

**NOAHs innspill til juridiske spørsmål
fra Klima- og Miljødepartementet**

Herunder følger NOAHs innspill til de ulike juridiske spørsmål sendt ut av KLD. Dokumentet er hovedsaklig på engelsk da det omhandler engelske kilder, og NOAH ber om å få ettersende en korrekturlest og ev. oversatt versjon. Vedlagt er også ni dokumenter med relevans for spørsmålene, som vi ønsker at departementet skal legge ved saken og vårt høringsvar.

1) Forholdet mellom Stortingets vedtatte bestandsmål og vurderingen av vilkårene for felling etter nml. og Bernkonvensjonen. I denne sammenheng er det av interesse å få vurdert føringer gitt av Stortinget i behandlingen av de ulike rovviltforlikene og naturmangfoldloven.

Three main points:

- *Exceptions under Article 9 cannot be considered in isolation from other provisions of the Bern Convention / Norway has to evaluate resorting to exceptions in light of its obligations under Article 2 (which is a more far-reaching obligation than securing the population goal of three litters per year). According to Article 2, Norway needs to secure a population level which corresponds in particular to ecological, scientific and cultural requirements*
- *Stortinget's political guideline of maintaining the wolf population within the population goal of 4-6 litters per year cannot be used to justify the killing of wolves under Article 9, because the use of Article 9 derogations for management intervention in expanding populations is ruled out in case of wolf that is listed in Appendix II of the Bern Convention as a specially protected species (assessments need to be made on a case-by-base basis, and a maximum population goal cannot therefore be determined beforehand)*
- *A number of aspects of the Norwegian wolf policy are either in contradiction with the Bern Convention (weighing of interests) or do not exist at all (practical commitments based on good faith to the achieve the conservation goals of the Convention and how this is done in cooperation with Sweden, lack of a national and an international management plan).*

These points altogether suggest that any application of exceptions should be stalled for the time being, or used only in extremely exceptional circumstances.

When addressing the issue of relationship between the «bestandsmål» and the relevant exceptions provided in the nml. and the Bern Convention, then we need to establish the context in which those exceptions are being applied. This means that we need to look at the more general aims of the protection of the wolf and the corresponding prohibitions (which actions are prohibited). Keeping in mind the general aims and the context is important, because this will also inform how the exceptions can be applied.

In this regard, we would like to draw your attention to the article on Norway's wolf policy and the Bern Convention published in Journal of International Wildlife Law and Policy, written by a renowned legal scientist in this area of law Arie Trouwborst and his colleague Floor M. Fleurke from Tilburg Law School, and John D.C. Linnell from NINA.

In this article (hereinafter referred to as Trouwborst 2017 et al. Article) Trouwborst et al. point out that the Convention does not allow for exceptions in respect of Article 2, and therefore the population standard provided in the Article is the absolute minimum. Trouwborst further points out that although the Convention does not define what is a population level corresponding to ecological (and scientific and cultural) requirements, **this level «can safely be assumed to be well above that at which a species is in danger of extinction»** (referring to M. Bowman, P. Davies and c. Redgwell, Lyster's International Wildlife Law, 2nd ed., 2010, s. 300). This conclusion finds

support in numerous Recommendations made by the Standing Committee where the level required by Article 2 has been alternatively described as a «favourable conservation status» and a «satisfactory conservation status» (Standing Committee Guidelines No. 3 (1993) and Standing Committee Recommendation No. 163 (2012)). Trouwborst et al. have concluded that **«actively suppressing the growth of the population that is below the prescribed level runs counter to the obligation imposed by Article 2» and that «the current wolf population target of four to six reproductions appears to be well below the level required by Article 2».**

With regard to Stortingets decision about «bestandsmål» we would also like to draw attention to this excerpt from the European Commission's reasoned opinion issued in 2011 against the government of Sweden on the breach of its obligations under the Habitats Directive that shows that the setting a «bestandsmål» that functions as a maximum to the wolf population is not in accordance with the Habitats Directive (<http://jandarpo.se/upload/2011%20RO%20om%20varg.pdf>):

3.25 Kommissionen ansåg att habitatdirektivet inte gör det möjligt att fastställa ett tak, inte heller tillfälligt, för arter som förtecknas i bilaga IV till direktivet, och att detta resonemang är ännu mer relevant för den svenska vargstammen eftersom den har en ogynnsam bevarandestatus. Det faktum att ett tak fastställdes för antalet djur i den svenska vargstammen har faktiskt stoppat dess utveckling mot en gynnsam bevarandestatus. Dessutom är storleken på den relevanta populationen för liten för att en ytterligare försämring av dess genetiska sammansättning ska kunna förhindras och gör att populationen fortsätter att vara drabbad av de faror som är typiska för små populationer.

The Stortinget's interpretation of the conservation goal - «å sikre overlevelsen til alle de store rovviltartene i norsk natur» – is clearly running short of the goal laid down in Article 2 of the Bern Convention. The population level that meets ecological and scientific requirements is clearly not satisfied by the population goal of 4-6 litters. We find support to this from the following scientific sources:

- "... the high rate of congenital anomalies that Scandinavian wolves suffer, ..., is a manifestation of poor population health that would be mitigated by larger population size and increased immigration, inasmuch as they would mitigate the genetic deterioration that is almost certainly the cause of many of these anomalies. For this reason, instituting a public harvest of wolves designed to limit abundance at this time is almost certainly inconsistent with the conservation goal of a healthy wolf population, inasmuch as limiting abundance would exacerbate genetic deterioration, at least until the time when rates of natural immigration are great enough to support the population's genetic health and the conservation status is favourable." (Räikkönen, 2013)
- Boitani and Powell have shown that the rule-of-thumb of 50/500 of practical conservation, that has been used also in the case of the Scandinavian wolf population, has many problems (related mainly to the genetic aspects), and therefore should not be used as threshold values or targets, but rather as warning lights.
- Stokland article where he shows that initially this was meant to be only as a minimum. It was turned into a maximum by political actors. Therefore, it has no ecological nor scientific basis.

NOAH believes that the difference in wording in Articles 2 and Article 9 and considering the special protection status granted to wolves according to Article 6 of the Bern Convention has direct legal consequences in the current situation. They are as follows:

A) Article 9 provides the conditions for applying the exceptions, but the cumulative effects of applying these exceptions need to be assessed in light of the wider goal as laid down in Article 2. Norway has not engaged in such assessments, neither on national nor transboundary (international) level. Therefore, any application of exceptions under Article 9 need to be preceded by respective assessments.

Section 40 of the Explanatory Report to the Bern Convention states: «It was agreed that the general condition that the exception must not be detrimental to the survival of the population concerned **does not affect the obligation under Article 2 to maintain that population at a level that corresponds in particular to ecological, scientific and**

¹ Räikkönen J, Vucetich JA, Vucetich LM, Peterson RO, Nelson MP (2013) What the Inbred Scandinavian Wolf Population Tells Us about the Nature of Conservation. PLoS ONE 8(6): e67218.

cultural requirements». In practical terms, this means that the 4-6 litter goal per year cannot be simultaneously a baseline for assessing whether the application of the exception will be detrimental to the survival of the population and a policy goal for the conservation of wolves.

This conclusion is supported by Trouwborst and also by Shine in their respective legal analysis:

- Trouwborst argues that „the setting of a fixed a priori population *maximum* for wolves (or indeed any other Appendix II species) at whatever level – even if this level were to be well above the one required by Article 2 – appears to sit uncomfortably with the system of strict protection laid down in Articles 6 and 9, which requires any removal of wolves to pass the test of the three conditions of Article 9 on a case-by-case basis” (s. 7)

- Shine states that „there is no slackening of vigilance for individuals from endangered or vulnerable populations of species, for which individual derogations are still needed”, meaning that the use of Article 9 derogations for management intervention in expanding populations is ruled out in case of wolf that is listed in Appendix II of the Bern Convention as a specially protected species (s. 10).

Also the Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention (2011) states that «When exceptions are considered with regard to populations that are not yet viable or in favourable conservation status, special caution should be taken» (p 7).

B) Norway needs to show how it is actively moving towards achieving the goal provided in Article 2 of the Convention. This is required by the principal rule of interpretation that has customary law status: a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” (Vienna Convention on the Law of Treaties, Art 31(1)).

As pointed out by Trouwborst et al. in the article, the UN International Law Commission has clarified this rule as follows: “When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted.” (s. 4, referring to the Yearbook of the International Law Commission, 1966, 4 (U.N. Pub.Sales No.67.V.2, Vol.II)).

If Norway is delaying the fulfillment of its obligations or is applying other means than those provided in the Convention, as pointed out in the «Stortingsmelding», the least Norway should do is to prove that it is acting in good faith in order to achieve the goals of the Convention. It seems to be self-evident that a management plan with a long-term goal of ensuring a viable wolf population to that respect is desirable. The existence of such a management plan becomes even more important in case of a transboundary population like the Scandinavian wolf, because it relates to the question of state responsibility. Any delays or other means of achievement need to be coordinated with the other state. No such coordination has taken place so far.

In addition to the points made above, we would like to emphasize that the weighing of interests on a general policy level where other than conservation interests are put on par with economic interests, as is apparent in the «rovviltforliket», fails to account for the wording of Article 2 of the Bern Convention. The formulation of Article 2 indicates that conservation interests will outweigh economic and recreational interests in case of conflict (reference to Trouwborst 2017, s. 4). Trouwborst et al. conclude that «the “object and purpose” of the Bern Convention would thus seem to dictate interpretations in favor of wildlife conservation rather than the contracting parties’ room for balancing conservation with other interests, and – to put it plainly – in favor of wild wolves rather than domestic sheep” (s. 5). This kind of hierarchy of interests is supported by the judgment of Oslo byrett in 1999 where the Court has stated that ««artsrikdom» er et overordnet mål” and that «Det overordnede mål underbygges av [Grunnloven § 110 b](#) om naturens mangfold og bærekraftige utvikling.»

NOAH believes that the lack of a management plan either on national or international level that is aimed at fulfilling the obligations provided in Article 2 of the Bern Convention severely restricts the possibility to resort to any of the exceptions in Article 9.

2) Betydningen av avveiningen mot andre viktige samfunnsinteresser og samiske interesser etter nml. § 14.

This provision needs to be interpreted in light of Article 2 of the Bern Convention, as it comes to drafting general

policy on wolves, or when weighing interests in the application of exceptions under Article 9. Article 9 is exhaustive in terms of what kind of other important societal interests can justify the application of exceptions. The only exception that does not specify which interests justify the use of the exception is stipulated in Article 9(1) para. 5. We refer to the Guidelines of 1993 by the Standing Committee (as revised in 2011), to the Swedish Supreme Court judgment made in December 2016 and our qualifying notes on that decision.

About the Swedish Supreme Court judgment, NOAH will make the following comments:

Den svenske dommen bør ses i den aktuelle sammenheng den ble gitt, og kan ikke brukes på norske forhold.

Svensk høyesterett konkluderte som kjent med at de regionale myndigheters avgjørelse om å skyte 24 ulv vinteren 2017 oppfylte de nødvendige kravene i følge svensk lov. De regionale myndighetenes avgjørelse var basert på § 23c i svenske jaktforskrifter som sier at felling av ulv må foregå under strengt kontrollerte forhold, på en selektiv basis og påvirke bare et begrenset antall individer.

Enda viktigere er det imidlertid å understreke at hensynet til et slikt spekter av samfunnsøkonomiske hensyn må ses i lys av anvendelse av dette unntaket. Hensyntagen til sosio-økonomiske interesser ble gjort etter en analyse av om ulvebestanden er tilstrekkelig beskyttet for å opprettholde "gunstig bevaringsstatus". Retten aksepterte anvendelsen av unntaket kun etter å ha fastslått at et sterkt rammeverk for beskyttelse av ulv med langsiktige mål for gunstig bevaringsstatus for arten er på plass. Ved analyse om hvorvidt gunstig bevaringsstatus vil bli opprettholdt, tok retten for seg genetisk levedyktighet av bestanden og vurderte om kvoten er innenfor trygge marginer. Retten mente at på nasjonalt nivå er det å fjerne opp til 46 ulv er innenfor akseptable grenser - dette utgjør 11% av den totale bestanden som er beregnet til 415 individer.

Ingen av disse elementene - vurdering av genetisk levedyktighet, trygge marginer eller målet å oppnå gunstig bevaringsstatus – er på plass i dagens norsk ulvepolitikk. Målet i norsk viltforvaltning er ikke å sikre gunstig bevaringsstatus av ulv - ei heller at ulven skal ut av kategorien som kritisk truet - men kun å hindre total utryddelse av bestanden. Å ha et slikt mål for den langsiktige ulvepolitikken kan i seg selv være i strid med § 5 i naturmangfoldloven.

Videre må man være klar over at den svenske dommen også er under kritikk, og at det er vitenskaplig strid om det foreligger gunstig bevaringsstatus for ulv i Sverige:

"Given the extremely low success rate of natural immigration or even relocation at this point, however, the extent to which wolves outside of Sweden and Norway can fairly be considered in determining FCS is questionable. Clearly, a record of successful immigration and improvement to genetic status must be established before the Swedish wolf's conservation status can be considered to be favourable."² (Espstein, 2016)

"Our results indicate that criteria for long-term genetic viability are not met for the current Fennoscandian wolf population. In order to meet such criteria, local population sizes as well as migration rates between subpopulations need to increase."³ (Laikre et al, 2016)

"Finally, the high rate of congenital anomalies that Scandinavian wolves suffer, (Fig. 3), is a manifestation of poor population health that would be mitigated by larger population size and increased immigration, inasmuch as they would mitigate the genetic deterioration that is almost certainly the cause of many of these anomalies. For this reason, instituting a public harvest of wolves designed to limit abundance at this time is almost certainly inconsistent with the conservation goal of a healthy wolf population, inasmuch as limiting abundance would exacerbate genetic deterioration, at least until the time when rates of natural immigration are great enough to

² Yaffa Epstein, Favourable conservation status for species: Examining the Habitats Directive's key concept through a case study of Swedish wolf, *Journal of Environmental Law*, 2016, 28, 221-244.

³ Laikre et al, Metapopulation effective size and conservation genetic goals for the Fennoscandian wolf (*Canis lupus*) population, *Heredity* (2016) 117, 279–289 Official journal of the Genetics Society

support the population's genetic health and the conservation status is favourable."⁴ (Räikkönen, 2013)

"Further, for a population to be viable in the long term, it must be sufficiently large and connected to other populations to maintain genetic diversity. This is not the case for the Nordic wolf populations."⁵ (Epstein, 2013)

3) Vilkårene etter nml. § 18 annet ledd og Bernkonvensjonens bestemmelser om at uttak ikke må true bestandens overlevelse og at formålet ikke må kunne nås på annen tilfredsstillende måte.

One of the most common arguments made with respect to the wolf in Norway is that it is not actually endangered, because it is part of a Scandinavian population that is considered in a favourable conservation status by the Swedish government. Firstly, we would like to point out that the assessment of the population as favourable has been contested by the European Commission and the Commission is still due to provide its response on the matter. This means that the conservation status of the Scandinavian wolf is open and cannot yet be presumed to be in favourable conservation status (see also the references in the above point). This is also pointed out in the „Stortingsmelding“: „Forskningsgruppene er enige i at populasjonen av ulv i Skandinavia utgjør en naturlig del av en større nordeuropeisk populasjon som omfatter ulv i Norge, Sverige, Finland og Russland, samt ned til Baltikum og Polen, gjennom migrasjon og derav genflyt. Gitt denne migrasjon mener Naturvårdsverket og alle forskerne unntatt én at populasjonen av ulv i Sverige må være på minst 300 individer for å ha gunstig bevaringsstatus. Dette forutsetter at det er migrasjon og innvandring fra den finsk-russiske populasjonen til den sør-skandinaviske ulvepopulasjonen, hvor minst en finsk-russisk immigrant skal reprodusere seg med ulv i den sør-skandinaviske populasjonen hver 5-årsperiode. Naturvårdsverket viser til at dersom det ikke er innvandring og reproduksjon av nye immigranter (og derav ingen genetisk utveksling) med sør-skandinaviske ulver, **må den skandinaviske ulvepopulasjonen bestå av minst 1 700 ulver for å kunne anses å ha gunstig bevaringsstatus.**”

The principle of shared responsibility is in its infancy in international law and Trouwborst states that «the legal viability of this approach (referring to shared responsibility as advocated in the Carnivore Guidelines) – and its ability to influence the interpretation of Article 2 (and indeed Article 9) – utterly hinges on the existence of formal safeguards agreed at the intergovernmental level to ensure the observance of the population-level plan concerned and the achievement of its objectives» (s. 9). Trouwborst concludes that «the concept of transboundary population-level management presently does not in any way lower or otherwise affect the standards to be met by Norway regarding wolves under Articles 2, 6 and 9 of the Bern Convention» (s. 9).

We would like to point out that Norway has allowed to shoot up to 18 wolves in winter 2016/2017. This makes about **26% of the Norwegian wolf population** of around 68 individuals. In Sweden, altogether 46 wolves were assessed to be in the safe margins of a population of around 415 wolves. This constituted **11% of the Swedish wolf population**. It is highly doubtful that the killing of such a high number of wolves is in line with the principle of shared responsibility. The killing of wolves in Norway means that there are less wolves who wander from Norway to Sweden, but also that more wolves from Sweden will come to Norway because the territory is freed up. This trend will undoubtedly have an impact on the number of wolves in Sweden. In any case, it is noteworthy that the two neighbouring countries who share the same wolf population apply so different safety margins (in Norway, there are no safe margins in place).

4) Hva skal til for at vilkåret om å "avverge skade på avling, husdyr, tamrein, skog, fisk, vann eller annen eiendom" i nml. § 18 første ledd b), og det tilsvarende vilkåret om å "avverge alvorlig skade på avling, husdyr, skog, fiske, vann eller andre former for eiendom" i Bernkonvensjonen artikkel 9 første ledd andre strekpunkt, er

⁴ Räikkönen J, Vucetich JA, Vucetich LM, Peterson RO, Nelson MP (2013) What the Inbred Scandinavian Wolf Population Tells Us about the Nature of Conservation. PLoS ONE 8(6): e67218.

⁵ Yaffa Epstein (2013) Population-based species management across legal boundaries: The Bern convention, The Habitats Directive, and the Gray Wolf in Scandinavia, 25 Geo. Int'l Envtl. L. Rev. 549-587.

oppfylt i denne saken? Temaer som har vært nevnt i debatten er bl.a. skade på bufe, tamrein og hund og skade på eiendom/rettigheter knyttet til jakt som følge av ulvens predasjon på elg.

We refer to the European Commission Guidance Document to the Habitats Directive - nature conservation ground for removing wolves - cannot be used to justify the removal of wolves because of their impact on common prey species like roe deer, wild boar and red deer.

In terms of how the relation between «rovviltforskriften», «naturmangfoldloven» and «viltloven» should be interpreted, we refer to our letter on the extension of the time of licenced hunting into the breeding season of wolves, and we would like to reformulate this and send additional comments to this specific point.

5) Hva skal til for at vilkåret om å ivareta "allmenne helse- og sikkerhetshensyn" i nml. § 18 første ledd c) og det tilsvarende vilkåret om " offentlige helse- og sikkerhetshensyn" i Bernkonvensjonen artikkel 9 første ledd tredje strekpunkt er oppfylt i denne saken?

We refer to Carnivore Guidelines which provides for the removal of large carnivores that are «rabid, aggressive, habituated or other specific individual animal that demonstrate unwanted behaviour». NOAH underlines here that normal curious behaviour of young animals, or other behaviour that is defined as normal for wild animals cannot automatically be defines as «unwanted» because certain parts of a community see the wolf itself and the animals normal behaviour as «unwanted».

6) Hva skal til for at vilkåret om å ivareta "andre offentlige interesser av vesentlig betydning" i nml. § 18 første ledd c) og Bernkonvensjonen artikkel 9 første ledd tredje strekpunkt er oppfylt i denne saken?

In the balancing it is essential to take into account also the interests protected by Grunnloven § 112 – the right to «en natur der produksjonsevne og mangfold bevares».

7) Er det hjemmel for felling etter naturmangfoldloven og Bernkonvensjonen pga. menneskers frykt?

We find that there is no independent ground neither in the Biodiversity Act nor the Bern Convention to allow killing of wolves because of humans' fear of wolves. We would like to remind you that one of the main reasons why wolves were exterminated in Norway, was also the dislike of wolves due to fear. In this respect, the Declaration of Principles for Wolf Conservation (Manifesto and Guidelines on Wolf Conservation of the Wolf Specialist Group of the International Union for the Conservation of Nature and Natural Resources – IUCN, Appendix to the SC Recommendation No. 17 (1989)) states the following:

4. Throughout recorded history man has regarded the wolf as undesirable and has sought to exterminate it. In more than half of the countries of the world where the wolf existed, man has either succeeded, or is one the verge of succeeding, in exterminating the wolf.

5. This harsh judgement on the wolf has been based, first, on fear of the wolf as a predator of man and, second, on hatred because of its predation on domestic livestock and on large wild animals. Historical perspectives suggest that to a considerable extent the first fear has been based on myth rather than on fact. It is now evident that the wolf can no longer be considered a serious threat to man. It is true, however, that the wolf has been, and is some cases still is, a predator of some consequence on domestic livestock and wildlife.

6. The response of man, as reflected by the actions of individuals or governments, has been to try to exterminate the wolf. This is an unfortunate situation because the possibility now exists for the development of management programmes which would mitigate serious problems, while at the same time permitting the wolf to live in many areas of the world where its presence would be acceptable.

The Bern Convention is a response of the international community to resulting extermination of many wildlife species, with an aim to secure the come-back of already lost populations or maintenance of the remaining ones despite of the economic and other pressures from an expanding human society. Therefore, an adequate response to the fear of local inhabitants is not killing of wolves, which would only be a temporary solution, because new wolves would soon move into the area.

There is also data that wolves do not pose a threat to humans, and therefore the fear is not based on a real situation, but a perception of the wolf by certain individuals. Although fear certainly can affect the quality of life of

a person, in legal terms it is not a proportional measure to just eliminate the object of fear (which is an internationally protected species), because:

- it will not achieve its objective (more wolves will move into the area),
- the measure is not necessary (wolves do not actually pose a realistic threat),
- other more effective measures can be applied (educational campaigns, precautions should be taken to avoid conflict situations, such as ensuring a sufficient population of prey animals in the area, not letting dogs out unattended or running loose, etc.).

8) Uavhengig av vurderingene i punktene 4 – 7 ovenfor: Kan felling tillates uten å være i strid med Bernkonvensjonen ut fra bestemmelsen i artikkel 9 første ledd siste strekpunkt som åpner for å tillate "i strengt kontrollerte former, på selektivt grunnlag og i begrenset utstrekning, fangst, forvaring og annen skjønnsom bruk av enkelte ville dyr og planter i begrenset antall"?

The relevant exception can be used only, if it has been stipulated in Norwegian law. We refer to our letter on the Swedish Supreme Court judgment of December 2016 (copied also into the above points). In our letter we show that the Court allowed resorting to this exception under the Habitats Directive only in very strict circumstances. We believe that most of the preconditions for applying this exception are currently not in place in Norway, even if the exception will be added into the nml. We also will elaborate on this point further in our response to the hearing due within 27.2.17.

9) Hva er betydningen av Bernkonvensjonens bestemmelser når det fattes enkeltvedtak etter nml.?

All individual decisions need to be in compliance with international conventions that are part of the Norwegian legal system.

10) Hvilken betydning for handlingsrommet etter nml. har det at Bernkonvensjonen ikke har direkte sanksjoner knyttet til brudd på konvensjonen?

The Convention's provisions are legally binding, with or without the existence of sanctions. Norway is bound by its international obligations according to Grunnloven.

Med vennlig hilsen

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