

## Kennedy C (Christopher)

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**From:** susan@livinglaw.co.uk  
**Sent:** 03 February 2022 12:55  
**To:** 'Smith, Kirsty'; Kennedy C (Christopher)  
**Subject:** WH Inquiry Documents with corrected CD numbering annotated  
**Attachments:** CD 13.3.1 - 818960 - Updated with correct CD references 03-02-22.pdf; CD 13.4 818948 - Updated with correct CD references 03-02-22.pdf; CD13.13 818978 - Updated with correct CD references 03-02-22.pdf; CD 13.1 818946 - Updated with correct CD references 03-02-22.pdf; CD 13.2 818947 - Updated with correct CD references 03-02-22.pdf

Good afternoon, Christopher –

*(copy to Kirsty)*

I hope this email finds you well.

Following completion of the Core Documents List, I thought it may be beneficial to the Reporter/Parties to be provided with updated copies of our principal inquiry documents etc noting the correct CD numbering throughout, where now allocated. At the same time as dealing with this administrative tidy-up, we have addressed the pagination issue being otherwise dealt with by Kirsty so as to ensure consistency of page numbering between parties' documents. I hope this is helpful with a view to minimising double-handling. (You will note that the electronic page numbering is now shown in the bottom right in blue text for ease of differentiation).

In addition, the Reporter had raised a query in connection with WH Hearing Statement on Policy matters via email dated 25/01. I confirm that the reference referred to is indeed a typo that worked into a late version. The error is marked in red strike through here for clarity purposes to avoid confusion. Please convey my apologies for the short delay in responding on that due to a COVID related personal matter.

I confirm for your file that aside from this, there are no changes other than addressing these administrative matters to tidy up CD cross-referencing. We hope this is, however, helpful for completeness and clarity purposes.

Kind regards,

Susan

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**SECTION 36 ELECTRICITY ACT 1989  
TOWN AND COUNTRY PLANNING (SCOTLAND) ACT 1997  
ELECTRICITY WORKS (ENVIRONMENTAL IMPACT ASSESSMENT) (SCOTLAND)  
REGULATIONS 2017**

**ADDENDUM TO DRAFT INQUIRY STATEMENT OF 17/12/21**

**INQUIRY STATEMENT – CLASHINDARROCH II WINDFARM PLI**

**ON BEHALF OF THIRD-PARTY OBJECTOR, WILDCAT HAVEN C.I.C**

**BY LIVING LAW**

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**MS SUSAN D. SHAW**, Solicitor (Scottish Qualified)  
LLM, LLB(Hons), Dip LP, NP

**17 January 2022**

Inquiry Statement (Addendum):	Clashindarroch II PLI for and on behalf of Wildcat Haven C.I.C
Matter Ref:	WH/E/CLASH/2019/1/SDS
DPEA Ref:	WIN-110-02
ECU Ref:	ECU00002002

**Addendum to Statement of 17 December 2021**

**Clashindarroch II Windfarm – Public Local Inquiry**

*in connection with the application to Scottish Ministers under the Electricity Act 1989, section 36 for consent and deemed planning permission for the proposed construction of a windfarm with upto 14 wind turbines (180m blade-tip height and 56 – 84MW installed capacity), together with associated infrastructure at Clashindarroch Forest, by Huntly.*

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**1. Introduction and Position Statement – Update**

1.1 This Inquiry Statement provides advance notice of third-party Wildcat Haven’s (“WH”) case on ecology matters before the Clashindarroch II Windfarm Public Local Inquiry (ref: WIN-110-02). For the sake of brevity, it should be read in conjunction with the other written submissions and Hearing Statements submitted and advanced by WH, which are incorporated herein. It should particularly be read together with Wildcat Haven’s ‘Outline Statement’ dated 17 December 2021 (**CD 13.01**) (hereafter, the “**Draft Inquiry Statement**”), to which only minimal modifications are regarded as required.

1.2 The evidence on Ecology Matters for WH to the PLI will address:-

- 📍 At Inquiry Session (No.2) – the focussed technical Wildcat and EIA matters within the scope of that session on methodology and data used to predict impacts/effects on the wildcat population. These are now documented fully within the Draft Inquiry Statement. Minor additions here encompass additional documents intended to be referred to within that session by WH’s witnesses. The evidence of WH will demonstrate the inadequacy of the Applicant’s EIA as a basis for predicting with sufficient confidence the impacts on the critically endangered Scottish wildcat and thus as a basis for legally compliant decision-making;
- 📍 At Hearing Session (Policy and Guidance) – the incompatibility of the proposed development with key planning policy (including, Aberdeenshire Council’s Adopted LDP Policy E1 – Natural Heritage) and national and other Scottish Government policy, to which appropriate weight should be accorded by Scottish Ministers, as decision-maker. This is as particularised fully within the Hearing Statement No.1 for WH.

- 📍 At Hearing Session (Conditions) – the need for more robust conditions to protect the Scottish wildcat without prejudice to the overall case advanced by WH for refusal of the proposed development by Scottish Ministers. This is as particularised fully within the Hearing Statement No.2 for WH.

1.3 To date, WH has not entered into any Statement of Agreed Matters with the Applicant but indicates it is willing to do so as helpful with a view to further focussing the scope of evidence to the inquiry session on ecology matters.

1.4 Representation and expert witnesses remain as specified in the Draft Inquiry Statement (of 17 December 2021).

## 2. Objection to the Proposal and Scope of Evidence

2.1 WH has objected to the proposed development since this Application was lodged with the ECU. The basis of objection is centred on wildcat legal, policy, regulatory and technical matters, all as documented in detail to the inquiry in its submissions already. The basis for objection is well-rehearsed and it is not proposed to duplicate this further here. However, for the purposes of clarity, WH's position to inquiry remains that:-

- 📍 The Scottish wildcat is not functionally extinct in the wild in Scotland. The presence of putative wildcat at Clashindarroch II is beyond doubt and efforts should instead now be taken to conserve this remnant population nuclei – as the single most important population known to remain in Scotland. The wildcat presence is not a matter of 'value judgement'; rather, it is one of legal compliance for such a critically endangered population;
- 📍 The presence of the critically endangered Scottish wildcat at the development site (and its environs) fundamentally render the proposed development as not being the 'right development in the right place': the heart of Scottish Planning Policy and development controls;
- 📍 The policy support for important renewable energy generation to address the climate crisis (which is accepted by WH) is manifestly tempered, *inter alia*, by the wider biodiversity policies to which WH has referred and more ambitious 'Net Zero' policies emerging which can achieve Scotland's world-leading climate targets;
- 📍 It is submitted that the Planning Authority, Aberdeenshire Council, has not placed sufficient emphasis on Policy E1 (Natural Heritage) of the Adopted LDP 2017 in consideration of the scheme in planning terms – a significant material consideration in assessing the proposed scheme's overall acceptability. Scottish Ministers require to ensure that the biodiversity crisis be weighed appropriately alongside material considerations relating to the climate crisis (which are given greater emphasis by the Applicant).
  - The legal and regulatory considerations applicable are particularised in WH's FWS #1 (CD 15.6).

- The evidence on policy basis is as particularised fully in the Hearing Statement of Wildcat Haven for the Policy/Guidance Hearing session.
- 📍 The Developer’s EIA is materially deficient and an insufficiently robust basis for decision-making. It does not sufficiently predict the impacts on the Scottish wildcat with the required degree of confidence for such an important receptor (including, the base-line scenario). No confidence can be placed on, nor attached to, the continued wildcat presence at the site (and environs) post-Clashindarroch I. The impacts of the Clashindarroch I windfarm are unknown;
- 📍 WH understands that the Statutory Nature Conservation Agency, Nature Scot (SNH), does not formally object to the proposed Development. However, WH’s stance remains that this is the result of a misdirection in law as to the “Avoid-Mitigate-Compensate” hierarchy applicable to the population of the critically endangered Scottish wildcat at the site (and its environs), as is reflected by national policy and law. In any event, it is Scottish Ministers that are the decision-maker in the instant case. The Bern Convention recommended the Scottish Government and agencies to work with WH to develop protocols for the protection and conservation of remnant wildcat nuclei in Scotland. Scottish Ministers earlier stated this consenting process would duly consider these matters. Suggestion of the earlier complaint’s “dismissal” is thus a misrepresentation in fact and in the face of clear and compelling evidence now as to species presence at the proposed development site;
- 📍 The mitigation proposed by the Applicant cannot address or remedy these concerns and deficiencies – and such as are put forward via proposed conditions are regarded as weak, inadequate and insufficiently robust for such a critically endangered species. They do not provide a basis for confidence in decision-making. This is addressed and as detailed in the Hearing Statement of Wildcat Haven for the Condition Hearing Session. Negative impacts on the Scottish wildcat should foremost be avoided.

See also further: para 23 of the Draft Statement.

2.2 The evidence of Wildcat Haven addresses and provides advance notice of these matters to Inquiry via the following:-

- i) the Draft Statement of 17/12/2021 aforementioned – in respect of the Inquiry Session on Ecology;
- ii) the Hearing Statement on Policy and Guidance;
- iii) the Hearing Statement on Conditions.

### **3. Information and Disclosure – Update**

3.1 WH has reviewed the final draft terms of the NDA presented by the Applicant with regards to facilitating its access to remaining and complete Confidential Data, which is withheld by the Applicant on species protection and legal grounds. On balance, the presented terms together with late stage now of deliberation (i.e. risks vs limited utility of concluding at this

junction) render the NDA unacceptable to a small conservation organisation such as WH. These concerns centre now primarily on subsequent and prospective enforcement and third-party terms for such. This means that WH has required to proceed with its objections to the Inquiry on the basis of the more limited information contained within the redacted Confidential Annexes (“CA”) disclosed to the public domain latterly by the Applicant.

3.2 WH’s position remains that the CA has been disclosed at an inappropriately late stage of the inquiry and is regarded as prejudicial to the participation by both WH and the public concerned in the proceedings. The Reporter’s recent ruling (13/01/22) indicating no change to planned procedure in this regard is, however, noted.

3.3 WH’s position is that it is unable to now devote its limited funding to further detailed negotiation of suitable NDA terms, ongoing already since September 2021, to otherwise support the full participation of its Witnesses and its advisers in the ongoing inquiry proceedings. The consequence of this is that the draft Statement of Case/Inquiry Statement put forward by WH on 17 December 2021 now stands and provides its summary of case to the inquiry ecology session/topics. Notwithstanding, this remains regarded as being prejudicial to the adequate exploration and testing by this inquiry of matters such as risk to den-sites and breeding females present.

#### 4. Additional Documents etc to be Referred to at Ecology Inquiry Session

4.1 The key documents to which WH intends to refer within the Inquiry Session on Ecology are already detailed in the Draft Inquiry Statement (CD 13.01) or otherwise lodged as Core Documents. WH notes the Reporter’s directions as regards the Scope of the planned Inquiry session. It is anticipated that marginal reference will require to be made by WH’s Witnesses to its FWS #1 (CD 15.6 and 15.7.1 – 48) in respect of legal and regulatory matters only to the extent which they are necessary to explain and contextualise the technical points being adduced as part of the now otherwise focussed inquiry session.

4.2 In addition, the following documents are being lodged and it is anticipated will be referred to by WH’s witnesses, as follows:-

##### *Documents and Additional Evidence of Dr O’Donoghue*

<u>Fig. Label</u>	<u>Description</u>	<u>Purpose Adduced</u>
<b>CD 13.6.1 - 1</b>	Photo “ <i>Ecological Desert</i> ” taken 14/01/20 by Dr O’Donoghue. (Photo – 2022-01-11-14-31-23.jpg)	To demonstrate example of unsuitability of the habitat at Clash 1 for wildcats or indeed any wildlife.
<b>CD 13.6.1 2 -to- 12</b>	Series of 10 photos taken by Dr O’Donoghue dated 02/11/21.	To demonstrate areas of existing suitable wildcat habitat within the Clashindarroch.
<b>CD 13.6.2</b>	Photograph produced by the Applicant (Vattenfall)	To demonstrate poor habitat at the existing Clashindarroch I site.

<b>CD 13.6.3</b>	Video PICT-0009KB-18-01-17	To demonstrate an example of wildcat presence identified by WH at Clashindarroch as part of fieldwork.
<b>CD 13.6.4</b>	Video 18 – Scottish Wildcat	To demonstrate an example of wildcats identified in the Clashindarroch as part of WH’s survey field work.

It is understood that admitting such video evidence would be unusual, but these are short clips for contextualisation of the issues before inquiry and their importance. The Reporter’s permission for such is accordingly sought, with disclosure per the normal Core Documents timetable.

*Additional Scientific Papers*

1. R. Landel (1998), ‘Anthropogenic, Ecological and Genetic Factors in Extinction and Conservation’, Res. Popul Ecol. 40(3), 1998, p. 259-269.	<b>CD 13.7</b>
2. R. Woodroffe et al (1998), ‘Edge effects and the Extinction of Populations Inside Protected Areas’, Science 280(5372), p. 2126.	<b>CD 13.8</b>
3. Francisco Palomares et al (2012), ‘Possible Extinction Vortex for a Population of Iberian Lynx on the Verge of Extirpation’, Conservation Biology 26 (4).	<b>CD 13.9</b>
4. N. M. Haddad et al (2015), ‘Habitat fragmentation and its lasting impact on Earth’s ecosystems’, Science Advances 2015;1:e1500052.	<b>CD 13.10</b>
5. Benson, John F., et al. “Extinction Vortex Dynamics of Top Predators Isolated by Urbanization.” <i>Ecological Applications</i> , vol. 29, no. 3, [Wiley, Ecological Society of America], 2019, pp. 1–14	<b>CD 13.11</b>

*Documents and Additional Evidence of Mr Woodfield*

<u>Fig. Label</u>	<u>Description</u>	<u>Purpose Adduced</u>
Annex 5 (Updated) <b>CD 13.03 - Annex 1</b>	Updated and complete version of the Annex 5 (originally dated 23-12-21) – Final dated 14-01-22.	Full particularisation of EIA deficiencies (final – update).
	<p>This analysis adduces 63 points of technical deficiency or failure with reference to Chapter 9 of the ES. These technical deficiencies are grouped as follows:-</p> <ul style="list-style-type: none"> <li>• Failure to comply with relevant assessment standards;</li> <li>• Exceptional reliance on flawed and unevidenced assumptions and leaps of faith;</li> <li>• Inadequate review and understanding of relevant scientific literature;</li> <li>• Failure of transparency;</li> <li>• Failure to apply the precautionary principle to the technical assessment uncertainties;</li> <li>• Factual inaccuracies.</li> </ul>	

### CD 13.3.

Figure 1 02	Clashindarroch 2015-2016_A3	Overlay of SWA data 2015-16.
Figure 2 03	Clashindarroch_2016_2017_A3	Overlay of SWA data 2016-17.
Figure 3 04	Clashindarroch_2017_2018_A3	Overlay of SWA data 2017-18.
Figure 4 05	Clashindarroch_Incidental_Records_2015_2018_A3	Incidental wildcat records 2015-18.

## 5. Hearing Sessions and Statements

5.1 As noted, two focussed Hearing Statements are submitted on behalf of Wildcat Haven which provide the details of its intended evidence to those sessions.

5.2 WH will be represented at both the Hearing Sessions by Mr Dominic Woodfield (Ecology Expert) and Ms Susan Shaw (Solicitor). In respect of each session, its evidence intends to address and discuss the following:-

- Topic 1: Policy and Guidance

The appropriate weight to be accorded to:-

- Policy E1, Natural Heritage of Adopted Aberdeenshire Council Local Development Plan 2017 (CD 3.5).
- The 2020 Environment Strategy for Scotland (CD 3.23).
- SPP (CD 3.1).
- Scotland's Third National Planning Framework (NPF3) (CD 3.2).
- Scotland's Fourth National Planning Framework (NPF4) – Consultation Draft (CD 3.3).
- Onshore Wind Policy Statement 2017 (CD 4.4).
- Onshore Wind Policy 2021 (Refresh) – Consultation draft (CD 4.42),

which WH submit taken together support the need for refusal of the scheme by the Scottish Ministers. WH intends to participate in this session in full.

- Topic 2: Conditions

Involvement in this session is restricted solely to conditions pertaining to the Scottish wildcat and will focus on the following aspects:-

- Terms of the Outline HMP for Wildcat matters, which are regarded as insufficiently robust and non-specific;
- Pre-Construction Safeguarding Conditions; and
- Post-Construction Safeguarding Conditions.



## **6. Additional Documents etc to be Referred to at Hearing Sessions**

6.1 The Documents to be referred to at the Hearing Statements are as specified within each of the said Statements for the two sessions respectively.

## **7. Site Visit Update**

7.1 In addition to the existing Clashindarroch 1 site, it is suggested the Reporter may wish to include within her site visits the areas relating to the structures/compound associated with Clashindarroch 1.

SUSAN SHAW, LL.M, LL.B (Hons), Dip. LP, NP  
Solicitor (Scottish Qualified), Living Law

for Wildcat Haven C.I.C (third party objector)

17 January 2022