

Annex to Complaint



for and on behalf of

Wildcat Haven Community Interest Company (hereafter, “Wildcat Haven” or the “Complainant”)

in respect of

Alleged Systemic Failures by the United Kingdom of Great Britain and Northern Ireland (the “Contracting Party”) to comply with the Bern Convention in respect of the Scottish wildcat (*Felis Silvestris*).

1. This submission supplements the foregoing complaint for, and on behalf of, Wildcat Haven C.I.C – a not-for-profit non-governmental organisation located in the United Kingdom. It alleges substantive breaches of the Bern Convention on the Conservation of European Wildlife and Natural Habitats 1979 (hereafter, the “**Bern Convention**”) by the Contracting Party of the United Kingdom of Great Britain and Northern Ireland which is failing to protect and preserve the remaining population of Scottish wildcat in the wild in Scotland.
2. The Secretariat is requested to seek urgent attention from the Standing Committee to Heads of Complaint II (at para 9) and III (at para 11) given that failure to address these issues in a timely manner risks the extirpation of a critical – indeed, the most important known remaining – population nucleus of this critically endangered species in the wild in Scotland. For the reasons which follow, it is also requested that the Standing Committee invoke its powers to undertake site inspection in this case by independent international observers.

About the Complainant

3. Our client is internationally recognised as an expert in the protection and preservation of Eurasian felids, including the iconic wildcat species (*Felis silvestris*). The organisation has run a project dedicated to protecting this species in the wild since circa 2008. They hold key specialist knowledge and expertise on the Scottish wildcat and on matters which we submit are material to this complaint. They are now the lead group dedicated to protecting the Scottish wildcat in the wild and have an active public petition to see the Clashindarroch Forest afforded protected status with a view to remedying legacy conservation failings. Their petition is now the largest British wildlife petition in UK history with some 727,679 signatures (and rising). This demonstrates very substantial public interest in this matter and, in our submission, elevated weight which should be applied to their complaint. The clear public interest in conserving this critical population of the Scottish wildcat *in situ* is irrefutable and that substantial public interest must now be recognised.

Subject Matter of Complaint: Wildcat (*Felis silvestris*) – Overview

4. The wildcat (*Felis silvestris*) is listed at Annex II (which lists the animal species requiring special protection).¹ It is critically endangered due, *inter alia*, to threats from hybridisation, habitat

¹ Appendices to the Convention and Amendments thereto which list the wild species that are protected by the Convention are available online at: <https://rm.coe.int/168078e2ff> (last modified in 2001). For present purposes, Appendix II lists the animal species requiring special protection. The wild fauna species of Appendix III are protected

destruction and disturbance. Notwithstanding these threats, our client's independent empirical field work demonstrates that, although critically endangered, the species is not (yet) extinct in the wild in Scotland. Sufficient individuals remain to enable a population recovery.

5. The national competent authorities have, however, embarked on a high-profile captive breeding programme which we submit is at best premature and at worst a convenient substitute for conservation *in situ*. We believe this to be against the provisions of the Convention and against internationally accepted conservation practice generally. Aligned to our client's legal interventions, a report has recently been published (2018/19) which declares the species as "*functionally extinct*". Said report was commissioned by individuals directly involved in the captive breeding programme. Our client submits that this conclusion has been arrived at on the basis of incomplete information and extensive areas in Scotland have not even been surveyed, including vast tracts of the west Highlands which have exceptionally low human population densities and considerable forest cover. Our client has presented empirical evidence against the claim of "*functionally extinct*" to the national competent authorities, which is not being given genuine regard.

Head I of Complaint: Failure to Adopt a Cohesive Approach to Species Protection at National Level

6. As the Secretariat will recall, the Convention has formally adopted Guidelines (in 1992) and Recommendations (in 1995) specifically relative to the conservation of the wildcat.² The 1992 guidelines acknowledge that fragmentation of populations due to, amongst others, habitat loss etc may lead to the extinction of some isolated populations and that only the preservation of the ecological characteristics of the habitat of the species may assure its long-term conservation. In areas of importance for the wildcat, *inter alia*, forestry policies need to be adapted to make survival possible.
7. For present purposes, several recommendations were made to the Contracting Parties at that time, including to –
 - Draw up regional cartographical inventories of areas *suitable* for the wildcat;
 - Manage wooded areas used by the wildcat, taking into account the ecological requirements of the species, including where appropriate *increasing the naturalness of such forests*;
 - *Avoid fragmentation* of wildcat populations by barriers;
 - *Evaluate*, in wildcat areas, the impacts of *new infrastructure developments* on wildcat populations;
 - *Avoid the shooting of feral cats* where there is a risk that wildcats may be shot and define areas in which it would be prohibited to shoot any cat except by specifically authorised personnel;
 - Evaluate the need to *draw up national plans for wildcat conservation*;
 - Consider *reintroduction projects* where standards can be met; and
 - Encourage *research* to facilitate sound management of populations.

but "exploitation" can be regulated in accordance with the Convention. Appendix IV lists the prohibited means and methods of killing, capture and other forms of exploitation.

² Guidelines No. 2 on the conservation of the wildcat (*Felis silvestris*) (adopted 4 December 1992). Recommendation No.43 (1995) on the Conservation of Threatened Mammals in Europe (adopted 24 March 1995).

8. We submit that the Contracting Party is not acting in line with these guidelines or its obligations under the Convention in Scotland. As mentioned, the Contracting Party has instead embarked upon a high-profile and, in our submission, flawed programme of captive breeding. This is now being used to obscure the need for efforts for *in situ* conservation of the wild population and to draw focus away from that objective.

Head II of Complaint: Disturbance from Logging Activity at Clashindarroch without European Protected Species Licence/s

9. Our client has launched formal legal interventions to highlight commercial logging activity ongoing at the Clashindarroch forest, by Huntly (Aberdeenshire). The forest is a publicly owned commercial forestry plantation. Prior to the launch of legal interventions it was described in the Forestry agency's own communications as a "*wildcat wonderland*". Yet, our client has obtained environmental information requests which demonstrate that: 1) the agency, Forestry and Land Scotland, does not hold a European Protected Species Licence for disturbance consequent on logging activity and that (critically) there is no proper handle on den, breeding and resting sites (which are also protected). This matter has been reported to Police Scotland but without sufficient action. Prior to this, substantial attempts have been made by the Complainant at engagement with, and education of, the competent authorities of the dangers posed to the wildcats and their kittens. The agency and competent authorities rather defer to hybridisation as justification for inaction. The disturbance is now, therefore, in our submission, deliberate.³

Hybridisation

10. Reference is continually being made by the competent authorities to "*hybridisation*" of the species as a justification for inaction at the national level; both in terms of general failure to pursue protection of sites with important wild populations and, more particularly, in respect of interference with the specific population nucleus at the Clashindarroch. In this regard, our client draws attention to Recommendation No.173 (2014) of the Standing Committee, adopted 05/12/2014, on hybridisation between wild grey wolves (*Canis lupus*) and domestic dogs (*Canis lupus familiaris*). We respectfully submit that this is a correct statement of the legal duties incumbent on Contracting Parties and equally applicable to the Scottish wildcat. Again, as our client can evidence, these requirements are not being adhered to by the competent authorities in their decision-making and the discharge of regulatory functions and duties at the national level, including in relation to the regime for strict protection. Notwithstanding the attempt to use hybridisation as a justification (which is alleged), the Clashindarroch Forest contains the highest scoring (purest) cats based on pelage found anywhere in Scotland: the cats score considerably higher than the vast majority of specimens that make up the captive breeding population. Indeed, RZSS (who run the captive breeding programme) are fully aware of the extent of hybridisation in the captive breeding

³ "Deliberate" is interpreted by the ECJ as going beyond mere "direct intention" (See, for example, Cases C-103/00 *Commission v Greece* (2002) ECR I-1147 and C221/04 *Commission v Spain* (2006) ECR I-4515) and encapsulates a person who is reasonably expected to know that their action will lead to an offence. In the present situation, direct knowledge and disregard can be demonstrated as these matters have been actively presented to the national authorities.

programme as the vast majority of kittens born at the facilities they run have been neutered due to levels of hybridisation. It is, however, important to note that RZSS have repeatedly publicised the birth of new 'wildcat' kittens at their facilities to considerable media fanfare; however, after the summer visitor season, over 75 percent of the said kittens are neutered.

Head III of Clashindarroch I Windfarm and Proposed Phase II of Complaint: Development by Vattenfall Windpower Limited

11. We enclose and refer to a formal Letter of Objection submitted to the national competent authorities detailing concerns in respect of proposals for a second windfarm at Clashindarroch. By way of background, the windfarm known as Clashindarroch I has been operational there since 2015. It was approved without proper baseline surveys of the species being undertaken. The Contracting Party in our submission is not adhering to Recommendation No.109 (2004) of the Standing Committee on minimising adverse effects of wind power generation on wildlife.⁴ Yet, as highlighted, the ecological value of the forest remains high with a range of protected species present; including, otter (*Lutra lutra*), badgers (*Meles meles*), pine martens (*Martes martes*) and goshawks (*Accipiter gentilis*).
12. In our submission, the Developer (with acquiescence from the Contracting Party) is now attempting to circumvent due Environmental Impact Assessment requirements – both in the application and in corporate structuring arrangements, as well as the management of forestry and harvesting operations itself. This raises justified suspicions of sequencing with the goal of facilitating consent (a larger proposal at this site was already refused consent in 2006). The previous non-compliant decision-making and lack of best practice seeks now to advance a doubling down approach to ecological harm which indubitably risks the extirpation of the wildcat population present.
13. In simplest terms, we submit that this is the wrong proposed development in the wrong site. Proper adherence by Government to the Strategic Environmental Assessment Directive and other such laws would have resulted in this site being earlier screened out. The failure of successive governments to pursue designation of important wildcat sites has exacerbated this situation – it is unlikely that the site would be considered for development if it were legally protected under domestic or international designation. Moreover, there has been no consideration of other lower sensitivity sites capable of accommodating the proposed 55 – 80MW renewable energy project.
14. We underscore that the impacts on the unique Scottish wildcat population present at this locus – highly vulnerable and elusive by its very nature – are not matters that can be addressed via reactive mitigation, as is currently proposed by the project proponents. Our client recognises fully (as the 2004 Recommendation does equally) that climate breakdown poses risks for all species, but *de facto* this development proposal is not the only means of achieving Scotland's climate goals and ambitions (such as, much needed commitments to energy efficiency and demand response). This development does, however, clearly pose risks of potentially catastrophic impact on a subspecies for which Scotland has a unique international responsibility, including under the Bern Convention. We submit that this is also a matter of common and international concern, as well as being of acute public interest.
15. There has been no-meaningful engagement with the requirement to consider alternatives by the Developer other than an extremely cursory consideration of alternative site layouts. The ES

⁴ Adopted by the Standing Committee on 03 December 2004.

includes no consideration of alternative sites and is predicated simply along the lines of an assumption that there will be a windfarm at this site and the only question is how many turbines, what height and where they will be sited. This is wholly non-compliant with the avoid-mitigate-compensate hierarchy that is the basis for decision-making where negative effects on important receptors are identified, as here. The Developer seeks to leapfrog avoidance and rely only on mitigation and compensation.

16. We highlight that the Government is in receipt of a 6-figure annual financial payment in respect of Phase I of this development. Further environmental information requests are outstanding at this time to clarify the financial arrangements relative to Phase II. However, our client has evidence that this may be influencing decision-making by the competent authorities detracting from a science-first approach and that separation of powers are not being adhered to. It is of utmost importance to the aims of this Convention to ensure that the impacts of such developments on key wildlife are minimised, including here the wildcat. In particular, the said Recommendations explicitly recognise the importance of the need for *“thorough environmental assessment procedure prior to selecting appropriate building sites and deciding on construction permits, in order to avoid damage to areas of particular ecological value”*. Moreover, the importance of the *“need for robust, objective baseline studies to inform sensitive siting to minimise deleterious effects on birds, other wildlife and their habitats, and the need for regular post-construction monitoring at consented installations where there are environmental sensitivities.”* As highlighted in our client's letter of objection, there can be no confidence that this development will not have such deleterious impacts (due, *inter alia*, to disturbance and emission of noise and cumulative effects) which have not been duly assessed. The precautionary principle must, moreover, be applied to such assessment.

Summary of the Legal Obligations to which the Contracting Party is Failing to Comply

17. Article 2 – the Contracting Parties *shall* take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific requirements, while taking account of economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally.
18. Article 3(1) – the Contracting Party *shall* take steps to promote national policies for the conservation of wild flora, wild fauna and natural habitats, with particular attention to endangered and vulnerable species, especially endemic ones, and endangered habitats, in accordance with the provisions of this Convention; (2) Each Contracting Party undertakes, in its planning and development policies and in its measures against pollution, to have regard to the conservation of wild flora and fauna.

Protection of Habitats

19. Article 4(1) – Each Contracting Party *shall* take appropriate and necessary legislative and administrative measures to *ensure* the conservation of habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats.

Protection of Species

20. Article 6 – Each Contracting Party *shall* take appropriate and necessary legislative and administrative measures to *ensure* the special protection of the wild fauna species in Appendix II. The following will in particular be prohibited for these species:

- a. All forms of deliberate capture and keeping and deliberate killing;
- b. The deliberate damage to or destruction of breeding or resting sites;
- c. The deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention.

The regime is recognised to apply to wild-born hybrids and this position has been affirmed as such by the Standing Committee.

21. Article 8 – in respect of.... cases where, in accordance with Article 9, exceptions are applied to species in Appendix II, Contracting Parties shall prohibit the use of all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species, and in particular, the means specified in Appendix IV.

Article 9 - Derogations

22. We acknowledge that Article 9 allows the Contracting Parties to make certain limited exceptions from the provisions of Article 4, 6, 7 and Article 8. Such exceptions require to be interpreted strictly in light of the objects of the Convention and under the failsafe condition that there must be no other satisfactory solution and the exceptions must not be detrimental to the survival of the population concerned. None of the grounds of such exception, therefore, apply – namely, for the protection of flora and fauna; to prevent serious damage to crops, livestock, forests, fisheries, water and other forms of property; in the interests of public health and safety, air safety or other *overriding* public interests (e.g. interests that cannot be served via alternative means, or in this case, sites); for the purposes of research and education, of repopulation, of reintroduction and for the necessary breeding; to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploration of certain wild animals and plants in small numbers.
23. In particular, in the absence of comprehensive national survey to adequately assess size and distribution of the species population(s), as well as the absence of cohesive and firm national action plan(s) to protect the remaining populations in the wild, it cannot be said with confidence that there is “*no satisfactory alternative*” to captive breeding. As such, we submit that the removal of wildcats (or high-scoring hybrids) from the wild is not in line with the Bern Convention (or Habitats Directive). Such measures could seriously disrupt the existing territory structures and could remove key breeding animals thereby damaging or indeed causing the extirpation of the remaining populations. In the Scottish situation, there is, based on the best available knowledge, a more effective alternative to captive breeding – namely, intensive and comprehensive neutering of domestic cats and low scoring hybrids in core wildcat areas. This largely eliminates the risk of further hybridisation and allows the wildcats to remain in the wild fulfilling their valuable ecological function. As submitted above, our client can demonstrate that the existing breeding programme is non-viable. Moreover, previous attempts in Europe to breed and reintroduce wildcats have had extremely low success rates with upto 80% mortality.⁵

⁵ IUCN (1996): Jackson, Peter Nowell, Kristin: Wild cats – status survey and conservation action plan. Available online at: <https://portals.iucn.org/library/node/6998>

09 April 2020

Annex 1: Supporting Submission to Complaint to the Bern Convention
Scottish wildcat (*Felis silvestris*)
For and on behalf of Wildcat Haven C.I.C



24. In this respect, we also allege there are serious instances of failures to report by the Contracting Party as required by Article 9(2).⁶ Further submissions can be provided on the details of these concerns, as required by the Standing Committee.

Conclusions and Actions Sought

25. For the reasons aforementioned, this complaint should be sustained in fact and in law. We respectfully urge the Standing Committee to open the case-file procedure and, following investigation, find the United Kingdom to be in non-compliance with its obligations under the Convention and to issue Recommendations accordingly. Allowing this species to go extinct on the territory of the Contracting Party is manifestly indefensible as an appropriate discharge of the obligations under this Convention and sets a dangerous precedent.
26. The Standing Committee is moreover specifically called upon to exercise its powers in terms of Rule 11 to the Rules of Procedure to undertake on-the-spot enquiries in this case.
27. Finally, we call upon the Standing Committee, recognising the complexity of these issues in both legal and scientific terms, to also use the UK's compliance failures as a catalyst and opportunity to galvanise the need to encourage and coordinate supplementary research on the subject matter of conservation of the *Felis silvestris* species across all Contracting Parties, and to make such other proposals as it sees fit to further the objects of the Convention accordingly. In particular, we submit there is an opportunity and demonstrable need to establish a working group in relation to this Felidae, similar to that which exists for large carnivores under the auspices of the Large Carnivores Initiative for Europe ('LCIE').

Ms Susan Shaw

Managing Partner, Living Law

susan@livinglaw.co.uk

DD +44(0)7929 996105

For Wildcat Haven

Dr Paul O'Donoghue

Director & Chief Scientific Adviser



⁶ By virtue of Article 9(2) – Contracting Parties are obliged to report every two years to the Standing Committee on the exceptions mentioned in the preceding paragraph. Such reports must specify:

- The populations which are or have been subject to the exceptions and, where practical, the number of specimens involved;
- The means authorised for the killing or capture;
- The conditions of risk and the circumstances of time and place under which such exceptions were granted;
- The authority empowered to declare that these conditions have been fulfilled, and to take decisions in respect of the means that may be used, their limits and the persons instructed to carry them out.
- The controls involved.

09 April 2020

Annex 1: Supporting Submission to Complaint to the Bern Convention
Scottish wildcat (*Felis silvestris*)
For and on behalf of Wildcat Haven C.I.C



For Bioscan UK

Dominic Woodfield

Senior Ecologist & Managing Director



Supporting Productions

General Documents

1. IUCN publication: “*Conservation of the wildcat (Felis silvestris) in Scotland: Review of the conservation status and assessment of conservation activities*”. Available online at: <http://www.scottishwildcataction.org/media/42633/wildcat-in-scotland-review-of-conservation-status-and-activities-final-14-february-2019.pdf>
2. Related BBC Press Release (Dec 2019): <https://www.bbc.co.uk/news/uk-scotland-46617965>
3. IUCN Cat Classification Task Force: A revised taxonomy of the Felidae (2017). Available online: https://repository.si.edu/bitstream/handle/10088/32616/A_revised_Felidae_Taxonomy_CatNews.pdf
4. Trapping license granted by Scottish Natural Heritage in favour of Dr Paul O'Donoghue (dated 20th September 2012) (copy attached)

Environmental Information Requests

5. EIR correspondence dated 6th and 7th June 2018 (Note: referencing ‘hostages to fortune’) (attached).
6. EIR from Scottish Natural Heritage confirming no EPS licence held for commercial disturbance activities (dated 9th April 2019). Note: this was only obtained following appeal to the Scottish Information Commissioner.

Clashindarroch Forest Logging Activity without EPS Licence

7. Forestry and Land Management Plan (online [here](#)). Note: as our client can demonstrate, the practice also does not follow the rhetoric herein stated.
8. Felling map – showing the extent of planned felling at the forest (attached).

Vattenfall Windpower Limited – Existing and Proposed Development

9. Details of application for consent for Clashindarroch II submitted to the Scottish Government Energy Consents Unit under section 36 of the Electricity Act 1989 by Vattenfall Windpower Limited (online [here](#)).
10. Letter of objection to Clashindarroch II submitted on behalf of Wildcat Haven C.I.C (online [here](#)).

Captive Breeding Programme

11. Breeding studbook data – detailing 21 kittens born (14 neutered, 5 dead and 2 unknown) (attached).
12. Press link regarding cats known as “Merida” and “Brave” (dated 24 June 2012). Available online: <https://www.ross-shirejournal.co.uk/news/double-debut-for-wildlife-park-stars-118404/>

09 April 2020

Annex 1: Supporting Submission to Complaint to the Bern Convention
Scottish wildcat (*Felis silvestris*)
For and on behalf of Wildcat Haven C.I.C



Founded in 2013, Living Law is a public interest, globally focussed law firm based in Scotland that seeks to advance access to environmental information, public participation and access to environmental justice in line with the UNECE Aarhus Convention and Principle 10 of the Rio Declaration. We advocate for the Environmental Rule of Law to help societies to make managed transitions to societies within Planetary Boundaries. That is, the ecological limits of the Earth system. For more information, you can find a copy of our mission statement on our website. www.livinglaw.co.uk



© Living Law 2019

Living Law is a Scottish Law firm regulated by the Law Society of Scotland

This briefing does not, and is not intended to, cover every aspect of the topics which it addresses. It is not designed to provide, and does not constitute, legal or other such advice. No reliance should be placed on its terms in that manner by any third party.

