



Appeal Decision

Inquiry opened on 21 July 2021

Site visit made on 30 July 2021

by Paul Dignan MSc PhD

an Inspector appointed by the Secretary of State

Decision date: 08 November 2021

Appeal Ref: APP/M9496/C/18/3215789

Land at Mickleden Edge, Midhope Moor, Bradfield, Yorkshire.

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeal is made by Mr Daniel Thomas Richmond-Watson (on behalf of Dunlin Ltd) against an enforcement notice issued by Peak District National Park Authority (PDNPA).
 - The enforcement notice, numbered ENF/0057, was issued on 21 September 2018.
 - The breach of planning control as alleged in the notice is without planning permission, engineering operations consisting of the laying of geotextile matting and wooden log rafts on the land to form a track.
 - The requirements of the notice are set out in Annex 1 attached to this decision.
 - The period for compliance with the requirements is 12 months for steps a), b), c) and d), and 42 months for steps e) and f).
 - The appeal is proceeding on the grounds set out in section 174(2)(a) and (f) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
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Decision

1. It is directed that the enforcement notice be varied by the deletion, in Paragraph 5(b) of the words "The removal shall either be carried out by hand or using low ground pressure tracked vehicles, equipment or machinery. Any equipment or machinery used in the removal shall at all times during the removal works be stationed on the Land. The removal shall commence at the north-west end of the Land and shall progress in a generally south-easterly direction along the Land until all of the geotextile matting, wooden log 'rafts' and any other imported materials used in the construction of the track have been removed." Subject to that variation, the enforcement notice is upheld and planning permission is refused on the application for planning permission deemed to have been made under section 177(5) of the Act as amended.

Application for costs

2. At the Inquiry an application for costs was made by Mr Daniel Thomas Richmond-Watson (on behalf of Dunlin Ltd) against Peak District National Park Authority. This application is the subject of a separate Decision.

Background and preliminary matters

3. The appeal site is open moorland within the Peak District National Park. It also falls within the Dark Peak Site of Special Scientific Interest (SSSI), the Peak District Moors (South Pennine Moors Phase 1) Special Protection Area (SPA)

and the South Pennine Moors Special Area of Conservation (SAC). The SPA and the SAC are part of the national site network subject to the Conservation of Habitats and Species Regulations 2017 (as amended). It is also mapped as open countryside for the purposes of The Countryside and Rights of Way Act 2000 (CROW Act), which normally gives a public right of access ('open access land').

4. The 2m wide track the subject of the notice is approximately 700m long, formed by laying a proprietary ground reinforcing plastic mesh (geotextile matting) with log rafts overlaid in wetter areas where the matting performed poorly. In the main the matting was laid directly on the ground, though in places some groundworks were necessary. It crosses Mickleden Clough as part of a longer access route running roughly east-west from an estate building at Lost Lad to the lower slopes of Harden Moss, crossing Cut Gate, a public bridleway, and Mickleden Beck.
5. Dunlin Ltd acquired the land in July 2012. At that time there had been infrastructure works on the moor which had used the route where matting was subsequently laid. This had resulted in degradation of the land along the route, including some wide areas of rutting and braiding. Plank and log structures had been laid in some of the wetter areas to enable passage. The appellant has argued that this route was a pre-existing track, so that the works the subject of the notice were not 'to form a track'. However, while there were places, specifically where short sections of planks and raised log structures were laid across wetter areas, where the route would have been restricted to a defined line, it is evident that over much of the route vehicles searched for good ground wherever they could find it, hence the extensive braiding. On the evidence available, including observation/recollection and photographs and the lack of reference to a track in the available documentation prior to the appeal works, I am satisfied that there was not a recognisable track along the route prior to the works the subject of the appeal. Hence the appellant's suggested corrections or amendments to the notice that may have been required had there been a pre-existing track are not necessary or appropriate.
6. The appellant's part of Midhope Moor is used for grouse shooting and for sheep grazing. Under the appellant's ownership the agricultural activities are run by Wakefield Farms Ltd (WFL). When nominated, WFL successfully applied to join Entry Level and Higher Level Stewardship Schemes (ELS/HLS). The scheme¹ agreed with Natural England (NE) in 2013, included a Moorland Management Plan (MMP) which required gully blocking, re-seeding of bare peat and bank profiling works above the 500m contour in an area most easily reached via the route where the appeal track was subsequently laid. To facilitate the ELS/HLS schemes, WFL prepared a Site Delivery Plan in April 2014 which identified the scope of the works, but also identified the access as a constraint. The degraded route was considered to provide the only suitable access for the works and it was recommended that matting be laid on the worst affected areas. NE gave consent for the works proposed in October 2014 and works commenced on the appeal track in late 2014, the matting being laid by February 2015 following some ground preparation. Log rafts were later laid in wetter areas over the mesh where the matting would not support traffic. The mesh remains beneath the log rafts, though it evidently has no function.

¹ Agreement Reference AG00444068

7. Although it was envisaged that the mesh track would serve as a single pass access route onto the moor for the heavy machinery used for the restoration work, that machinery was moved onto the moor before the mesh was laid and returned by a different route. The track has since been used for estate management, worker and materials access to the restoration areas and monitoring. It was also used for access for suppression of a wildfire. So far as the agreed restoration works are concerned, these are complete, although the HLS runs until 31 August 2023. Further restoration works in the area are proposed, but these are still at the feasibility study stage.
8. When the need for planning permission for the track was pointed out to the appellant, a retrospective planning application was made. This was refused in June 2018², although it is notable that NE supported a grant of temporary permission, of no more than 5 years, to allow for future assessment of the suitability of the track in the light of any new evidence on the impact of mesh trackways. A Habitat Regulations Assessment (HRA) of the HLS was carried out by NE in August 2013, but that did not include consideration of the effect of the laying of the appeal track. The Secretary of State issued a screening direction, dated 8 March 2019, upon request of the appellant under regulation 6(10) of the Environmental Impact Assessment (EIA) Regulations 2017³, directing that the development is not EIA development within the meaning of the 2017 Regulations.

Arguments on nullity and invalidity

9. The enforcement notice requires removal of the track. It is common ground that this could not be done without the consent of NE, and the notice does not require such consent to be given. To proceed otherwise would be a criminal offence, and it is argued, by reference to the *McKay*⁴ judgement, that the notice is thus a nullity. In that case a notice which was valid on its face included requirements which would themselves have been a breach of s2 of the Ancient Monuments and Archaeological Areas Act 1979, and so a criminal offence, so that the notice was held to be a nullity. However, in the subsequent case of *South Hams*⁵ the Court of Appeal specifically declined to follow the decision in *McKay*. They held that if the requirements of a notice did put the recipient in that position, which he was unable to resolve, he would have a defence to the notice if prosecuted. Such a notice was therefore valid and not a nullity. As far as I can see therefore, the Courts have considered the situation whereby compliance with a notice may require a further consent, but concluded that that does not make it either a nullity or invalid. That approach was followed in the case of *Cash*⁶. Circumstances are always different, but it seems to me that the basic principle above must apply here.
10. It is further argued that the notice requires the addition, within the steps required, of a requirement to give NE notice pursuant to section 28E(1)(a) of the Wildlife and Countryside Act 1981 and fulfil one of the subsection (3) conditions, and that to vary the notice in this way would cause injustice to the appellant. While I cannot see how such a variation of the notice would possibly

² Ref. NP/S/1217/1304

³ The Town and Country Planning (Environmental Impact Assessment) Regulations 2017

⁴ *McKay v Secretary of State for the Environment and others*, [1994] JPL 806

⁵ *South Hams DC v Halsey* [1996] JPL 761

⁶ *Mr Felix Cash v Wokingham BC* [2014] EWHC 3748 (Admin)

cause injustice, I do not consider it necessary in any case, having regard again to the *South Hams* judgement.

Ground (a) and the deemed planning application

11. The basis of the appeal on ground (a) is that planning permission should be granted for the track on a permanent basis. If that is not acceptable, then a temporary permission is sought.

12. The main issues are:

- The impact on the landscape and scenic beauty of the National Park.
- Whether the development is permissible in the Natural Zone.
- Whether the development has implications for biodiversity.

The impact on the landscape and scenic beauty of the National Park

13. The site lies within the Dark Peak area of the National Park, an extensive area of high moorland dissected by narrow rocky cloughs and broader valleys, and adjacent in-by-land. Two distinct, though typically adjacent, landscape character types within PDNPA's Landscape Character Assessment (2009) are relevant. A short section at either end is on 'Open Moors', described as a wild, unsettled landscape with wide views, but the track then descends into Mickleden Clough, which is within the 'Moorland Slopes and Cloughs' character area. This is typically less open with views over lower ground often limited by clough sides, though Mickleden Clough, which the track traverses, provides long ranging views⁷ in places across the moorland landscape to the north. A key element of the overall strategy for the Dark Peak is to protect the remoteness, wildness, open character and tranquillity of the Dark Peak landscapes.

14. The land is open access land and, while remote, is readily accessible from the Cut Gate bridleway which passes along the side of Mickleden Clough, which I understand is well used. The track when laid was undoubtedly an obvious, alien and visually discordant feature within Mickleden Clough and also in some wider views, in particular, due to its synthetic bright green appearance. The appellant's landscape consultant conceded that the presence of the track when new was likely to have had a significant detrimental impact on the landscape character. Since 2015 there has been grass growth through the mesh and in places heather has become established, though the shrubby habit is only evident on the mid-line. This has resulted in the track becoming less evident in many places, though it is still clearly identifiable along almost all of its route as a linear contrast with the surrounding vegetation, be that acid grassland, bracken or heather, and there are many stretches where the mesh itself, though more muted in colour, remains clearly distinguishable.

15. In its current state the appellant's landscape consultant considers the track to have made no significant change in the landscape character of Mickleden Clough, and envisages that with further appropriate mitigation, in particular around the junction with the Cut Gate public bridleway where it is acknowledged that the track is not fully integrated, that there will be a low positive effect on landscape character in the Clough by 2025, though this is

⁷ Visibility was very limited on my site visit due to weather conditions, so I rely on the evidence, including photographs, in this respect.

- partly by its role in removing detracting features, namely the previous braided condition. He considered that it will have no significant effect on the character of the open moor.
16. In visual impact terms, however, a major negative impact was identified at the time of mesh laying, remaining at a medium negative visual impact along the whole route for those walking along it, and a minor negative impact in views within 0.5km of the track within the valley landform. Again, further mitigation is predicted to negate the visual impact by 2025.
 17. However, in concluding that there is no significant detrimental impact on landscape character and visual amenity, there appears to have been limited consideration of the specifications of the geotextile matting itself, which is promoted for temporary uses only. After just over 6 years the mesh is showing significant signs of deterioration in places and considerable stretches are clearly in need of renewal and repair. This would consist of, or include, re-laying of new sections of mesh, which would inevitably return the track, or significant parts at least, to a state where its impact would again be significant and adverse, both in landscape and visual terms, even if done in relatively short stretches at a time.
 18. Moreover, I could see on my site visit that for much of its length the vegetation growth through the existing mesh has not been successful in naturalising its appearance in views from alongside. It remains readily distinguishable as a plastic mesh track which appears incongruous within a setting almost devoid of man-made features. There is a tactile dimension to this, the mesh track almost constituting an obstacle on even moderate slopes where it feels unsafe to walk on due to the risk of slipping, adding to its sense of intrusiveness. It was argued in its favour that the presence of other man-made elements, such as signage and the bridleway, which has been paved in places nearby to counteract erosion, might dilute the perception of incongruity, but the signage is discretionary and the bridleway is a long-standing historical pack-horse route that would be perceived by most as being part and parcel of the landscape and visual character of the moor. The landscape assessment also appears to have given significant weight to the role of the development in restoration of the degraded parts of the Clough. That degradation appears to have been due to a short period of inappropriate use by a former owner and would not in the future be an inevitable, or even likely given the current management philosophy, consequence of removal of the track. In the context of considering whether planning permission should be granted for its retention, I consider that the focus should be on present and future benefits, and weight attributed on that basis.
 19. Overall, while vegetation growth through the mesh has served to mitigate the initial wider landscape harm since its placement, there will be periods when necessary track repair and renewal works will have a detrimental impact on landscape character, particularly within Mickleden Clough itself, such that the overall landscape character of the Clough will not be preserved over time.
 20. In terms of visual impact however, I consider that the presence of the plastic mesh will be evident always on significant stretches of the track by those walking along the route, even before repairs are taken into account, and this will be perceived by many as an alien, intrusive and incongruous feature in the Clough, detracting from its scenic beauty, which derives in the main from its

remoteness from overt human influence and its natural and wild character. Renewal works will increase the harmful visual impact.

21. The log rafts in some wetter sections do not have such an impact because they are a natural material and evidently weather quickly so as to blend reasonably well with the taller rushy vegetation around them. They are also in short sections associated with specific areas, wet flushes, and likely to be perceived reasonably positively by people moving through the landscape, who will understand their role and not perceive them as alien features, notwithstanding that they are clearly man-made. As such, used as they are along the appeal track route they are a feature that the landscape can accommodate without significant detriment. They are nonetheless part and parcel of the development and are not functionally severable.
22. It is national policy that valued landscapes should be protected and enhanced in a manner commensurate with their statutory status, and National Parks have the highest status of protection in this respect, such that great weight should be given to conserving and enhancing their landscape and scenic beauty. Relevant development plan policies are contained in the Peak District National Park Authority Local Development Framework: Core Strategy (October 2011) (the CS) and the Peak District National Park Authority Development Management Policies (May 2019) (the DMP). CS Policy GSP1 requires all development to be consistent with the National Park's legal purposes and duty. These are to conserve and enhance the natural beauty, wildlife and cultural heritage of the National Parks, and to promote opportunities for the public understanding and enjoyment of the special qualities of the Parks. CS Policy GSP2 expects opportunities for enhancing the valued characteristics of the National Park to demonstrate that they offer significant overall benefit to natural beauty, wildlife and cultural heritage, while design must respect the character of the area. Similarly, CS Policy L1 requires development to conserve and enhance valued landscape character. DMP Policy DMC1 expects development proposals to clearly demonstrate how valued landscape character will be conserved. These policies are consistent with national policy. The harmful impact of the track on landscape and scenic beauty places the development in conflict with these policies.

Whether the development is permissible in the Natural Zone

23. The Natural Zone comprises areas that the PDNPA has identified as particularly important to conserve, largely underpinned by sites designated for biodiversity protection. Areas included are expected to substantially have a quality of 'wilderness', relatively natural vegetation, few obvious signs of human influence, open access, high wildlife value and natural beauty. Not all land included in the Natural zone will have all qualities, and it may include some land that has none, but the appeal site is very much the type of land to which the high level of protection contained within Natural Zone policies is intended to apply.
24. CS Policy L1 aims to prevent development in the Natural Zone other than in exceptional circumstances. DMP Policy DMC2 describes what constitutes exceptional circumstances in this context. Of particular importance is that the development must be essential for the management of the Natural Zone or for the conservation and/or enhancement of the National Park's valued characteristics. It goes on to explain that development that would serve only to

make land management or access easier will not be regarded as essential. Development that meets these tests is subject to further restrictions, including an initial time limit to enable the impact to be assessed, and an initial 'appropriate person' restriction.

25. The origin of the track may have had a direct connection with works for the conservation or enhancement of valued characteristics, but while it clearly assisted the recovery of the land along the route degraded by earlier inappropriate use, it appears to me to have had very limited utility in the actual conduct of the moorland restoration works, which have long finished, and I struggle to see how it could be considered as necessary for monitoring of the works undertaken, which would normally be expected to be low intensity and flexible operations which could be done on foot and in suitable weather conditions. They should not require a vehicular track.
26. Further works requiring heavy machinery may be authorised in the future, but it is difficult to see why the track would be essential for that given its limited utility for the earlier works which were of a similar nature to those currently envisaged. Beyond the possibility that the track would be used for moorland conservation works in the future, there is not evidence that it is currently essential for ongoing management of the moor for purposes that could be considered as management of the Natural Zone or conservation or enhancement of the Park's valued characteristics.
27. The track was used in connection with one wildfire suppression event involving neighbouring land that was not being managed for grouse shooting. However, while it might also prove useful in this respect in the future, wildfire occurrence is difficult to predict and has a lower likelihood on managed grouse moors such as the land that the track provides direct access to. At best it's availability for wildfire suppression is a marginal benefit to which very limited weight can be attached.
28. On the evidence available the development appears to me to currently serve only to make land management and access easier, and there is no certainty that it will be essential for future works of conservation or enhancement. As such it cannot be considered as essential for the purposes of DMP Policy DMC2, and hence is not permissible development for the purposes of that policy, and so also conflicts with CS Policy L1

Whether the development has implications for biodiversity

29. It is common ground that the construction of the track has had the benefit of allowing degraded ground along the route to recover. However, while a Habitat Regulations Assessment (HRA) of the moorland restoration works agreed with NE was carried out, this did not include an assessment of the impact of track construction, NE apparently being of the view that it did not affect SAC qualifying vegetation. As it turned out, parts of the track were evidently⁸ laid directly over heather, which would be indicative of qualifying habitat, and short sections at either end are mapped by NE as blanket bog, also a qualifying habitat. It seems clear also that NE were not aware of the full extent or details of the track at the time it conducted the HRA, so that HRA cannot be relied upon as NE's conclusion that it would not have any significant effect on the

⁸ See Andrew Cook POE Appendix AJC5

SAC/SPA, nor can the consent be relied upon as a finding that there would be no effect on the SSSI.

30. There does not appear to have been a detailed ecological survey of the route prior to the commencement of development. The track has been assessed⁹ in September 2020 for the purposes of this appeal. Seven plots were surveyed on the track itself, all of which were found to be dominated by grassland, but with patches of dwarf-shrub heath and flush. The extent of matting exposure ranged from 5 to 25%. Where heather was present it was most prominent in the central strip of the track, evidently being otherwise suppressed by traffic. Grass species were typical of upland acid grassland, but the grassland lacked many of the characteristic forbs. The vegetation on the track was assessed as being in good condition, but in habitat terms it would be considered as indicative of unfavourable condition. Some erosion was also noted where the matting was missing or had not been put in place. Plots assessed in dwarf-shrub heath alongside the track were mostly in favourable condition, whereas 2 plots selected on ground that was obviously previously disturbed were not, though one showed signs of recovery.
31. From these survey results it seems that, even before track repairs and maintenance are factored in, little, if any, of the vegetation growing on the track is SAC qualifying vegetation in favourable condition. By contrast, the trackside habitats are generally in favourable condition and typical of upland moorlands, aside from the most degraded land. Given the significant degradation along the route prior to the development, and the favourable condition of much of the surrounding habitats now, it is possible that the development has not caused a net loss of qualifying habitat within the wider site to date. That is not to say, however, that the previously degraded condition of the land along the route should be taken as a baseline for assessment of the likely future impact of the track on biodiversity.
32. The question then is whether the track is likely to adversely affect features of importance in the future, either in terms of direct loss of habitat or indirectly through compaction or hydrological damage. The appellant's ecological survey did not find any demonstrable effect of either the matting or the log rafts on the hydrology of the site, as indicated by vegetation and surface condition, but it did note that in areas where the matting had either not been placed or was missing there was obvious erosion of the underlying peat/mineral soil. Erosion of the underlying soil where matting deteriorates is a matter of significant concern in my view, given that such deterioration and disintegration has been observed, and may be of increased frequency as the material ages. Unmatted areas showing signs of significant erosion, such as those adjoining Cut Gate and the approach to Mickleden Beck, must be considered as part of the track since there are no alternative for vehicles using the covered parts of the track.
33. Deterioration of the matting as it ages will require repair, including overlaying new matting, and there appears to have been somewhat ad-hoc development of the track to date, illustrated by the addition of the log rafts to the track as and where needed and without consent, the mesh having evidently proven ineffective for its purpose in the wetter areas at least. The condition of the track under its current level of use and the ongoing maintenance requirements suggest that it is unlikely that the vegetation on the line of the track will ever

⁹ Andrew Baker POE Appendix 1

reach a favourable condition. By comparison to a condition where the route is not in use at all, that would amount to a loss of qualifying habitat.

34. I consider that the relevant comparison, however, should be to a use of the route for vehicular traffic reasonably necessary to manage the moorland for estate management purposes, there being no evidence of substance that it is currently needed for the consented moorland restoration. On the assumption that some vehicular access using low ground pressure vehicles will always be reasonably required and likely to be considered acceptable, and that the topography means that route choices will be limited in places, some surface compaction and suppression of vegetation are unavoidable, though there is the requirement in the stewardship agreements that the use of vehicles must not result in rutting or damage to the surface vegetation.
35. But the present situation is that no evidence has been provided that would enable a comparison between what is there and the impact of a reasonable level of estate traffic without the development, so it is not possible to draw firm conclusions on the overall impact of the development in the long term. In order to adequately consider proposals for development that might affect nature conservation interests, DPD Policy DMC11 expects that proposals coming forward aim to achieve net gains to biodiversity. Given the retrospective nature of this development, it is the further positive role in this respect that should be considered. The policy expects that proposal should show that all reasonable measures have been taken to avoid net loss, including consideration of alternative sites that cause less harm. No consideration of alternatives accompanies this proposal, nor is there adequate assessment the direct and indirect effects of the development, as required by the policy.
36. It is evident that NE had been concerned about the condition of the route before the current ownership and in its 2016 advice described the purpose of the application of the geotextile matting as being to allow recovery of semi-natural vegetation cover to exposed soils in the vicinity of the route, to enable continued limited use of light vehicles along a specific line for the purpose of estate management without further degradation of the surface and to allow general recovery of the surrounding habitat within the SSSI. It described the development as a 'lightweight temporary trackway laid over the soil and vegetation'. In its formal response to the retrospective planning application for the track in 2018, while NE supported temporary retention for the duration of the moorland restoration works, it advised that once restoration works were completed the temporary trackway should be removed and the area restored.
37. NE's advice in respect of permanent planning permission noted that the residual and long term effects of surfacing the access route with plastic matting may include an increased use of the track in preference to others, going beyond the function originally intended in the HLS scheme for restoration works. It advised that continued and regular use of the track for agricultural and non-agricultural use may result in an increase in soil compaction, a localised effect on hydrology and a limited recovery of vegetation, with the potential for a credible risk to the qualifying features. NE was clearly aware that the mesh track had assisted with recovery of the soils and vegetation along the route, but rightly focussed on the effects of long term use, and its advice as the statutory appropriate nature conservation body, which I understand to be that a credible risk to qualifying features could not be ruled out, must be given substantial weight.

38. The limited research on the impact of tracks in moorland environments to which I have been referred is neither conclusive or necessarily directly applicable to the range of habitats affected by the appeal track given that the presence of blanket bog is disputed by the appellant, but it makes it clear that the long-term effects of geotextile matting tracks in terms of soil compaction, vegetation recovery and hydrology in the moorland environment are not well understood. NE did not comment on the installation of log rafts, which were not a feature consented under the HLS agreement, but it noted that modification of the track to incorporate a log raft would require clear supporting information that would need to be considered separately. Beyond noting that the flush vegetation was abundant either side of the rafts and growing through the gaps on the centre-line, nothing of substance has been provided in this respect.
39. Although strictly a material consideration, the harm that could result from the works required to remove the track has been put forward as justification for retaining it. In essence, it is argued that the removal of the track, taking with it the existing vegetation growing through the mesh, would leave the underlying peat substrate exposed to erosion, and the track would need to be isolated from livestock, vehicles and people for several years to allow the vegetation to recover. There might also be a need to create an alternative track for routine management and access, which could cause further erosion. An estimate of 5 years is suggested for satisfactory recovery, and land beside the track could also be affected by the physical works of removal. However, the only potential scheme of restoration so far detailed is that set out by PDNPA in the requirements of the enforcement notice. Although critical of the scheme, the appellant's ecologist did acknowledge that placing heather brash on the exposed ground would help to mitigate the risk of erosion.
40. It is clear that the more established the on-track vegetation is the more difficult the matting will be to remove, but it is really damage to the substrate that must be avoided since the existing vegetation has in any case largely resulted from treatment of the track, so once the mesh is removed the land beneath should be suitable for revegetation in the same way, provided it is not damaged in the process or eroded afterwards. It seems to me that there are feasible means of ensuring this. NE clearly consider that possible given its view that the mesh should be removed and the track restored once no longer needed for moorland restoration works. If anything, it is the length of time that the mesh has been in place that makes its removal more difficult, but I can see no good reason why an appropriate scheme of works could not be devised. Certainly, while problems have been pointed out, the one scheme that has been detailed has not been shown to be unachievable, or even inappropriate, and the estimated time for full recovery is not excessive in this environment.
41. Overall, I consider that while I am unable to determine on the evidence available that the development would cause net harm to features of importance to biodiversity, by the same token there is insufficient evidence to enable me to be reasonably certain that it would not, and, as NE has pointed out, there is a credible risk to qualifying features. Circular 06/2005¹⁰ places an emphasis on certainty, making makes clear that the approach to be taken in considering a proposal that might have a significant effect on a national¹¹ site, which I

¹⁰ Government Circular: Biodiversity and Geological Conservation – Statutory Obligations and their impact within the planning system

¹¹ Formerly referred to as a European site

consider to be the case here, it is for the decision-taker to consider the likely and reasonably foreseeable effects and to ascertain that the proposal will not have an adverse effect on the integrity of the site. In the absence of cogent evidence to indicate that the route could not be used for normal estate management purposes without causing greater habitat loss, soil compaction and erosion than that that can be attributed to the appeal development, I am unable to conclude that it does not have an adverse effect on qualifying features.

42. As such, the development fails to comply with CS Policy L2, which expects development to conserve and enhance sites of biodiversity importance, and with DMP Policies DMC11 and DMC12 which detail how such developments should be considered. In coming to this view I consider that the need for the development, particularly so far as the development might be essential for the management of the site, features or species, or the conservation and enhancement of the NPs valued characteristics, has not been adequately demonstrated. Any role that the track had in securing the moorland restoration works is reduced now to facilitating monitoring, and it has not been shown that it is essential for that, such monitoring commonly being carried out at long intervals and without the need for surfaced tracks.

Other considerations

43. I have dealt with most of the arguments about the need for the track already, and it's potential value for wildfire suppression. One further consideration is the possibility that it may be used in the future for further works of restoration of the moorland, and NE has agreed to finance a feasibility study, with the survey work likely to occur this Autumn. It is suggested that removing the appeal development would prevent these future works, but I do not see how it would. The heavy machinery used previously did not use the appeal track, and ultimately its role, and NE's consent for it, was linked to the parlous condition of the ground along the route, which is no longer the case.

Conclusions on ground (a) and the DPA

44. The development conflicts with development plan policies aimed at protecting the landscape and natural beauty of the National Park, the Natural Zone and areas of importance for biodiversity. Some reduction in weight can be attributed to the conflict with Natural Zone CS Policy L1 and DMP Policy DMC2 since NPPF paragraph 176 does not include an exceptional circumstances test for non-major development, but the thrust of the policies is clear, and there is clear overall conflict with the development plan read as a whole. The appellant's proposed conditions would not make the development acceptable in planning terms.
45. I have considered whether a temporary permission should be granted, but the case for a time limited permission is weak. NE's support for a temporary permission was to enable the HLS works to be completed, which is done save for some monitoring, and also to allow for future assessment of the suitability of the track in the light of any new evidence on the impact of mesh trackways, which seems a very minor benefit, if any, given the focus on the difficulties of removal, largely a function of the time the track has been there. The Planning Practice Guidance on temporary planning permissions suggests that circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on

the area or where it is expected that the planning circumstances will change in a particular way at the end of that period. Neither applies here, nor am I aware of any other circumstances that would justify retention for a temporary period.

46. There is clear conflict with the development plan, and there are not material considerations of sufficient weight to otherwise justify the development. Accordingly, and having regard to all other matters raised, the appeal on ground (a) cannot succeed and the application for planning permission is refused.
47. Although I consider that the development could have a likely significant effect on a national site, since the appeal is dismissed it does not require assessment against the Habitats Regulations.

Ground (f)

48. Section 173(3) of the 1990 Act provides that an enforcement notice shall specify the steps which the authority require to be taken in order to achieve, wholly or partly, any of the purposes set out in Section 173(4). The relevant purpose in this case is restoring the land to its condition before the breach took place. The basis of the appeal on ground (f) is that the steps required by the notice go beyond what is required to remedy the breach in that they are both too prescriptive and aim to, in effect, improve the condition of the land before the breach took place.
49. Taking the second point first, it is submitted, in effect, that a narrow view should be taken of the condition of the land to which it should be restored, namely the precise condition immediately prior to the development, so far as it can be ascertained. That would involve 'restoring' the land to a 'muddy mess', at least in places. I consider that to be an extreme approach, bearing in mind that the enforcement procedure is intended to be remedial. In the context of engineering works, works that enable the affected land to re-integrate into the surrounding landscape will be a sufficient remedy in almost all circumstances, and hence I prefer the PDPNA approach to the formulation of the steps required to remedy the breach, which is that the land should be restored to a reasonable condition, consistent with the land around it. That is a purposive and pragmatic approach. In that regard, specifying the means of encouraging revegetation is no different, in the moorland context, to requiring re-seeding of restored ground in other contexts, something that is rarely, if ever, controversial. Seeking typical vegetation rather than vegetation of the exact specification of that removed, which would not now be feasible to establish in any case, is entirely reasonable.
50. Turning to whether the steps in this case go beyond what is necessary to restore the land to a reasonable condition, the main focus is on step (b) which requires the removal of the geotextile matting and wooden log rafts. It specifies that they should either be removed by hand or using low ground pressure tracked vehicles, equipment or machinery, that they work from the track itself only, and goes on to specify the direction of removal. While it all makes sense, I agree that it is overly prescriptive, even though it is clear that the step is so described in order to minimise damage to the land from which the matting and logs have been removed and the surrounding land, in view of the importance and sensitivity of the habitats concerned. However, there may be other ways that the materials can be satisfactorily removed. NE's consent will be required in any case, so any notification under section 28E of the 1981

Act will require appropriate specification. Accordingly, I consider that step (b) should be varied to simply require the removal of the geotextile matting, the wooden log 'rafts' and other materials used in the construction of the track.

51. However, I do not consider the other steps to be excessive. They are entirely appropriate to the purpose of restoring the land to its condition before the breach took place and reflect the normal moorland restoration approach taken by PDNPA. The steps do not seek improvement, merely restoration to a reasonable condition. The circumstances in this appeal are not the same as those in the 'Strines' appeal¹² decision letter to which I have been referred. In that case there was a pre-existing track upon which stone was laid, and a required method of removal of the stone was set out in similar detail to step (b) of this notice. The Inspector found that a requirement to remove the stone alone would remedy the breach, and varied the notice accordingly, as I shall do in respect of step (b). However, there was no requirement in that case to re-vegetate the land, hence there was no consideration of a step of that nature.
52. A further argument is that upholding the notice, even at its barest, that is with a simple requirement to remove the geotextile matting and log 'rafts', is not possible because removal is likely to have a significant effect on the integrity of a national site, so that an appropriate assessment is required, which it is argued a requirement for removal would inevitably fail. While I agree with the appellant that appropriate assessment would require details of the removal method, which of course I would not have, given the limited success on ground (f), I am not of the view in any case that upholding the notice with step (b) varied but with all other steps retained would be likely to have a significant effect on a protected site. As set out in response to the argument on nullity, there is a defence in law to non-compliance with the notice if the appellant can show that he did everything he could be expected to do to secure compliance with the notice. That would have to include a notification to NE, and that would have to specify how the works would be carried out. If NE were to decide that the project required appropriate assessment, it would have sufficient information, as I would not. I cannot therefore be the competent authority. I consider it extremely unlikely in any event that NE, if presented with a works specification akin to that set out in step (b) before variation, would not give consent, given its statement that the approach¹³ at Mickleden has been to return the track to a green route used only moderately by "Argos and Quads (all terrain vehicle – ATV)" for moorland management.
53. Accordingly, the appeal on ground (f) succeeds to a limited extent and I shall vary the requirements as set out above.

Paul Dignan

INSPECTOR

¹² Appeal Ref. APP/M9496/C/18/3208720

¹³ Appendix AJC2

ANNEX 1

Enforcement Notice Requirements

5. WHAT YOU ARE REQUIRED TO DO

The steps below ((a) to (f), inclusive) shall only be carried out between 1 September and 28 February, in the following year:

- a) Place between 30 and 35 cubic metres of locally sourced heather brash, which has been collected between 1 October and 31 January in the following year, alongside the Land. The heather brash shall be placed in bags or piles between 20 and 50 metres apart with each bag or pile consisting of between 1 and 2 cubic metres of heather brash.
- b) Following the completion of step a) above, remove the geotextile matting, wooden log 'rafts' and any other imported materials used in the construction of the track from the Land. The removal shall either be carried out by hand or using low ground pressure tracked vehicles, equipment or machinery. Any equipment or machinery used in the removal shall at all times during the removal works be stationed on the Land. The removal shall commence at the north-west end of the Land and shall progress in a generally south-easterly direction along the Land until all of the geotextile matting, wooden log 'rafts' and any other imported materials used in the construction of the track have been removed.
- c) Following the completion of step b) above, spread the heather brash by hand over the Land to a depth of between 1.5 and 2.5 centimetres.
- d) Following the completion of step c), plant sphagnum moss plugs by hand at a minimum density of one plug per 5 square metres over the areas where the wooden log 'rafts' have been removed. The sphagnum moss plugs shall consist of the following mix, or an equivalent in order to stabilise the peat bog, 10% Sphagnum capillifolium; 10% Sphagnum papillosum; 40% Sphagnum palustre; 30% Sphagnum fallax; 5% Sphagnum cuspidatum; 5% Sphagnum fimbriatum.

Time for compliance for steps a), b), c) and d): Within 12 calendar months of the date when the notice takes effect.

- e) Any parts of the Land which, within 30 calendar months after this Notice takes effect, have more than 30% grass cover over any 10 metre long section, shall be sprayed with a grass-specific, selective herbicide.
- f) Following the completion of step e) spread heather brash, which has been collected between 1 October and 31 January in the following year, by hand over any areas of grass or bare peat on the Land to a depth of between 1.5 and 2.5 centimetres.

Time for compliance for steps e) and f): Within 42 calendar months of the date when the Notice takes effect.