appellant is seeking to create.) Indeed, APP 9 is a further invoice from Scott Mackie for work in relation to "Clova – access road" dated 29 October 2016. If the Appellant wishes to maintain this ground of appeal notwithstanding the position described at 2.4.2 and 2.4.3 above, the Appellant is requested to submit all invoices from Scott Mackie and all other contractors employed by the Appellants in relation to track works covering work undertaken between June 2015 to June 2017.
- 5.11 The leading case on interpretation of the meaning of "substantially completed" is the case of *Sage v Secretary of State for the Environment, Transport and the Regions* and another (2003 [UKHL] 22) (CNPA 24). The enforcement notice was upheld by the House of Lords and it was held that "regard should be had to the totality of the operations which the person originally contemplated and intended to carry out". "If it is shown that he (the developer) has stopped short of what he contemplated and intended when he began the development, the building as it stands can properly be treated as an uncompleted building against which the four-year period has not yet begun". This case makes clear that "substantial completion" of works is not just about completing all of those parts of the works which require planning permission, rather the question of whether the works are complete needs to be looked at holistically. Although the Sage case is an English decision, the terms of section 171B(1) of the English Town and Country Planning Act 1990 and section 124(1) of the Town and Country Planning (Scotland) Act 1997 are in identical terms, and so as a House of Lords case this case should be regarded as highly persuasive law in Scotland.
- 5.12 The case of *Ross v Aberdeen County Council* [1955 S.L.T. (Sh. Ct. 65)] (CNPA 22) establishes that in an appeal against an enforcement notice the onus of proof "*rests with the party who would fail if no evidence was adduced on either side*". Consequently, as the party who has brought the appeal, it is for the Appellant to prove that track works were substantially completed more than 4 years before the enforcement notice was issued (i.e. before 23 September 2015). For the reasons set out above, it is submitted that the Appellant has failed to meet the onus of proof. Indeed, it is submitted that there is clear evidence (including but not limited to the 4 June 2016 photograph by Samantha Grant) to

demonstrate that the red track was not substantially complete until some considerable time after 23 September 2015. The Enforcement Notice was therefore issued timeously.

That the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by such breach

5.13 []

5.14 []

5.15 []

5.16 []

5.17 []

5.18 All of the substantive points made in paragraphs 5.13 to 5.17 of the Appeal Statement have been responded to in detail earlier in this statement. The Appellant appears to be arguing that the steps required by the Enforcement notice (1) exceed what is necessary to remedy any breach of planning control; and (2) exceed what is necessary to remedy any injury or amenity which has been caused by such breach. These arguments raise different consideration and as such are addressed separately below.

The steps required by the Enforcement Notice exceed what is necessary to remedy any breach of planning control

5.18.1 Sections 128(3) and 128(4) of the 1997 Act are as follows:

(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.

(4) Those purposes are—

(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach.

5.18.2 Paragraph 5 of the Enforcement Notice, "***The purpose of the steps and actions set out in this paragraph of this notice is to remedy the breach of planning control specified in paragraph 3 by restoring the Land to its condition before the breach took place.***" makes it clear that the Enforcement Notice was served for the purposes specified in section 128(4)(a), i.e., remedying the breach of planning control.

5.18.3 The Appellant has made no effort to explain in technical terms why the steps required under the Enforcement Notice exceed what is necessary to remedy the

breach of planning control (the unauthorised construction of the red track.) Instead, the Appellant focusses on comparing what is required under the Enforcement Notice with the Appellant's (fundamentally incorrect) understanding of works which the CNPA officer indicated would be likely need to be included in a detailed package of mitigation works to be developed by the Appellant to seek to mitigate the landscape impacts of the track.

- 5.18.4 This ground of appeal is not concerned with the perceived fairness or reasonableness of the planning authority's decision to issue an enforcement notice (for the record CNPA maintains that it has been entirely fair and reasonable), but rather whether in technical terms the steps required go further than is necessary to address the breach of planning control (in other words, whether the breach of planning control could be remedied without that particular step).
- 5.18.5 The Appellant has not discharged the onus on him (*Ross v Aberdeen County Council*) to demonstrate in what respect the steps exceed what is necessary to remedy the breach of planning control.

The steps required by the Enforcement notice exceed what is necessary to remedy any injury to amenity which has been caused by such breach

- 5.18.6 While this ground isn't specifically addressed by the Appellant in paragraphs 5.13 to 5.18, it appears to be the thrust of section 6 of the Appeal Statement. Section 6.3 specifically mentions that under section 128 (128(4)(b)) one of the purposes of an enforcement can be to remedy injury to amenity.
- 5.18.7 Section 128(4)(a) is concerned with remedying a breach of planning control. Remedying breach of planning control may itself address adverse amenity impacts of an unauthorised development. For example, the demolition of an unauthorised and inappropriately designed dwelling house would directly remedy adverse visual amenity impacts of that development.
- 5.18.8 Section 128(4)(b) is not concerned with injury to amenity which would be directly remedied by remedying a breach of planning control. Rather, it is concerned with remedying injuries to amenity which may have been caused by a breach of planning control, but which cannot be addressed under 128(4)(a) because either (1) there is no ongoing breach of planning control or (2) remedying the breach of planning control wouldn't necessarily result in the amenity injuries being fully remedied. Take for example an unauthorised temporary use of land which resulted in the destruction of landscape planting. If the situation came to the attention of the planning authority after the temporary used had ceased, it would not be possible to proceed on the basis of the purposes specified in 128(4)(a) as there would be no ongoing breach of planning control to be remedied.
- 5.18.9 Paragraph 5 of the Enforcement Notice, "***The purpose of the steps and actions set out in this paragraph of this notice is to remedy the breach of planning control specified in paragraph 3 by restoring the Land to its condition before the breach took place.***" makes it clear that the Enforcement Notice was served for the purposes specified in section 128(4)(a), i.e., remedying the breach of planning control. It was not served for the purposes specified in Section 128(4)(b), i.e. remedying any injury to amenity which has been caused by the breach.
- 5.18.10 In *Wyatt Brothers (Oxford) Ltd v Secretary of State for the Environment, Transport and Regions* ([2001] EWCA Civ 1560), (CNPA 23) (which relates to section 173(4)(f) of the Town and Country Planning Act 1990 which is the English equivalent of this ground of appeal under Section 130(1)(f)) the Court of Appeal held that where the steps required by the enforcement notice were all for the purpose of remedying the breach of planning control, it was not possible to appeal on the ground that the steps or activities exceeded what was necessary to remedy an injury to amenity. This approach is followed by DPEA.

- 5.18.11 Section 130(1)(a) of the 1997 Act previously provided an additional ground of appeal as follows, "**that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;**" That ground of appeal was however specifically removed with effect from 28 July 2004. In the case of a track development, injury to amenity (landscape) is the most significant planning consideration. Allowing an appellant to contest the planning authority's views on the direct amenity impacts of the development would, in effect, allow the appellant to argue the planning merits of the development notwithstanding the previous removal of the ground of appeal that planning permission ought to be granted.
- 5.18.12 Without prejudice to the foregoing, for completeness we have summarised below the direct amenity impacts which CNPA considers the track development has had and will continue to have if the steps specified in the Enforcement Notice are not implemented.
- 5.18.13 The significant impacts of the track are the visual impacts and impacts on landscape character. In the case of the hillside the red track crosses, its distinctiveness was as a boulder strewn slope with few signs of development. It now has large track and construction corridor cutting up and across those slopes, significantly changing the character of those slopes and of view up Glen Clova from approaches on both sides of the Glen. The track has become a dominant focal point in the landscape that competes with the landscape character.
- 5.18.14 The track has not been sited or designed to minimise adverse effects on landscape character. It appears as an incongruous hard line of development across otherwise undeveloped slopes, possibly initiated as a route of convenience for construction vehicles during construction of the Clova Hotel hydro scheme. The route stands out as large track on rough boulder strewn and craggy slopes within a landscape of upper Glen Clova where there are no other comparable features. The footpaths that rise from the lower slopes of the glen are visible from the many locations but as narrow sinuous lines. The only other constructed vehicle tracks within this landscape that are clearly visible from the valley floor (both up the glen to its end, and down the glen until the character changes to a wider valley) are either tracks associated with farmland of the valley floor and lower slopes or are forestry tracks associated and within forestry plantations.
- 5.18.15 In addition to the direct visual impacts of the track and its effects on the established landscape character, the track also changes the experience of the landscape, particularly for people travelling up the glen, at a key visual milestone and landmark of the route and stopping or slowing point. The Cloval Hotel is a distinctive landmark for travellers up the Glen, framed by woodland and the craggy and boulder-strewn slopes of the Lairds Chamber above it. The road layout of this point in the glen, where two roads meet and a narrow bridge must be crossed, emphasise a physical as well as landscape transition. The track sits sharply at odds with the established landscape, competing for the viewer's attention with the established and natural features. Indeed the corridor it creates on the hillside stands out comparable or wider than those of the public roads on the glen floor. The track does not conserve the landscape character of the area.

That any period specified in the notice in accordance with Section 128(9) falls short of what should reasonably be required

- 5.19 The Appellant does not seek to explain why a 1 year period is considered to be insufficient, nor why a 2 year period would be more appropriate. CNPA remains of the view that a period of 12 months is appropriate.

6 The Development Plan

6.1 The provision in Section 127(2) of the 1997 Act that a planning authority may issue an enforcement notice where there has been a breach of planning control and **"...it appears to them that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations"** describes the circumstances under which a planning authority may issue an enforcement notice. It does not create an additional ground of appeal beyond the statutory grounds of appeal set out in Section 130(1) of the 1997 Act. Section 130(1)(a) previously provided an additional ground of appeal as follows, **"that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;"** That ground of appeal was however specifically removed with effect from 28 July 2004. Allowing an appellant to contest whether or not the development was contrary to the development plan and other material considerations would, in effect, allow the appellant to argue the planning merits of the development notwithstanding the previous removal of the ground of appeal that planning permission ought to be granted. Any challenge by the Appellant of CNPA's decision (that it was expedient to issue the notice as per section 127(1)(b)) could only be taken by way of a Judicial Review challenge. For the record, CNPA maintains its decision (that it was expedient to issue the notice as per section 127(1)(b)) was a proper and reasonable decision.

6.2 As paragraphs 6.2 to 6.8 of the Appeal Statement are submissions in relation to the development's compatibility with the development plan and other material considerations, which CNPA does not consider to be a valid ground of appeal, CNPA has not directly responded to those submissions. In case however it is of relevance to the Reporter for background reasons, CNPA has set out its assessment of the red track development against the development plan and other relevant planning considerations below.

6.2.1 The significant impacts of the track are the visual impacts and impacts on landscape character. Policy 3, Sustainable Design of the LDP 2015 requires that development be sympathetic to the traditional pattern and character of the surrounding area, local vernacular and local distinctiveness. In the case of the hillside the track crosses, its distinctiveness was as a boulder strewn slope with few signs of development. It now has large track and construction corridor cutting up and across those slopes, significantly changing the character of those slopes and of view up Glen Clova from approaches on both sides of the Glen. The track has become a dominant focal point in the landscape that competes with the landscape character. The development does not comply with Policy 3, Sustainable Design of the LDP 2015.

6.2.2 Policy 7 Landscape of the LDP 2015 presumes against development that does not conserve and enhance the landscape character and special qualities of the Cairngorms National Park, including wildness. If a development does not then it will only be permitted where any significant adverse effects on the landscape character of the National Park are outweighed by social or economic benefits of national importance and the adverse effects on the setting have proposed development have been minimised and mitigated through appropriate siting, layout, scale, and construction. The track has not been sited or designed to minimise adverse effects on landscape character. It appears as an incongruous hard line of development across otherwise undeveloped slopes, possibly initiated as a route of convenience for construction vehicles during construction of the Clova Hotel hydro scheme. The route stands out as large track on rough boulder strewn and craggy slopes within a landscape of upper Glen Clova where there are no other comparable features. The footpaths that rise from the lower slopes of the glen are visible from the many locations but as narrow sinuous lines. The only other constructed vehicle tracks within this landscape that are clearly visible from the valley floor (both up the glen to its end, and down the glen until the character changes to a wider valley) are either tracks associated with farmland of the valley

floor and lower slopes or are forestry tracks associated and within forestry plantations.

6.2.3 In addition to the direct visual impacts of the track and its effects on the established landscape character, the track also changes the experience of the landscape, particularly for people travelling up the glen, at a key visual milestone and landmark of the route and stopping or slowing point. The Cloval Hotel is a distinctive landmark for travellers up the Glen, framed by woodland and the craggy and boulder-strewn slopes of the Lairds Chamber above it. The road layout of this point in the glen, where two roads meet and a narrow bridge must be crossed, emphasise a physical as well as landscape transition. The track sits sharply at odds with the established landscape, competing for the viewer's attention with the established and natural features. Indeed the corridor it creates on the hillside stands out comparable or wider than those of the public roads on the glen floor. The track does not conserve the landscape character of the area, does not provide social or economic benefits of national importance, and has not been designed to minimise impacts on the setting of Glen Clova. The track is not considered capable of sufficient mitigation so the development does not comply with Policy 7, Landscape of the LDP 2015.

7 CONCLUSIONS

- 7.1 As explained in paragraph 6.1, it is not open to the Appellant to challenge CNPA's decision to issue the Enforcement Notice through the appeal procedure. The Appellant is restricted to the statutory grounds of appeal set out under Section 130(1) of the 1997 Act. For the record, CNPA maintains that its decision to issue the Enforcement Notice was both justified and reasonable.
- 7.2 As explained in paragraph 5.18, it is only open to the Appellant to seek to challenge the requirement to remove the entire track on the basis that such steps exceed what is necessary to remedy a breach of planning control. No such case has been made. For the reasons given in paragraph 5.9 to 5.12, CNPA does not accept that the red track is now immune from enforcement action on the basis that it benefitted from permitted development rights.
- 7.3 As explained in paragraphs 5.18.6 to 5.18.15 and 6.1, it is not open to the Appellant to seek to argue the planning merits of the red track by contesting CNPA's assessment of the its amenity impacts or how the red track sits in relation to the development plan and other relevant considerations.
- 7.4 After becoming aware of the creation of the red track and investigating it, CNPA gave the Appellant every opportunity to try to demonstrate that the landscape impacts of the track could be sufficiently mitigated by a programme of remedial works.
- 7.5 The Appellant has failed to properly engage with CNPA in this regard over an extended period of time and has not carried out any significant mitigation works. CNPA therefore determined that it was expedient to issue an enforcement notice having regard to the development plan and other relevant material considerations.
- 7.6 The Enforcement Notice complies with all relevant statutory requirements.
- 7.7 The majority of the arguments made in the Appeal Statement do not amount to relevant grounds of appeal. To the limited extent that the Appeal Statement does include potentially relevant grounds of appeal, the Appellant has failed to provide adequate evidence to substantiate such grounds. Moreover, CNPA has adduced strong evidence which demonstrates that the ground of appeal relied upon the Appellant do not apply.

- 7.8 The track has become a dominant focal point in the landscape that competes with the landscape character. The development does not comply with Policy 3, Sustainable Design of the LDP 2015. The track does not conserve the landscape character of the area, does not provide social or economic benefits of national importance, and has not been designed to minimise impacts on the setting of Glen Clova. The track is not considered capable of sufficient mitigation so the development does not comply with Policy 7, Landscape of the LDP 2015.
- 7.9 In the circumstances, the Reporter is respectfully requested to dismiss the appeal and uphold the Enforcement Notice.

20 September 2019

Harper Macleod LLP

On behalf of Cairngorms National Park Authority

Appendix

CNPA List of Documents

Documents which were before the planning authority when the decision to issue the enforcement notice was taken are shown in **bold**.

Documents which form part of the DPEA's core documents library have been referenced by a hyperlink to the relevant page of the DPEA website.

Documents which also form part of the Appellant's documents list have been cross-referenced.

Document Number	Document Description	Date
CNPA 1	Town and Country Planning Act 1990	
CNPA 2	Town and Country Planning (General Permitted Development) (Scotland) Order 1992	
CNPA 3	Town and Country Planning (Enforcement of Control) (No. 2) (Scotland) Regulations 1992	
CNPA 4	Town and Country Planning (Scotland) Act 1997	
CNPA 5	National Parks (Scotland) Act 2000	
CNPA 6	Cairngorms National Park Designation, Transitional and Consequential Provisions (Scotland) Order 2003	
CNPA 7	Town and Country Planning (General Permitted Development) (Scotland) Amendment (No. 2) Order 2014	
CNPA 8	NOT USED	
CNPA 9	NOT USED	
CNPA 10	Scottish Planning Circular 2/2015 https://www.gov.scot/publications/planning-circular-2-2015-consolidated-circular-non-domestic-permitted-development/	
CNPA 11	Cairngorms National Park Authority Local Development Plan adopted 27 March 2015 https://www.gov.scot/publications/cairngorms-national-park-planning-authority-core-documents/	
CNPA 12	Cairngorms National Park Partnership Plan 2012 - 2017	
CNPA 13	Cairngorms National Park Planning Enforcement Charter (Updated October 2019)	
CNPA 14	Cairngorms National Park Planning Service Protocol 31 March 2016	
CNPA 15 [APP 7]	Planning Contravention Notice ENF/2017/0001 dated 15 June 2017	

CNPA 16 [APP 8]	Appellant's Response to Planning Contravention Notice ENF/2017/0001 dated 20 June 2017	
CNPA 17	Confidential Report to Planning Committee 24 May 2019 seeking Authorisation of the Use of Planning Enforcement Powers	
CNPA 18 [APP 1]	Enforcement Notice	
CNPA 19 [APP 15]	Section 33A Notice	
CNPA 20	NOT USED	
CNPA 21	NOT USED	
CNPA 22	Ross v Aberdeen County Council [1955 S.L.T. (Sh. Ct. 65)]	
CNPA 23	Wyatt Brothers (Oxford) Ltd. v Secretary of State for the Environment, Transport and the Regions [2001 EWCA Civ. 1560]	
CNPA 24	Sage v Secretary of State for the Environment, Transport and the Regions and another [2003 [UKHL] 22]	
CNPA 25	2008 Aerial Image of Site	2008
CNPA 26	CNPA annotation of 2008 aerial image (full version of CNPA Figure 2)	14/11/2019
CNPA 27	July 2014 Aerial Image of Site	11/7/2014
CNPA 28	CNPA annotation of 2014 aerial image (full version of CNPA Figure 3)	14/11/2019
CNPA 29	Not USED	
CNPA 30	Not USED	
CNPA 31	Samantha Grant Blog Photo showing track incomplete taken 06 June 2016	06/06/2016
CNPA 32	Screenshot Samantha Grant Blog of 6 June 2016 (from which CNPA 31 is taken)	06/06/2016
CNPA 33	Annotated Version of CNPA 31 (Full version of CNPA Figure 4)	
CNPA 34	Zoom in of Annotated Version of CNPA 31	
CNPA 35	CNPA photograph from 16 May 2018 (taken from same viewpoint as CNPA 31)	16/05/2018
CNPA 36	Annotated version of CNPA 35 (full version of CNPA Figure 5)	
CNPA 37	Satellite image 29 September 2015	29/09/2015
CNPA 38	Satellite image 14 January 2016	14/01/2016
CNPA 39	Satellite image 7 March 2016	07/03/2016
CNPA 40	Satellite image 14 March 2016	14/03/2016
CNPA 41	Satellite image 17 March 2016	17/03/2016
CNPA 42	Satellite image 16 April 2016	16/04/2016
CNPA 43	Satellite image 20 April 2016	20/04/2016
CNPA 44	Satellite image 16 May 2016	16/05/2016
CNPA 45	Satellite image 23 May 2016	23/05/2016
CNPA 46	Satellite image 5 June 2016	05/06/2016
CNPA 47	Satellite image 21 August 2016	21/08/2016
CNPA 48	Satellite image 24 August 2016	24/08/2016

CNPA 49	Satellite image 20 September 2016	20/09/2016
CNPA 50	Satellite image 17 July 2017	17/07/2017
CNPA 51	Satellite image 4 July 2018	04/07/2018
CNPA 52	Satellite image 15 October 2018	15/10/2018
CNPA 53	Satellite image 27 June 2019	27/06/2019
CNPA 54	Satellite image 2 July 2019	02/07/2019
CNPA 55	Satellite image 20 September 2019	20/09/2019
CNPA 56	Satellite image 28 October 2019	28/10/2019
CNPA 57	Photograph showing hill track as at June 2017	
CNPA 58	Compendium of Photographs with narrative from 14 June 2017 Site Visit	14/06/2017
CNPA 59	Map of Locations for 14 June 2017 Site Visit Photographs	
CNPA 60	Compendium of Photographs with narrative from 16 May 2018 Site Visit	16/05/2018
CNPA 61	Map of Locations for 16 May 2018 Site Visit Photographs	