

22 October 2019, Oslo

To the Standing Committee of the Bern Convention

### **Request for clarifications on the exception *other overriding public interests* in Article 9(1) indent 3 of the Bern Convention**

The Norwegian animal rights organisation NOAH would like to ask the Standing Committee to consider whether the exception from the strict protection of the wolf (*canis lupus*) based on Article 9 paragraph 1 indent 3 “*other overriding public interests*”, as it has been applied by the Norwegian authorities in 2017-2019 and outlined below, is justified.

We are aware of the fact that the Contracting Parties to the Bern Convention enjoy a margin of discretion to decide which specific interests can be considered under the exception of “*other overriding public interests*”. However, this discretion is not without limitations, considering the aims and other provisions of the Convention, especially the strict protection provided by the Convention to species listed in its Annex II.

According to paragraph 15 of the Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, adopted on 2 December 2011, “*it is possible for the Standing Committee to consider whether a particular exception is justified on the grounds put forward, in this case “other overriding public interests”*”. It is further stated that “*if the grounds in question were put forward, the Standing Committee of the Bern Convention could assess the merits of the exception in the light of all the provisions contained in the Convention*”. NOAH would like to put forward to the discussion of the Standing Committee some of the grounds relied upon by the Norwegian authorities under the exception “*other overriding public interest*”, as stipulated in Article 9 (1), indent 3, because there is strong reason to believe that culling wolves as practiced by the Norwegian authorities breaches the legal boundaries set by the Bern Convention.

#### **Introduction**

In April 2017, the Parliamentary Committee on Energy and the Environment of the Norwegian parliament Stortinget adopted guidelines on the interpretation and application of the exception “*other overriding public interests*”.<sup>1</sup> Based on this exception and the guidelines of the Stortinget, the Ministry of Climate and the Environment of Norway adopted decisions in 2017 and 2018 to shoot three families of wolves, altogether 22 animals. Altogether the government adopted a quota for the licenced hunt of 42 wolves in 2017/2018 (of which 31 were killed) and 29 wolves in 2018/2019 (of which 21 were killed) – around 40% and 30% of

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<sup>1</sup> This exception has been transposed into the Norwegian Biodiversity Act with a slightly different wording, that is “*public interests of significant importance*”.

the Norwegian wolf population respectively. In 2019, the regional committees on the management of large carnivores adopted a quota for the licenced hunt of 42 wolves of which around 17 wolves (three wolf families) are found in the wolf zone. Several of these decisions have been appealed to the Ministry of the Environment. The latter's decision on the complaints is awaited in November 2019.

Norwegian policy on large carnivores is based on the system of zoning, also called geographically differentiated management. The zoning system has over the years become a cornerstone in the policies and management practices concerning the four large carnivore species found in Norway. This entails in practice that large carnivores enjoy a lower level of protection in areas prioritized for grazing, and higher level of protection in areas prioritized for large carnivores. With regard to wolves, this principle has been applied so that priority to the grazing industry applies to 95% of the Norwegian territory while the remaining 5% is the area where wolves are allowed to live and breed. That is also the area where the population targets shall be aimed to be achieved. The so-called wolf zone is located in the south-east of Norway bordering Sweden. In 2018, for the first time a wolf family whose territory was entirely within the wolf zone, was shot.

There is strong political pressure to further weaken the level of protection even in this relatively small area where wolves are allowed to exist and where they by the law should be given the strictest legal protection. According to our assessment, the decision of the Ministry in 2018 to shoot a wolf family within the wolf zone is a clear and serious breach of the Bern Convention. It is the result of tendentious application of the exception "other overriding public interests" in order to satisfy the demands of certain interest groups and political factions.

NOAH finds therefore that it is important to bring the recent decisions of the Ministry to the attention of the Contracting Parties.

### **The conservation status of *canis lupus* in Scandinavia**

The wolf is categorized as critically threatened on the Red List of Species in Norway, 2015. There are, however, no short-term or long-term goals to improve this status. The Norwegian parliament Stortinget has set the population target for wolves at 4-6 litters of wolves annually which means in effect that the wolf population in Norway is maintained at the critically threatened level indefinitely.

The Norwegian wolf population is part of the Scandinavian wolf population that as of June 2019 counts around 380 individuals. The Scandinavian population has been in decline since 2015.<sup>2</sup> The wolf population is heavily inbred where any two random individuals of wolves are genetically as identical as siblings. The migration of wolves from the Karelian and Russian wolf populations to Scandinavia is not made easy – most wolves are shot in the reindeer herding areas. For example, the Norwegian authorities have issued licences to shoot all those wolves who entered Norway from the north within the last two years<sup>3</sup> and who were of critical importance in order to contribute to the much-needed diversity of the genetic pool of

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<sup>2</sup> The Scandinavian wolf population was assessed to be 460 individuals in 2014, 430 wolves in 2015 and 2016, and 410 wolves in 2017. According to the recent assessments in autumn 2018 and winter 2019, the population is at 380 individuals. [www.rovdata.no](http://www.rovdata.no)

<sup>3</sup> Altogether five wolves. The most recent wolf who entered Norway from the North (Karasjok commune) was shot from helicopter by the Norwegian Environment Agency on 29 November 2018, as the wolf – according to the Agency – posed too high a risk of damage to the reindeer in the area.

the Scandinavian wolf population. A high level of inbreeding is the greatest threat to the long-term survival of the population.

The sub-population in Norway amounts to 84-87 wolves if the wolves whose territory is on both sides of the border are counted in with the coefficient of 0,5.<sup>4</sup> The sub-population had been steadily increasing for the last five years until 2019 when the population has somewhat declined. The research results show that a bi-annual pattern can be detected in the variations in the net flow of migrants between the two countries – when the sub-population in one country increases, it decreases in the other.<sup>5</sup> Some of the growth of the wolf population in Norway is dependent on immigration of wolves from Sweden and researchers have concluded that the considerable increase in the Norwegian sub-population in 2016 could never have occurred without a strong inflow from Sweden.<sup>6</sup>

There is no coordination nor cooperation between the two countries as to population targets and conservation measures to ensure the survival and long-term viability of the Scandinavian wolf population. The cooperation between the Swedish and Norwegian authorities is limited to an agreement concluded in 2011 on the procedures to ensure the protection of genetically important individuals of wolves between the two countries. This agreement included the definition of such individuals and common guidelines for monitoring and exchange of information.<sup>7</sup>

In all other respects, the two subpopulations are managed as independent populations. Norway has not made any reservations to the Convention at the time of signing it.

### **The Ministry's decisions on the exception of "other overriding public interests"**

The decisions of the Ministry in 2017 and 2018 on the shooting of three wolf families were both based on the exception "other overriding public interests". It is worth noting here that Norway has not included the exception in the last indent of the first paragraph of Article 9 – *to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers* – into its Biodiversity Act, and this exception is thereby not applicable in Norway.

Despite this, the main ground for the licenced hunt of the two wolf families in 2017 (Julussa and Osdalen), under the exception "other overriding public interests", was population control, based on the principle of geographically differentiated management where the mere occurrence of wolves outside the wolf zone was considered as a sufficient ground to issue a licence for the hunt.<sup>8</sup> This has practically resulted in a situation where the requirements of the

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<sup>4</sup> As of 1 June 2019. <https://www.rovdata.no/Nyheter/Nyhetsartikkel/ArticleId/4761/Ulvebestanden-i-Skandinavia-g-229-r-fortsatt-ned.aspx>, published on 3 June 2019.

<sup>5</sup> O. Liberg, H. Sand, P. Wabakken, C. Wikenros, B. Zimmermann, A. Eriksen, Beräkningar av beskattningsnivå av den Skandinaviska vargpopulationen 2019, Rapport til Naturvårdsverket, Sverige och Miljødirektoratet, Norge, frå SKANDULV, 08.06.2018.

<sup>6</sup> Ibid.

<sup>7</sup> Based on this agreement, the environmental authorities in both countries agreed upon common guidelines for the management of genetically important individuals in the Scandinavian wolf population in April 2012.

<sup>8</sup> Outside the wolf zone, licenses to shoot wolves can be issued all year around, using occasionally also helicopters to locate and/or shoot the animals.

Bern Convention with regard to the conservation of the wolf are inapplicable to 95% of the Norwegian territory.<sup>9</sup>

In 2018, the Ministry relied in its decision to shoot the wolf family (Slettås) in the wolf zone on the need to reduce the level of conflict arising from the presence of wolves in the respective area. The Ministry also put weight on the perception of (an undetermined) part of the local population that the wolves were behaving in a manner that was threatening, although results from a thorough scientific research conducted in 2009-2018 showed that the wolves' behaviour was normal and there was no ground for concern.

*The Parliament Committee issues guidelines on the exception "other overriding public interests"*

In April 2017, the Parliamentary Committee on Energy and the Environment of Stortinget issued a proposal where the government was instructed to amend the regulations on the competence of the regional committees on the management of large carnivores. With this amendment, the committees were for the first time given the authority to set quotas for the licensed hunt of large carnivores on the ground of "other public interests of significant importance".

In addition, the Committee issued guidelines on the interpretation and application of the exception and made it clear that "*if the wolf population has a negative effect on the aim of the national district policy to uphold a widespread inhabitation in Norway, there may be a legal ground for the removal of wolves*" provided that it is "*highly probable that the wolf population has a negative impact on national district policy considerations*". The guidelines stated that "*district policy considerations should be considered as public interests of significant importance*" and then went on to give a non-exhaustive list of specific interests that could be considered under such "national district policy considerations".

The specific interests outlined by the Committee were as follows:

- the interest to conduct hunting as recreational activity and as a livelihood by selling hunting rights if the increasing population of large carnivores affects the deer population to such an extent that the hunting base is documented to have become significantly reduced/impaired;
- psycho-social circumstances of general character where fear towards large carnivores and the feeling of insecurity has reduced the quality of life over time for a larger group of people;
- the economic interest to have free-ranging sheep, reindeer and cattle on the grazing grounds, and the interest of having economic activity in the district.

*On the Ministry's decision to shoot the wolf packs Julussa and Osdalen in 2017*

The Norwegian authorities resorted to the exception "other overriding public interests" for the first time in 2017 when the regional committees on the management of large carnivores in regions 4 and 5 in the east of the country<sup>10</sup> set the quota for the licensed hunt of two families

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<sup>9</sup> In NOAH's view, this is especially problematic in light of the fact that no migration corridors have been ensured to allow the much-needed inflow of wolves from other populations so that the genetic base of the Scandinavian wolf population could be improved.

<sup>10</sup> Hereafter referred to as "the regional committee".

of wolves – Julussa and Osdalen – to 16 wolves. This quota was later extended to another three wolves.

The territories used by the two wolf families were partly within and partly outside the wolf zone. The Osdalen-pack used a territory that lay 96% outside the wolf zone while the territory of the Julussa-pack lay 67% outside the wolf zone. For legal purposes, the areas used by these wolf packs were categorized as falling outside the wolf zone.<sup>11</sup> It is worth noting here that the regional committee decided to shoot the Osdalen wolf pack already in 2016 to prevent damage to grazing animals, but the Ministry considered the losses suffered in the territory of the wolf pack as minimal and overturned the decision of the regional committee the same year.

The decision to shoot the two wolf packs in winter 2017/2018 was first and foremost based on the principle of geographically differentiated management. The Ministry of Climate and the Environment stated in its decision of 1 December 2017 that “*The geographical differentiation is to be considered as a measure to safeguard “public interests of significant importance” / “overriding public interests”*” and that “*it is a public interest of significant importance that wolves occur to a small extent outside the wolf zone*”. The Ministry further highlighted the benefits that the geographically differentiated management was aimed to safeguard, such as predictability, the need to reduce conflict and provide clarity in the management of the wolf population. In this particular context this meant that the public should be able to rely on the principle that the threshold for the removal of wolves is low outside the wolf zone and high within the wolf zone. The Ministry pointed out as an additional benefit the increased trust and respect of the public towards wolf management.<sup>12</sup>

#### *The Ministry’s decision to shoot the wolf pack Slettås in 2018*

In 2018, the Ministry upheld the decision of the regional committee on the shooting of a wolf pack Slettås in the wolf zone on the grounds of public interests of significant importance. These wolves had been described by some locals as coming too close to human habitats, however no data was provided as to the number of people (or a respective proportion of the local population) who had made such claims. The scientific research published in 2018,<sup>13</sup> however, established that the wolves did not behave in a way that could be described as abnormal, and the wolves had come closer to human habitats only at night when on the hunt for moose and deer. Despite the research data, the Ministry concluded that the *perception* of some of the locals that the wolves were at times too close to the houses, was evidence of a level of conflict that had been lasting for years and therefore affected “*negatively the considerations of national district policy*”.<sup>14</sup>

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<sup>11</sup> According to the 50/50 rule where the wolf family in its entirety is considered to be within the wolf zone if more than 50% of the territory used by the family falls within the boundaries of the wolf zone, and vice versa – if more than 50% of the territory used by the family falls without the boundaries of the wolf zone, the wolf family is considered in its entirety to be outside the wolf zone.

<sup>12</sup> The Ministry also mentioned the burden that the local communities are made to carry when enduring the presence of large carnivores and the accruing reduced quality of life of some individuals, as relevant ancillary public interests that fell within the scope of the exception “public interests of significant importance”.

<sup>13</sup> Zimmermann B, Wabakken P, Eriksen A, Maartmann E, Carricondo-Sanchez D, Versluijs E, Sand H, og Wikenros C. 2018. *Slettåsulvenes atferd i forhold til menneskelig bosetting gjennom et helt år*. Utredning om ulv og bosetting del 6. Skriftserien 13 - 2018, Høgskolen i Innlandet. 35 s.

<sup>14</sup> The term “conflict” or “conflictual” was used to denote the stability of the wolf pack such as relatively large number of wolves in the pack over the years and regular reproductions and not to any abnormal behavior of the wolves. The territory-marking wolves of Slettås were registered for first time in 2009/2010 and the lead pair had

Paradoxically, in 2017 the Ministry had overturned the decision of the regional committee to shoot the Slettås-pack, because it did not find the considerations presented by the committee to be sufficient to justify the shooting. In that decision, the Ministry also emphasized the importance of applying the geographically differentiated management in a consistent manner for the sake of predictability and clarity in the wolf management and in order to reduce the level of conflict. However, only a year later when the regional committee presented again the same considerations for the shooting of the Slettås-pack, the Ministry came to the opposite conclusion and found the decision to be justified, without providing any grounds for this total turn.

The decision to shoot the wolves of Slettås to reduce the level of conflict arising from wolf management in the area was further supported by the following considerations:<sup>15</sup>

- disadvantages that the grazing businesses/farmers had to endure because of the presence of large carnivores, especially problems related to grazing in fenced pastures within a limited area which resulted in less feed for the grazing animals, and because of the constant fear experienced by farmers that wolves might attack their animals;
- disadvantages related to hunting as recreational and business activity where the income from renting hunting rights might be reduced due to the risks related to hunting moose and smaller wild animals with a loose dog;
- psycho-social circumstances such as fear and feeling of insecurity due to living near wolves;
- the need to share the burden of sustaining wolves in one area for a longer period of time so that wolf packs that are perceived as “conflictual” can be removed and other areas will “overtake” this burden.

In its overall assessment, the Ministry found that the listed considerations as a whole reached a level of severity that satisfied the threshold of “overriding public interests” and therefore the shooting of the Slettås-pack was justified.

#### *The recent decision of the regional committee to shoot three wolf packs in the wolf zone*

In September 2019, the regional committee adopted a decision to shoot three wolf families – Letjenna, Mangen and Römskog – in the wolf zone in winter 2020. If this decision is upheld by the Ministry of Climate and the Environment, around 17 wolves will be killed during the hunt that will start on 1 January 2020. The committees decided to shoot the Römskog wolf pack in spite of the request by the Swedish Environmental Agency to the opposite, since it is a so-called border-pack that uses the territory of both countries.

The decision is based on the exception “public interests of significant importance” provided under Article 9(1) indent 3 of the Bern Convention. The interests considered under this exception are in essence identical to the one used in 2018 with regard to the Slettås wolf pack – the burden and inconveniences related to the presence of wolves as experienced by farmers, hunters and some of the local people. As in previous years, the claims have not

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cubs every year since 2010/2011. However, at the time of the Ministry’s decision in 2018, the Slettås-pack consisted only of 2-3 animals (the lead pair and a yearling).

<sup>15</sup> According to the Ministry, these considerations did not provide a sufficient ground to issue a license in their own right but were to be included as supportive grounds in the overall assessment.

been backed up by any data or other evidence, references are made to general assertions only.

For example, with regard to hunting it is stated that the presence of wolves *“has made it necessary to adjust the way hunting is conducted”* and that *“it can also be assumed to have a certain impact on the possible number of hunted deer locally”* (however, no numbers are provided). It is concluded that *“the presence of wolves over a longer period of time has caused a burden on hunters and owners of hunting rights that builds up conflicts related to the wolf management”*. With regard to the grazing interests, it is written in the decision that although the extent and damage potential of grazing animals in the area is very limited, farmers *“may still experience some fear that new wolf attacks may occur on sheep and cattle”*. It is further mentioned that adjustments from free-ranging pasture to fenced pasture can also lead to additional burdens such as *“spiny problems, poor production results and poor utilization of feed resources, as well as increased requirements for fence inspection and maintenance.”* With regard to the psycho-social considerations of the local people, it is stated in the decision that despite the fact that no wolves have exhibited abnormal behavior, the locals<sup>16</sup> nonetheless *“experience wolves as coming too close, which causes fear and discomfort”*. With regard to municipalities that have had wolves for some time, it is stated that *“it can be a strain that affects people’s quality of life”*.

Similar to the decisions of two previous years, the respective interests of the farmers, hunters or the local people are considered not to amount to public interests of significant importance each on their own but are still considered to satisfy the threshold of applying the exception when seen together cumulatively, as a whole.

The regional committee concludes that *“presence of wolves over a longer period of time in an area builds up the conflict related to the management of large carnivores”*. This aim to reduce conflict is the main argument to justify the decision on the culling of three wolf families. In this regard, it is important to note that for the purposes of reducing conflict, the committee considers the most stable wolf packs in the wolf zone to give rise to conflict the most, because those packs have been at the same place over a longer period of time, have had a relatively large number of family members and have been regularly productive.

As indicated above, the decision of the Ministry of Climate and the Environment on the complaints to the decision of the regional committee is expected in November 2019.

### **Questions to the Standing Committee**

We would like to pose the following questions on the content and application of the exception “other overriding public interests” in Article 9 of the Convention to the Standing Committee for consideration, taking into account Articles 2, 4 and 6 of the Convention:

1. Does the exception “other overriding public interests” cover the aim of “reducing conflict” that has arisen from the presence of wolves in a certain area and related to whether and how the wolf population is managed by the authorities?

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<sup>16</sup> No indication of the number of people or proportion of the local population who allegedly had such experiences, has been provided in the regional committee’s decision.

2. Does the exception “other overriding public interests” cover the aim of preventing loss of profit from hunting due to reduction in deer or moose populations as a result of predation by wolves?
3. Does the exception “other overriding public interests” cover the aim of relieving the economic burden or emotional stress of farmers to adjust to the presence of wolves?
4. Is resorting to the exceptions listed under 1-3 dependent on showing why and how the culling of entire wolf packs will actually or most likely achieve these aims, in other words that it is suitable for the purpose? What kind of quantitative or qualitative data should be provided or what kind of other requirements of proof apply?
5. Does the exception “other overriding public interests” cover the aim of wolf population regulation as such, i.e. reducing the number of wolves in the population as a whole, or eliminating them in a certain area?
6. If any of the aim pursued cannot be resorted to because the threshold of “serious damage” required under point (b) is not satisfied, can this aim be resorted to under point (c) as an “overriding public interest”?
7. If any of the aims do not amount to “overriding public interest” on its own, can the aims be lumped together as cumulatively constituting an “overriding public interest”?
8. Can the threshold for resorting to the exception “other overriding public interests” be set at a level that is so low that any wolf pack anywhere in the country could satisfy that threshold and thereby be culled under the exception? In other words - does the exception “other overriding public interests” apply to the general inconvenience and nuisance related to the mere presence and normal behaviour of wolves, as alleged by some inhabitants?

NOAH would like to draw attention to the recent judgment by the Court of Justice of the European Union (CJEU) in the case concerning permits granted by the Finnish Wildlife Agency to kill wolves to prevent poaching (C-674/17) where the Court gave guidelines on the interpretation and application of the exception in Article 16(1)(e) of the EU Habitats Directive.<sup>17</sup> This article corresponds in wording to Article 9(1) indent 5 of the Bern Convention. Although this particular exception in Article 9(1) indent 5 is not part of Norwegian law, we would like to ask whether the conclusions made by CJEU in the following paragraphs of the judgment could and should be relevant also in the application and interpretation of Article 9(1) indent 3: paragraphs 36-38, paragraph 41, and paragraphs 48-50 of the judgment?

Yours Sincerely



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<sup>17</sup> <http://curia.europa.eu/juris/celex.jsf?celex=62017CJ0674&lang1=en&type=TXT&ancre=>