

NEW JERSEY BLACK BEARS (URSUS
AMERICANUS), ANIMAL PROTECTION
LEAGUE OF NJ, ANGELA METLER,
DOREEN FREGA, AND SUSAN
RUSSELL

Appellants,

v.

SHAWN LATOURETTE, in his capacity as
Commissioner of the NJ Department of
Environmental Protection; NJ
DEPARTMENT OF ENVIRONMENTAL
PROTECTION, DAVE GOLDEN, in his
capacity as Assistant Commissioner of the
NJ Division of Fish and Wildlife; NJ
DIVISION OF FISH AND WILDLIFE;
FRANK VIRGILIO, in his capacity as
Chairman of the NJ Fish and Game Council;
NJ FISH AND GAME COUNCIL

Respondents.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-000672-23T4

Civil Action

On Appeal from Respondents'
Rulemaking Adopting a
Comprehensive Black Bear
Management Policy

AMENDED BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Respondents deliberately concealed their bear population data in order to garner public support for a rule that calls for two bear hunts every year, when Respondents knew that the bear population was actually much lower than they had stated in the proposed rule. Based on inflated bear population numbers, commenters supported the rule proposal based on “science” and “too many bears,” and Respondents never corrected the data. When adopting the policy, Respondents removed the inflated bear population estimate, which is a substantial change from the proposed bear policy. Respondents also never told the public what the data actually showed: that the bear population was only 40% of the estimate they had used to propose the policy. The bear policy, codified at N.J.A.C. 7:25-5.6., should be overturned and the bear hunt canceled because:

- Respondents’ omission and misrepresentation of their bear population data is arbitrary and capricious; and
- Respondents’ adoption of the bear policy violated the Administrative Procedure Act at N.J.S.A. 52:14B-1 et seq. because the adopted policy is substantially changed from the proposed policy;

- The adopted rule fails to satisfy the requirements set by the NJ Supreme Court; and
- The adopted rule is scientifically arbitrary and capricious.

STATEMENT OF FACTS AND PROCEDURAL HISTORY¹

The Black Bears (*Ursus americanus*) are a species of native wildlife in New Jersey who are impacted by the bear hunt as a population and as individuals. The Animal Protection League of New Jersey (“APLNJ”) is a nonprofit organization that works to protect animals, including the Black Bears, and submitted a comment on the multi-year comprehensive black bear management policy that was proposed in December of 2022 (“Proposed CBBMP”). (Pa1925) APLNJ’s members use and enjoy the state’s wildlife. (Pa1925) Angela Metler is a New Jersey resident and executive director of APLNJ, and submitted a comment on the Proposed CBBMP. (Pa1969) Doreen Frega is a New Jersey resident and submitted comments on the Proposed CBBMP. (Pa1970,

¹ Because this case is an appeal of an administrative agency decision, the statement of facts and procedural history are combined because they are inextricably entwined.

T6:18)² Susan Russell is a New Jersey resident and director of wildlife policy for APLNJ, and co-authored APLNJ's comment on the Proposed CBBMP. (Pa1925)

Shawn LaTourette is the commissioner of the New Jersey Department of Environmental Protection. The New Jersey Department of Environmental Protection ("NJDEP") is a state agency. Dave Golden is the Assistant Commissioner of the New Jersey Division of Fish and Wildlife. The New Jersey Division of Fish and Wildlife ("DFW") is a Division within the NJDEP. Frank Virgilio is chairman of the New Jersey Fish and Game Council. The New Jersey Fish and Game Council ("Council") is a Council within the DFW. Six of the 11 members of the Council must be "sportsmen" recommended by a hunting club. N.J.S.A. 13:1B-24.

In 2003, 2005, and 2010 through 2015, bear hunts were held only in December. (Pa44, Pa387) The 2003 bear season was curtailed because of a court order closing the bear hunt on federal land for part of the season. Fund for Animals v. Mainello, 294 F. Supp. 2d 46 (D.C. Cir. 2003) The Division published bear

² Citations to the transcript refer to the transcript of the January 18, 2023 public hearing

population estimates based on those December bear seasons, including the curtailed 2003 season, when there was no October bear hunt segment, in the Proposed CBBMP (Pa45, Pa53) as well as the adopted comprehensive black bear management policy (“Adopted CBBMP”) (Pa1902, Pa1904). From 2018 until November of 2022, bear hunting was prohibited on state lands (Pa114), but Respondents published bear population data from the 2018 through 2020 hunts. (Pa45, Pa53, Pa1902, Pa1904)

At the Council’s September 14, 2021 meeting, a slide presentation by the Council’s Game Committee stated that the bear population “will approach or exceed 4,000 bears during 2021.” (Pa288) The Council unanimously approved an emergency bear hunt rule in September of 2021 (Pa1766) but the Commissioner and Governor did not concur and the emergency bear hunt was not enacted in 2021. Animal Protection League of NJ v. NJ Fish and Game Council, 477 N.J. Super. 145, 154 (2023)

At the Council’s November 15, 2022 meeting, the NJDEP’s slide presentation stated that the bear population was “Projected to approach or exceed 4,000 bears within the next two years.” (Pa398) Based on this population figure, the Council once again

unanimously voted in favor the emergency rule and concurrent proposal, and the Governor (Pa114) and the Commissioner (Pa1769) concurred with the Council. The estimate of 4,000 bears figured heavily into the decision to resume a bear hunt, as evidenced by the NJDEP's slide presentation at the Council's November 15, 2022 meeting (Pa398), Shawn LaTourette's November 15, 2022 letter (Pa230), Shawn LaTourette's Administrative Order 2022-22 (Pa1769), Governor Murphy's Executive Order 310 (Pa114), and Respondents' bear management FAQ from November 10, 2022 (Pa118).

On December 5, 2022, Respondents Shawn LaTourette, NJDEP, Dave Golden, NJDFW, Frank Virgilio, and the Council (collectively, "Respondents") published a document in the NJ Register on December 5, 2022 that was both an emergency adoption of a comprehensive black bear management policy authorizing a bear hunt for December of 2022, and a proposed multi-year comprehensive black bear management policy. (Pa1) The Proposed CBBMP stated that the bear population will "approach or exceed 4,000 bears" (Pa7, Pa20). By invoking the "imminent peril" section of Administrative Procedure Act, N.J.S.A. 52:14B-4(c) ("APA"),

the state circumvented the usual APA procedure and timeline for adoption of agency rules. Several organizations and individuals filed an appeal of the emergency adoption of the Proposed CBBMP, which was overturned by the Appellate Division after the December, 2022 bear hunt occurred. Animal Protection League of NJ v. NJ Fish and Game Council, 477 N.J. Super. 145 (2023).

The December, 2022 bear hunt took place over 8 and a half days. (Pa1922)

The Division's biologists tag and release bears as part of their research. (Pa15) Respondents' data from the December 2022 emergency bear hunt showed that out of 114 bears killed, 13 were bears tagged in 2022; and a total of 184 bears had been tagged in 2022. (Pa1917, Pa1922) The Lincoln-Petersen (sometimes spelled "Lincoln-Peterson") method ("L-P Method") is the Division's preferred method for estimating the bear population (Pa43-45, Pa47, Pa53-54, Pa279, Pa1894, Pa1902-04), and estimates the population by looking at the ratio of tagged bears killed, and extrapolating that ratio to the bear population as a whole. (Pa1972, Pa1995) The L-P Method can only be used "when a hunting season takes place" (Pa1902) and is done annually (Pa279). In the 2022,

Division biologists tagged 184 bears; 13 tagged bears were killed in the hunt; and a total of 114 bears were killed. (Pa1922) Applying the Lincoln-Petersen method of population estimation, the 13 tagged bears made up 11.4% of the bears who were killed, so the 184 tagged bears made up 11.4% of the state's total bear population, which gives an estimate of only 1,614 bears in the state. (Pa1971)

The 2022 bear hunt is the first time Respondents have refused to calculate or publish a bear population estimate using the hunt data, despite several previous years of bear hunts only in December. (Pa1904) Included in Respondents' published bear population estimates were data from the 2003 hunt ("December 8-13, 2003" 35 N.J.R. 4053(a) at 7:25-5.6(a)) and 2005 hunt ("the current six-day season" Pa215), both of which took place in December and lasted only six days. Respondents have also published bear population estimates for 2004 when no bear hunt was held (Pa225, Pa226), and for the future (i.e. bear population estimates published in 2005 for 2006 through 2009 at Pa225 and Pa226; and published in 2022 for 2023 and 2024 at Pa387).

Previously, the 2003 black bear hunt had produced data that showed the bear population was less than half the estimate that was used to justify the hunt, leading to the NJDEP commissioner at the time canceling the bear hunt in 2004. U.S. Sportsmen’s Alliance v. NJDEP, 372 N.J. Super. 598, 600-603 (App. Div. 2004), rev’d U.S. Sportsmen’s Alliance v. NJDEP, 182 N.J. 461 (2005).

On January 18, 2023, Respondents held a hearing where the public commented on the Proposed CBBMP (Pa1773) but did not present a summary of the factual information on which the proposal was based (T3:2 and T27:16) and did not respond to public questions (T27:16-17).

On October 2, 2023, Respondents published the Adopted CBBMP (Pa1772), which is the subject of this appeal. The Adopted CBBMP removes all references to the population estimate, although Respondents mentioned the 4,000 figure in a response to public comments (Pa1894, response to comment 44). Also, Respondents state that the black bear population is “increasing” in response to 4 comments (Pa1887, Response to comment 6; Pa1888, Response to comment 15; Pa1890, Response to comment 28; Pa1891, Response to comment 32) and “rapidly increasing” in response to 5 comments

(Pa1896. Response to comment 55; Pa1899, Response to comment 72; Pa1899, Response to comment 73; Pa1899. Response to comment 74; Pa1900, Response to comment 78). In the Adopted CBBMP itself, Respondents claim that there are “bear population increases.” (Pa1906) Furthermore, regarding bear population estimates, Respondents claim:

Because the L-P estimator utilizes the recapture data collected in Segment A (the October segment of the hunting season), the lack of a hunt in 2021, and only a partial hunt in 2022 (Segment B only), resulted in the State being unable to generate L-P population estimates for those years. This resulted in figures within the proposed CBBMP that did not include 2021 or 2022 population estimates. Additionally, because the concurrent proposal was filed in November 2022, prior to the end of the year, the Council was unable to incorporate other 2022 data into the 2022 CBBMP. . . the Council is updating the Figures within the CBBMP, upon adoption, to include all available 2021 and 2022 data. (Pa1894, response to comment 47)

Respondents also claimed there were “safeguards in place to prevent overharvest,” including a provision to close the season if the harvest rate reaches 30%. (Pa1900, response to comment 15).

On October 3, 2023, counsel for appellants requested a stay pending appeal (Pa1916), which Respondents denied on October 5, 2023 (Pa1919). In his October 5, 2023 letter, Respondent Frank Virgilio stated, “There was no October segment of the black bear

hunting season In 2022, and Segment B (December) was truncated” in his discussion of the reasons for the omission of the 2022 bear hunt data from the Adopted CBBMP. (Pa1919-20)

On October 5, 2023, appellants filed an application for permission to file an emergent motion, which was denied the same day. (Pa175)

LEGAL ARGUMENT

I. RESPONDENTS’ OMISSION AND MISREPRESENTATION OF THEIR BEAR POPULATION DATA IS ARBITRARY AND CAPRICIOUS (not raised below)

An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record. In Re Hermann, 192 N.J. 19, 27-28 (2007). Respondents’ misrepresentation of the bear population data is arbitrary and capricious because there was no rational reason to omit and misrepresent it; because it endangers the Black Bears as a population and as individuals; and it was done to garner public support for a trophy bear hunt. While several arguments concerning the bear population were raised below, the main point about the omission and misrepresentation of the data was not raised below

because Appellants could not have predicted that Respondents would omit and misrepresent their data in the Adopted CBBMP.

A. No rational reason to misrepresent bear population data:

Respondents have published population estimates using data from hunts that were as short as 6 days; published a population estimate for a year when there was no hunt; and published population estimates for the future; but irrationally claim they are unable to use data from an eight-and-a-half-day hunt in 2022 to generate a population estimate for 2022. Respondents also irrationally and repeatedly claim the bear population is “increasing” when their own data showed a drastic reduction in the bear population. When Respondents published the Proposed CBBMP on December 5, 2022, they twice mentioned a population estimate of 4,000 bears (Pa7, Pa20), but data from the 2022 hunt that took place on 9 dates from December 6 through 17 (Pa1922) showed that the bear population was only 1,614 (Pa1971). However, both the 4,000 figure and the 1,614 figure are omitted from the Adopted CBBMP. Respondents present a disingenuous argument for why they omitted the latest bear population data; and misleadingly tell the public that the bear population is increasing.

Respondents knowingly and intentionally omitted the 2022 bear population data, as stated in the Adopted CBBMP: “. . . 2022, hunting occurred for a portion of Segment B. Thus there is no LP estimate for those years” (Pa1904) and in responses to public comments (Pa1894, response to comment 47). The segment B hunt in 2022 was originally scheduled to be six days long, with an additional 4 days added if the harvest rate did not reach 20%. (Pa115-16) However, this court temporarily stayed the hunt for a day and half before the stay was lifted. Animal Protection League v. NJ Fish and Game Council, 477 N.J. Super. 145, 150-51 (App. Div. 2023) and Pa1922. With the extension, the hunt took place over eight-and-a-half days. (Pa1922) Respondents’ claim that they were “unable” to generate an estimate for 2022 using the L-P Method because it was a “partial” hunt is disingenuous, because Respondents generated estimates with the L-P Method for the shorter hunts in December of 2003 and 2005 with only six days of hunting each.

Respondents also had no problem generating population estimates when no hunt took place in 2004, and published estimates for future years before those hunts took place.

Respondents' claim that they were updating the Adopted CBBMP to include "all available 2021 and 2022 data" (Pa1894, response to comment 47) is untrue. Even the raw data on the number of bears killed in 2022 is missing from the Adopted CBBMP.

Also, Respondents claim that they were "unable" (Pa1894, response to comment 47) to include data from the 2022 hunt because it took place after the proposal was published is disingenuous because they were able to add bear nuisance complaints for all of 2022 in the Adopted CBBMP (Pa1904, figure 3), and modify figure 3 from the original in the published proposal (Pa53-54) to include not only the bear incidents for 2022 and 2021, but also an explanation for why the 2022 bear hunt data was omitted. Since Respondents had sufficient time to add bear incident data through December 31, 2022 in the Adopted CBBMP, they had sufficient time to include data from a bear hunt that concluded on December 17, 2022.

Including the true data from the 2022 bear hunt would not only reveal the vulnerability of the Black Bears to hunting, but also discredit Respondents' graph (Pa1904, figure 3) that attempts to

establish a link between the bear population and bear complaints. As former NJDEP Commissioner Mark Mauriello (Pa1985) and others (Pa1888, comment 16; Pa1894, comment 45; Pa1983-84) point out, the use of bear complaints as scientific data to justify a hunt is unreliable because the complaints are not verified.

Since the NJ bear hunt resumed in 2003, the 2022 bear hunt is the only bear hunt for which Respondents have refused to use their data to publish a bear population estimate. The 2022 bear hunt is also the second time that bear hunt data has revealed that the bear population is less than half of the estimated population; and first time it happened, the NJDEP Commissioner canceled the bear hunt the next year.

A possible explanation for the apparent sharp decrease in the bear population is the drought and/or climate change that caused the extremely dry weather in 2022, which may have resulted in less natural food (Pa246, Pa422) for the bears. Drought can also lead to increased nuisance activity, as bears search farther for food (Pa958-59, Pa1350, Pa1361-63), which could account for the increase in bear nuisance complaints in 2022. But when commenters mentioned drought (Pa1887, comment 6) and climate

change (Id., Pa2018-19), Respondents dismissed their concerns, claiming there was “no evidence” (Pa1887, response to comment 6).

Respondents’ claim that they are unable to apply the L-P Method to an eight-and-a-half-day bear hunt is unsupported and contradicted by the record, and is therefore bad faith, arbitrary and capricious. Similarly, their claim that the bear population is increasing is unsupported and contradicted by the record, and is therefore arbitrary and capricious. When the CBBMP’s basic scientific findings are contradicted by the record, arbitrary, and capricious, the CBBMP should be invalidated and the bear hunt should be canceled.

B. The Adopted CBBMP endangers the Black Bears: Black bears reproduce slowly (Pa1926; Pa1999; P2033; Table 1;) and are susceptible to overkill/overharvest (Pa157, Pa529, Pa1949, Pa1996, Pa1999). It can take years for a population to recover from overharvest. (Pa529, Pa1554) When Respondents believed that the bear population was at or near 4,000 (Pa288, Pa398), they decided the bear season should be stopped if the harvest rate reached 30%, “in order to protect populations from overharvest.” (Pa59) After

they published the Proposed CBBMP, Respondents' data showed that there were only 1,614 bears. Compared to the starting figure of 4,000 bears, the Black Bears effectively suffered a 60% harvest rate. This drastic reduction in the population is double the rate that Respondents claim is sustainable, but instead of canceling the hunt, Respondents misrepresented their data and adopted a CBBMP which calls for two bear hunt segments every year, regardless of the bear population.

Numerous commenters doubted or contradicted Respondents' estimate of 4,000 bears (P1887, comments 6 & 7; Pa1893-94, comment 41; Pa1894, comment 42; Pa1894, comment 44; Pa1932; Pa1995; Pa2018; T5:12-16; T9:19-24; T29:10-15;) and stated that bear hunting would endanger the bear population (Pa1888, comment 12; Pa1951; Pa1999; Pa2018).

C. Respondents misrepresented the data to garner public support for a recreational trophy hunt: Respondents' false claim that the bear population is increasing is designed to manufacture public support for an unpopular trophy hunt. Respondents admit that at least part of the purpose of the bear hunt is "public recreation" (Pa1893, response to comment 36), which means it is a

trophy hunt (Pa2001). Respondents are aware that the bear hunt is a trophy hunt because their survey of successful bear hunters revealed that the majority “have the head and/or hide professionally prepared” and note that the bear hunt economically benefits taxidermists. 36 N.J.R. 2325(a) economic impact statement. According to Respondents, a trophy bear hunt is one that “would target only adult males by beginning the hunting in late November or early December, a time when most females are already denned for the winter.” 32 N.J.R. 3294(a) response to comment 10. Every bear hunt in New Jersey since 2003 has a segment in early December.

Additionally, Respondents used outdated information about Pennsylvania to support its claim that the bear population in New Jersey is increasing. The Adopted CBBMP states “Pennsylvania increased its bear hunting season in counties adjacent to New Jersey in 2002 due to an increase in the bear population” (Pa9104) but the bear population in Pennsylvania has been declining since 2020 (Pa2042). (Raised below, Pa1981)

Despite Respondents’ inflated bear population estimate, the bear hunt remains unsupported and unpopular with the public. Out

of 9,213 comments on the bear policy (3,637 individual comments (Pa1773), 4,856 comments on postcards (Pa1838), and 720 electronic comments from members and supporters of Center for Biological Diversity (Pa2031)), 1,591 comments support the CBBMP in its entirety (Pa1886, comment 1) and 6,230 oppose the CBBMP in its entirety (Pa1886, comment 5; Pa1838, Pa2031).

In 2022, Governor Murphy and the NJDEP Commissioner both cited the estimate of 4,000 bears when supporting the emergency bear hunt. In 2023, among commenters who supported the bear hunt, 251 commenters stated that there were “too many” bears (Pa1890, comment 27); 72 commenters noted that there were “numerous” bears (Id.); 46 commenters wanted the bear population at a “safe level” (Id.); and 66 commenters believed that bear complaints correlate with the bear population (Pa1886, comment 2).

Spreading false information to garner public support while deliberately concealing data is deceitful, arbitrary, and capricious; and should never be done by a state agency. Therefore the CBBMP should be invalidated and the bear hunt canceled.

II. RESPONDENTS' ADOPTION OF THE CBBMP WITH MISREPRESENTED POPULATION DATA VIOLATED THE ADMINISTRATIVE PROCEDURE ACT (not raised below)

A comprehensive black bear management policy (generally, a “CBBMP”) must be adopted in substantial compliance with the APA. NJ Animal Rights Alliance v. NJDEP, 396 N.J. Super. 358, 370 (App. Div. 2007). If a CBBMP is not adopted in substantial compliance with the APA, it is invalid and the non-compliance cannot be excused “even on an interim basis.” Id. at 372, n.3. If an agency wishes to make substantial changes to a proposed rule upon adoption, it can either file a new notice of proposal or follow the procedure detailed in N.J.S.A. 52:14B-4.10, which requires publication in the NJ Register and a new 60-day public comment period. “Substantial changes” is defined as:

any changes to a proposed rule that would significantly: enlarge or curtail who and what will be affected by the proposed rule; change what is being prescribed, proscribed or otherwise mandated by the rule; or enlarge or curtail the scope of the proposed rule and its burden on those affected by it. N.J.S.A. 14B-4.10(1)(a)

Respondents’ Adopted CBBMP contains substantial changes compared to the Proposed CBBMP because the bear population is much lower than represented in the Proposed CBBMP and, as explained above, the Adopted CBBMP endangers the bear

population. The change significantly enlarges who and what will be affected by the rule, what is being mandated by the rule, and the burden on those affected by it.

While Respondents claim that the omission of the population data is “non-substantial” (Pa1894, response to comment 47), the basic requirements for the CBBMP established by the Supreme Court mention including a bear population number, which indicates that an intentional misrepresentation of this data is substantial. The Supreme Court stated that a CBBMP needs to include “factors that should be considered when determining which tools will be utilized.” US Sportsmen's Alliance v. NJ DEP., 182 N.J. 461, 477-78 (2005), and those factors “may include consideration, among other things, of the absolute size of the bear population, the number of harmful bear-human interactions and the fiscal and human resources available to carry out the stated goals.” U.S. Sportsmen’s Alliance (2005) at 478.

By misrepresenting this vital information about the size of the bear population and adopting a policy that now endangers the Black Bears, Respondents made a substantial change compared to the Proposed CBBMP and should have followed APA procedures to

draft and propose a new CBBMP with the correct bear population data. Because the Adopted CBBMP contained a substantial change and substantial misrepresentation, its adoption violated the APA and the Adopted CBBMP must be reversed.

III. The Adopted CBBMP Does Not Meet the Requirements of N.J.S.A. 13:1B-28 or the Supreme Court (raised below Pa1889, comment 18; Pa1941; Pa1973; Pa1988;)

Courts have a limited role in reviewing the actions of state agencies.

"Normally, State agency action is subject to the deferential arbitrary, capricious or unreasonable standard of review." Lipman v. Rutgers-State Univ. of NJ, 329 N.J. Super. 433 (N.J. Super., 2000) However, "such deference is inappropriate when an agency interpretation clearly conflicts with the intent of the Legislature." P.F. and B.F., v. NJ Div. of Developmental Disabilities, 139 N.J. 522 at 529 (1995) A court is "in no way bound by the agency's interpretation of a statute or its determination of a strictly legal issue" In re Langan Eng'g & Env'tl. Servs., Inc., 425 N.J. Super. 577, 581 (N.J. Super. 2012), citing Utley v. Bd. of Review, 194 N.J. 534, 551, (2008).

In 2005, the NJ Supreme Court clarified the requirement for comprehensive management policies under N.J.S.A. 13:1B-28. The elements required for a comprehensive policy are:

1. End-point objectives;
2. Detailed outline of the mandated approach;
3. Tools at the Council's disposal to accomplish those goals; and
4. Factors that should be considered when determining which tools will be utilized.

US Sportsmen's Alliance v. NJ DEP., 182 N.J. 461, 477-78 (2005). The Adopted CBBMP includes a similar list interpreted from the US Sportsmen's Alliance (2005) decision:

1. Black bear management objectives,
2. A detailed outline for meeting those objectives,
3. The tools at the Council's disposal; and
4. The criteria used to determine which tools are selected. (Pa1901)

Examining these four elements, the CBBMP is missing two of the four elements:

A. The Adopted CBBMP Contains No End-Point Goals (raised below Pa1942; Pa1973; Pa1988)

The end-point objectives cannot be vague:

[T]he statute clearly envisions more than vague statements of general aspiration . . . the Fish and Game Council could enact essentially any regulation and portray it as within the ambit of "balancing bear population with safety" or "providing recreational and aesthetic opportunities for New Jersey citizens." That was not the intent of the

statute that effectuated the unitary approach envisioned by the constitutionally mandated reorganization. Id. at 477.

There is no end-point goal stated in the CBBMP. There is no bear population number or number of bear complaints that, once reached, will cancel the bear season, which is why Respondents have changed the Court's words from "end-point goals" to "black bear management objectives." In its decision in US Sportsmen's Alliance (2005), the Court was calling for a comprehensive policy that would institute a hunt only under certain circumstances.

Instead of end-point goals, the Adopted CBBMP contains vague objectives that are very similar to the language that Respondents were specifically told to avoid. "Manage the bear population at a level commensurate with available habitat and consistent with reducing risk to public safety and property" (Pa1902) and "Ensure that regulated hunting remains a safe and effective management tool to provide recreation and control New Jersey's black bear population" (Pa1902) are practically identical to the examples of the vague goals the Supreme Court prohibited: "balancing bear population with safety" or "providing recreational and aesthetic opportunities for New Jersey citizens." Id. at 477.

The Adopted CBBMP also states, "The black bear policy and management goals consider the cultural carrying capacity, which is the number of bears that can co-exist compatibly with the local human population in a given area, in concert with the biological carrying capacity of the land to support bears." (Pa1901)

However, Respondents fail to give a population number that would be consistent with available habitat and cultural carrying capacity. The bear population is already consistent with available habitat (biological carrying capacity) and cultural carrying capacity. In response to comments about biological and cultural carrying capacity, Respondents previously wrote:

[A]n absolute value for cultural carrying capacity cannot be ascertained. The CBBMP recommends that the bear population be reduced to a level commensurate with available habitat and consistent with a reduced risk to public safety and property. (47 N.J.R. 2753(a), response to comment #26)

The vague aspiration of "reduced risk" is the type of objective that does not satisfy the Court's requirements for a comprehensive policy.

State wildlife managers in Pennsylvania also included cultural and biological carrying capacity in their bear management plan, (Pa181) and planned to survey residents about satisfaction with existing bear populations in 2008 and 2013 to develop population objectives, showing that it is possible to develop population goals based on cultural carrying capacity. (Pa182) The New York State Department of Environmental Conservation's ("NYDEC") Black Bear Management Plan requires the NYDEC to collect public input on "bear population status and impact, and adjust bear population objectives as needed." (Pa423) However, Respondents have done no recent cultural carrying capacity studies and have not developed a population objective. Instead of surveying residents, the

Council makes a conclusory statement in its November 15, 2022 imminent peril statement: “When the bear population reaches a point that there is a concern for public safety it is an indication that cultural carry (sic) capacity has been exceeded.”

Respondents’ most recent public survey regarding black bears is the public comments on the Proposed CBBMP, which overwhelmingly oppose bear hunting and oppose the CBBMP. As detailed above, out of 9,213 comments on the bear policy, 1,591 comments support the Proposed CBBMP in its entirety and 6,230 oppose the Proposed CBBMP in its entirety.

Respondents’ most recent survey of NJ residents, in 1997, found that 89% did not want the bear population reduced (Pa539), and “[a]lmost all (95.7%) of the participants expressed that they were willing to adopt conservation methods such as careful storage of garbage, birdfeeders and grills as a way to exist in close proximity to bears.” (Pa540)

Under the Adopted CBBMP, bear hunt segments will take place twice a year, year after year, regardless of the number of bears and regardless of the number of bear complaints. With language such as "end-point" and "Had the Fish and Game Council enacted policies that were approved by the Commissioner and that explained when it would pursue a bear hunt over other population control and conservation methods," the Court has made it clear that a comprehensive policy is

not one that institutes a recreational hunt year after year with no goal. Under the Adopted CBBMP, the hunt can be canceled only after it has started and only after 30% of tagged bears have been killed (Pa21), even if the bear population is dangerously low.

Because the record shows that Respondents are ignoring cultural carrying capacity when it is one of their stated objectives, and because the CBBMP lacks end-point objectives as required by the Supreme Court and state statute, the CBBMP should be invalidated.

B. The Adopted CBBMP fails to list factors that should be considered when determining which tools will be utilized (raised below Pa1941; Pa1973; Pa1988)

The Division and the Council have included no factors to be considered when determining whether to hold a bear hunt. Instead of listing factors, the CBBMP calls for two automatic bear hunt segments every year, with one in October and another in December. The Supreme Court stated that the factors “may include consideration, among other things, of the absolute size of the bear population, the number of harmful bear-human interactions and the fiscal and human resources available to carry out the stated goals.” U.S. Sportsmen’s Alliance (2005) at 478.

The bear hunts will be held twice a year regardless of the size of the bear population or the number of human/bear conflicts. Respondents call the hunt “an inexpensive and exciting hunting adventure close to home.” (Pa208). The CBBMP

mentions the recreational purpose of the hunt at least 12 times. (six times on Pa1901; three times on Pa1902; Pa1906, Pa1911, Pa1912).

The Court explained that factors to be considered are “the most complex” part of the CBBMP, and “may include consideration, among other things, of the absolute size of the bear population, the number of harmful bear-human interactions and the fiscal and human resources available to carry out the stated goals.” U.S. Sportsmen’s Alliance (2005) at 478. In their zeal to hold two recreational bear hunts every year regardless of the bear population or the number of negative human/bear conflicts, Respondents offered no factors to be considered.

Without these two important requirements – end point objectives and factors to be considered when determining which tools should be used – the CBBMP does not satisfy N.J.S.A. 13:1B-28 or the Court's holding in US Sportsmen's Alliance, and Respondents’ emergency rulemaking should be invalidated.

IV. The Adopted CBBMP is Scientifically Arbitrary and Capricious (Raised below, Pa1838; Pa1890, comments 29 and 30; Pa1892, comment 36; Pa1893, comment 39; Pa1943; Pa1938; Pa1969; Pa1977; Pa1978; Pa1979; Pa1980; Pa1989; Pa2001; Pa2020,)

The Proposed CBBMP is arbitrary and capricious for several reasons:

A. The Adopted CBBMP is a recreational hunt disguised as bear management. (Raised below, Pa1892, comment 36; Pa1938; Pa1977; Pa1989; Pa2001) Even if Respondents had been honest about the bear population, the Adopted CBBMP would be arbitrary and capricious because it is a recreational

trophy hunt that takes place twice a year no matter how many bears there are and no matter how many bear complaints there are. If the Adopted CBBMP were a bear management policy, factors such as the number of bears and the number of bear complaints would be taken into consideration when deciding how to manage the bears. Respondents state, “Data is utilized to track population response to management decisions and to develop appropriate harvest targets to ensure a sustainable population, while preventing the population from exceeding cultural carrying capacity.” (Pa19; Pa1892, response to comment 33) However, Respondents have misrepresented that data; developed a 30% harvest target but continue holding bear hunts even though the bear population has effectively suffered a 60% harvest rate; and have no cultural carrying capacity finding.

B. Contradictory Environmental Impact Statement (raised below Pa1978)

In its own environmental impact statement, the Proposed CBBMP states that it “should have little environmental impact” (Pa25), but the CBBMP also states that it will “reduce the bear population to manageable levels.” (Pa40) No number of bears or definition for “manageable level” is given; and no population goal is presented in the CBBMP. The term seems to have been chosen to scare the public into thinking about “unmanageable” levels of bears, even though, as is well-documented in the record, bears are self-regulating. Not only will areas of abundant food support a greater density of bears (Pa1024), but if food is scarce, the

sows will have fewer cubs; if food is more available, the sows will have larger litters. (Pa570, Pa587, Pa793, Pa855, Pa953) Respondents incorrectly state, “No scientific literature was presented in support of the commenters’ position that black bears self-regulate as a population control mechanism prior to exceeding their biological carrying capacity.” (Pa1895, response to connect 50) In addition to the scientific literature on self-regulation that was already in the record, two commenters (Pa1999 and Pa2019) cite A.D. Wallach et al, “What is an Apex Predator?.” Oikos 124, no. 11 (2015) (Pa2032). The Wallach article states:

These studies offer examples where social interactions, rather than resource availability, drive mortality and fecundity, limit population density and stability, and influence the expression of life history traits that slow population growth rates (Pa2033). . . Large carnivores probably self-regulate because they typically invest more in fewer offspring, suppress the reproduction of mature females and commit infanticide (‘family planning’), are socially cooperative and hold sparsely populated territories. (Pa2037)

Also, Respondents’ 1997 bear management plan cites numerous articles with various findings on self-regulation in black bears. (Pa552-53)

Similarly, the Council falsely claims “there is no evidence to support claims that bears in New Jersey produce more cubs due to the availability of unnatural foods, that human-supplied food sources increase fecundity, or that the absence of such supplemental foods would result in a decrease in reproductive rates.” (Pa1891, response to comment 30) However, again, Respondents’ own 1997 bear management plan states, “Bears in New Jersey have so many alternate food

sources available to them (agricultural crops, garbage) that reproductive capacity has remained high throughout the period of study.” (Pa464)

Furthermore, the record demonstrates that by allowing up to 30% of tagged bears to be killed (which indicates that 30% of the total number of bears are killed) the CBBMP is endangering the bear population. One scientific article in the record states that black bears in North America have a maximal sustainable hunting mortality of 14.2% (Pa1216), while another scientist puts the total sustainable human-caused mortality at 4%-10% (Pa243).

Since the CBBMP will allow two bear seasons every year, even though there are only 1,614 bears, the contention that hunting will reduce the bear population to “manageable levels” is disingenuous. There is no scenario –drought, famine, or disease that decimates the bear population – that cancels the bear hunt. By claiming that the hunt will reduce the bear population to a “manageable level,” the Council means that the bear hunt will have population level impacts; which makes their claim of “little environmental impact” nonsensical, arbitrary, and capricious.

C. Public trust statute (raised below, Pa1969, Pa1979)

The public trust doctrine, established in Arnold v. Mundy, 6 N.J.L. 1 (1821) and recently codified in state statute, states that ownership of the State’s natural resources “is vested in the State to be held in trust for the people.” N.J.S.A. 13:1D-150(b). Given that the majority of NJ residents are not hunters, but wildlife is

managed by a Council comprised primarily of hunters who are endangering the bear population with an unscientific bear policy, there is no management of bears for the nonhunting majority of New Jersey residents. Most of the commenters on the CBBMP oppose the CBBMP in its entirety, and the public trust doctrine requires the state to hold the bears in trust for all New Jersey residents, and not just hunters. The court owes no deference when the agency action conflicts with the intent of the legislature (P.F. and B.F. at 529) and by codifying the public trust doctrine, the legislature made clear its intention to hold natural resources in trust for the public.

Because bears are a public trust natural resource and Respondents have not taken the will of the majority of the public into account when deciding how bears should be managed, the Adopted CBBMP violates the public trust statute and should be overturned.

D. Lack of cultural carrying capacity studies (raised below Pa1943, Pa1980, P1989)

Respondents contend that the bear policy and management goals consider cultural carrying capacity (Pa38, Pa275), but Respondents have failed to conduct any cultural carrying capacity studies. Cultural carrying capacity is the number of bears humans will tolerate (Pa38). As discussed above, Respondents offer only conclusory statements about the bears exceeding cultural carrying capacity (Pa1887, response to comment 5). Both New York and Pennsylvania conduct

cultural carrying capacity studies by surveying residents. (Pa182, Pa423). There is no reason for Respondents to refuse to do the same, but with the majority of the Council members chosen by a private hunting club (N.J.S.A. 13:1B-24), there is a bias for conducting annual recreational bear hunts regardless of cultural carrying capacity. Respondents even recognize that cultural carrying capacity can change: “changes in human tolerance for bears brought about by education” (Pa21), but does nothing to monitor these changes. The vast majority of public comments on the Proposed CBBMP were against the bear hunt, but Respondents still claim that they are managing the bears according to human tolerance. Claiming to consider cultural carrying capacity while failing to conduct surveys and going against the known will of the public is bad faith, arbitrary, and capricious.

E. Hunting Accidents (raised below, Pa1893, comment 39)

Respondents claim that hunting is “safe” (Pa58) but bears present a “risk,” (See, e.g. Pa9, Pa10, Pa20. Pa1901). This contradicts the record: 631 people have been shot – 34 fatally - in hunting accidents in New Jersey in the past 50 years (Pa207), while only one person has ever been killed by a bear during the state’s entire recorded history (Pa8; Pa1890, response to comment 28).

By ignoring the safety risks of hunting and claiming that bears present a risk to public safety, Respondents are creating a risk to public safety from hunting accidents. Hunting accidents have killed 34 people in 50 years and Respondents

call hunting “safe” (Pa58), but when bears have killed only one person in 350 years, Respondents call them a “life-threatening” imminent peril (Pa108).

Meanwhile, the Council downplays the effectiveness of nonlethal management for minimizing human-bear conflicts (Pa13) that focuses on eliminating bear attractants in residential neighborhoods, when, as discussed below, these methods have been proven to work all over the United States and Canada.

The solution to an alleged public health risk cannot be an increase in an activity that has proven to be far more dangerous than the alleged risk. To call bears “life-threatening” and an “imminent peril” when many more people have been injured and killed in hunting accidents is bad faith, arbitrary and capricious.

F. Controlling bear attractants is far more effective than hunting for reducing human/bear conflicts. (Raised below, Pa1838; Pa1890, comments 29 and 30; Pa2020) The record proves over and over that the most effective way to reduce human/bear conflicts is securing bear attractants like garbage, bird feeders, pet food, fruit trees, and other human-generated foods. Regardless of how many bears there are, unsecured garbage will attract bears to residential neighborhoods. A review of public education and garbage control programs in Yellowstone National Park, Yosemite National Park, Great Smoky Mountains National Park, Juneau, AK, Lake Tahoe, NV, and Elliot Lake, Ontario, Canada showed that “In all

instances, the removal of food sources has been successful in substantially reducing by 40 to 80% the number of human–bear conflicts reported.” (Pa1312). In a community in Lake Tahoe, NV, installing bear-resistant containers reduced bear complaints from 50 to 3. (Pa1262) In Glacier National Park, injuries from bear encounters “declined to near zero” after control of human food and garbage was implemented. (Pa1502) Incidents of bears obtaining human food decreased by 96% in Denali National Park when visitors were provided bear-resistant containers. (Pa1530)

Biologists in Pennsylvania found that “Although the bear population has expanded both numerically and geographically, the proximate cause of many incidents is the readily available foods found near homes.” (Pa1325) Humans and bears can even live in close proximity to each other without conflicts as long as human-generated food is secured. (Pa1395) This is especially important, as more human homes and roadways now overlap with historic black bear habitat. (Pa477, PA1013, Pa1350)

In addition to bear-resistant garbage and food containers, electric fencing has been proven effective around campgrounds, livestock, and bee hives. (Pa1451-52) In Colorado, where 80-90% of home entries by bears could be prevented if people close and lock doors and windows, authorities visit the homes of residents who call with bear complaints, to offer bear deterrent advice. (Pa1427-28) Another study in

Colorado saw a 60% decline in bear conflicts with bear-proof trash cans, education, warnings, and law enforcement. (Pa1994) Fines and enforcement of bear feeding bans can also be effective, and a survey in Alaska found that most people support fines for failing to store garbage properly. (Pa1472)

Other management techniques are ineffective if unsecured attractants are available. As one paper points out, lethal and non-lethal reactive (responding after there is a conflict) techniques “do little to address root causes of human–bear conflict. As long as bears find easy access to garbage, bird feeders, urban fruit trees, and other food subsidies, conflicts are likely to continue.” (Pa1237)

Also, when natural food is scarce, bears tend to expand their range to search for food, which leads to conflicts and has nothing to do with bear hunting. As scientists from The Humane Society of the United States point out, “What drives human-bear conflicts is the amount of available natural foods (“mast crops”) available to bears, not the numbers of bears” (Pa241), citing: E. J. Howe et al., "Do Public Complaints Reflect Trends in Human-Bear Conflict?," *Ursus* 21, no. 2 (2010); M. E. Obbard et al., "Relationships among Food Availability, Harvest, and Human-Bear Conflict at Landscape Scales in Ontario, Canada," *ibid.* 25 (2014). M. A. Barrett et al., "Testing Bear-Resistant Trash Cans in Residential Areas of Florida," *Southeastern Naturalist* 13, no. 1 (2014); S. Baruch-Mordo et al., "Stochasticity in Natural Forage Production Affects Use of Urban Areas by Black

Bears: Implications to Management of Human-Bear Conflicts," Plos One 9, no. 1 (2014); D. L. Garshelis et al., "Is Diversionary Feeding an Effective Tool for Reducing Human-Bear Conflicts? Case Studies from North America and Europe," Ursus 28, no. 1 (2017); H. E. Johnson et al., "Human Development and Climate Affect Hibernation in a Large Carnivore with Implications for Human-Carnivore Conflicts," Journal of Applied Ecology 55, no. 2 (2018); Jared S. Laufenberg et al., "Compounding Effects of Human Development and a Natural Food Shortage on a Black Bear Population Along a Human Development-Wildland Interface," Biological Conservation 224 (2018); D. L. Lewis et al., "Foraging Ecology of Black Bears in Urban Environments: Guidance for Human-Bear Conflict Mitigation," Ecosphere 6, no. 8 (2015); Elizabeth F. Pienaar, David Telesco, and Sarah Barrett, "Understanding People's Willingness to Implement Measures to Manage Human-Bear Conflict in Florida," Journal of Wildlife Management 79, no. 5 (2015).)

Hunting does not work because killing bears does not stop other bears from being attracted to available food. Studies have shown “evidence demonstrating the effectiveness of harvest management for reducing (human-bear conflicts) is lacking” (Pa262); “no convincing evidence exists” that reducing the bear population will decrease conflicts (Pa1441); there are “no apparent trends in harvest and human-bear conflicts” (Pa1442); a “spring harvest had no effect on

human-bear conflict levels” (Pa1442); “conflict complaints had no correlation with the effects of the extended hunting season in Pennsylvania” (1443); “no clear correlation between complaints and harvest” (Pa1444); scientists “could not conclude that hunting bears reduces human-bear conflicts at the state or population level” (Pa1479); altering bear density “correlates poorly with human-bear conflict trends” (Pa1554); increasing hunting “does not always result in reduced nuisance complaints” (Pa1580-81); bear hunting in Wisconsin “did not correlate with nuisance complaints” (Pa1581); and that “human-bear conflict levels remained relatively constant” despite an increase in bear hunting (Pa1554).

A study in Canada found that a new bear hunt season with a significant increase in the number of bears killed led to no reduction in bear conflicts (Pa240), citing Joseph Northrup et al., "Experimental Test of the Efficacy of Hunting for Controlling Human-Wildlife Conflict" (paper presented at the 6th International Human-Bear Conflict Workshop, Lake Tahoe, NV, Oct. 16-22, 2022).

Reducing human/bear conflicts through hunting would require reducing the bear population to very low densities, which would threaten the viability of the bear population. (Pa269). Education and securing bear attractants is “a better strategy” than hunting. (Pa269).

In New Jersey, Respondents’ data shows that despite having annual recreational bear hunts from 2010-2021, bear complaints went up in 2011, 2014,

and 2020. (Pa241) As can be seen from Defendants’ data, the bear hunt in New Jersey has never achieved results like the 40%-96% reduction in human/bear conflicts from garbage and food control programs in other areas. (Pa241)

While Appellants do not believe that bear complaint calls are a good measure of the actual number of human-bear conflicts (Jessy Coltrane from the Alaska Department of Fish & Game notes that a single bear can generate 50 complaints in one day, and “Complaint calls cannot be used to assess the effectiveness of education or management efforts” (Pa1445)), such calls are the measure that Respondents have decided to use to justify a bear hunt. Even using Respondents’ chosen measure of human-bear conflicts, as explained above, bear complaints are not solved with hunting.

Respondents claimed to already have a public education program and enforcement efforts (Pa390-94, Pa82), but the programs were inadequate. (Pa1934, Pa1994) Respondents’ public education campaign seemed more focused on “a positive brand lift” (Pa392) and encouraging bear complaint calls with a banner across the top of the website with the phone number to call with complaints (Pa390), rather than securing garbage. Commenters suggested a Bear Smart/Bear Aware public education program (Pa1892, comment 34; Pa2025; Pa2028) and suggested a bear education coordinator. (Id. and Pa2027)

Instead of choosing methods that are proven to reduce human-bear conflicts, Respondents adopted a recreational bear hunt. While Respondents are allowed to hold a recreational bear hunt, their efforts to disguise it as bear management have caused them to make disingenuous statements about cultural carrying capacity, bear self-regulation, the connection between unnatural food and bear fertility, and the effectiveness of nonlethal management and education. Because of these arbitrary and capricious aspects of the Adopted CBBMP and other deficiencies, the Adopted CBBMP should be reversed and the bear hunt canceled.

CONCLUSION

Based on Respondents' bad faith misrepresentation of the bear data, the violations of the Administrative Procedure Act, the failure of the Adopted CBBMP to meet the standards of the Supreme Court and state statute, and arbitrary and capricious policies contained in the Adopted CBBMP, Appellants respectfully ask this Court to reverse the adoption of the Adopted CBBMP and cancel the bear hunt.

Attorney for Appellants

Dated: July 22, 2024

/s/Doris Lin

Doris Lin, Esq.



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November 12, 2024

VIA ELECTRONIC FILING

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Re: NEW JERSEY BLACK BEARS (URSUS AMERICANUS),
ANIMAL PROTECTION LEAGUE OF NJ, ANGELA METLER,
DOREEN FREGA, AND SUSAN RUSSELL V. SHAWN
LATOURETTE, IN HIS CAPACITY AS NJDEP
COMMISSIONER; NJ DEPARTMENT OF ENVIRONMENTAL
PROTECTION; DAVE GOLDEN, IN HIS CAPACITY AS
ASSISTANT COMMISSIONER OF THE NJ DIVISION OF FISH
AND WILDLIFE; NJ DIVISION OF FISH AND WILDLIFE;
FRANK VIRGILIO, IN HIS CAPACITY AS CHAIRMAN OF THE
NJ FISH AND GAME COUNCIL; NJ FISH AND GAME
COUNCIL
Docket No. A-0672-23T4

On Appeal from Final Decision by the New Jersey Fish and Game
Council

Letter Brief and Appendix of Respondents



November 12, 2024

Page 2

Dear Mr. Orlando:

Please accept this letter brief and appendix on behalf of Respondents, Shawn LaTourette as Commissioner of the New Jersey Department of Environmental Protection, the New Jersey Department of Environmental Protection, Dave Golden as Assistant Commissioner of the New Jersey Division of Fish and Wildlife, the New Jersey Division of Fish and Wildlife (“Fish & Wildlife”), Frank Virgilio as Chairman of the New Jersey Fish and Game Council, and the New Jersey Fish and Game Council (“Council”) (collectively “Respondents”) in lieu of a more formal brief.

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

This arbitrary-and-capricious challenge to administrative policy determinations lacks support in the record or in case law. Appellants oppose the hunting of black bear and seek to invalidate the Council’s 2022 Comprehensive Black Bear Management Policy (“2022 CBBMP”) because, in their view, it misrepresents bear population data, and because it includes regulated hunting as part of the State’s integrated black bear management strategy.² Their arguments reflect a fundamental misunderstanding of wildlife management concepts, bear population data, and Supreme Court requirements. The court should reject Appellants’ invitation to substitute the Council’s well-reasoned and scientifically-supported judgments with their own policy preferences. The 2022 CBBMP should be upheld.

¹ Because they are closely related, the Procedural History and Counterstatement of Facts are presented together for efficiency and the court’s convenience.

² For purposes of this appeal, Respondents will assume that the Black Bears are not literal appellants. The standing of animals to bring suit is a novel issue that the court need not address in order to adjudicate the merits of this case, which weigh wholly in favor of Respondents. As game animals, black bears are a natural resource held in trust, and it is the State which represents their interests and welfare. See N.J.S.A. 13:1B-30.

Background

In New Jersey, black bear hunts occur pursuant to the New Jersey Game Code, N.J.A.C. 7:25-5.1 to -5.39 (“Game Code”), in accordance with a CBBMP. N.J.A.C. 7:25-5.6. The Council is statutorily-authorized, subject to the approval of the Commissioner of the Department, to “formulate comprehensive policies for the protection and propagation of fish, birds, and game animals[.]” N.J.S.A. 13:1B-28. CBBMPs must also be promulgated in accordance with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15 (“APA”). N.J. Animal Rights All. v. N.J. Dep’t of Env’t Prot., 396 N.J. Super. 358, 370, 372 (App. Div. 2007). Although the bear hunt must comport with a duly promulgated CBBMP that is approved by both the Council and the Commissioner, N.J.A.C. 7:25-5.6(a), it is the Game Code, not the CBBMP, which sets forth “under what circumstances, when and in what localities, by what means and in what amounts and numbers [black bears] may be . . . taken[.]” N.J.S.A. 13:1B-30.

Following periods of limited hunting (1958-1970), and no hunting (1971-2002), the Council reinstated a regulated hunting season for black bears beginning in 2003. (Pa1902).³ Designed to be conservative, black bear hunting

³ “Pa” refers to Appellants’ appendix, and “Pb” refers to their brief. “Da” refers to Respondents’ appendix.

seasons held in 2003, 2005, and 2010-2015 occurred for six days in December, coinciding with the firearm deer season. 47 N.J.R. 2753(c), 2833, 2839 (Nov. 16, 2015). However, in response to an increase in the black bear population and corresponding complaints, the Council expanded the black bear hunting season to include an October segment (“Segment A”) as well as the ability to extend the December segment (“Segment B”), beginning in 2016. (Pa1902). The black bear hunting season, when held, has since followed this structure - with the exception of 2022, when the Council authorized a bear hunt during Segment B only, pursuant to an emergency rule that has since expired. See (Pa1894); 54 N.J.R. 2205(a) (Dec. 5, 2022).^{4, 5}

On December 5, 2022, the Council proposed the 2022 CBBMP for adoption in the normal course, concurrently with publication of the adopted emergency rule authorizing the 2022 bear hunt. 54 N.J.R. 2205. In the proposal summary, the Council discussed a population projection for New Jersey’s black bears: “that the bear population in [the northwest portion of the State] will

⁴ Following the expiration of the 2015 CBBMP, there was no black bear hunting season in 2021. 54 N.J.R. 2206; (Pa6).

⁵ The emergency rule which authorized the 2022 black bear hunting season was subsequently reversed. Animal Prot. League of N.J. v. N.J. Fish & Game Council, 477 N.J. Super. 145, 166-67 (App. Div. 2023) (holding that there was no imminent peril under the circumstances).

approach or exceed 4,000 bears within the next two years if immediate measures to control the population [are] not implemented.” 54 N.J.R. 2206; (Pa7). The Commissioner approved the 2022 CBBMP, which the Council duly promulgated in the normal course and adopted on September 6, 2023, then published in the New Jersey Register on October 2, 2023, at 55 N.J.R. 2056(a).⁶

The 2022 CBBMP brings up to date the 2015 CBBMP previously upheld by this court. See (Da9). As part of this update, the Council analyzed data “to determine the status of the black bear population in the State, the effectiveness of the provisions of the 2015 CBBMP in managing that population, and information on interactions between the black bear population and humans.” 54 N.J.R. 2206; (Pa6). Fish & Wildlife has used, and continues to explore, the best available methods and models to estimate New Jersey’s black bear population. (Pa1894). Accordingly, the 2022 CBBMP includes estimates of the black bear population in the northwest portion of the State generated by Fish & Wildlife using the Lincoln-Petersen Index (“L-P Estimates”). (Pa1902).

The Lincoln-Petersen Index is a method of “mark-recapture” population estimation, and is a widely used estimator for bear populations. (Pa1894; Pa1902). In New Jersey, black bears are “tagged” or “marked” through Fish &

⁶ For the court’s convenience, citations to the 2022 CBBMP will refer to the copy included in Appellants’ appendix.

Wildlife’s trapping efforts, and hunter harvest comprises the “recapture” portion of the index. (Pa1894; Pa1902). Thus, an L-P Estimate for the hunt area has been—and could only be—calculated for years in which a hunt takes place. (Pa1902). Starting in 2016, when the two-segment black bear hunting season structure began, Fish & Wildlife has generated L-P Estimates based solely on data from Segment A. See (Pa1894).

Accordingly, and as explained by the Council, an L-P Estimate using data from Segment A is considered a comparable L-P Estimate to prior recent years. Ibid.; (Pa1919-20). The 2022 CBBMP contains L-P Estimates for 2003, 2005, and 2010-20, but does not contain L-P Estimates for 2021 or 2022, “[b]ecause [since] the L-P estimator utilizes the recapture data collected in Segment A (the October segment of the hunting season), the lack of a hunt in 2021, and only a partial hunt in 2022 (Segment B only), resulted in the State being unable to generate L-P population estimates for those years.” (Pa1894; Pa1902).

On October 3, 2023, following the 2022 CBBMP’s publication in the New Jersey Register, Appellants requested the Council stay the 2022 CBBMP pending appeal, alleging, in part, that the “omission” of a 2022 population estimate constituted a substantial change on adoption. (Pa1916-17). On October 5, 2023, the Council denied the request, and explained that there was no such estimate to include because Fish & Wildlife used hunt data from

Segment A for L-P Estimates, and an L-P Estimate based on data from the 2022 hunt (a truncated Segment B) would not be comparable. (Pa1919-20). On October 5, 2023, Appellants filed an Application for Permission to File Emergent Motion with the Appellate Division, which was promptly denied. This appeal followed.

ARGUMENT

THE COUNCIL SATISFIED ALL PROCEDURAL AND SUBSTANTIVE REQUIREMENTS IN DEVELOPING THE 2022 CBBMP AND ITS JUDGMENTS ARE WELL-SUPPORTED BY THE RECORD.

Administrative agency action is granted a strong presumption of reasonableness. Aqua Beach Condo. Ass’n v. Dep’t of Cmty. Affs., 186 N.J. 5, 16 (2006) (quoting Newark v. Nat. Res. Council, 82 N.J. 530, 539 (1980)). “[Courts] will not reverse an agency’s decision unless: (1) it was arbitrary, capricious, or unreasonable; (2) it violated express or implied legislative policies; (3) it offended the State or Federal Constitution; or (4) the findings on which it was based were not supported by substantial, credible evidence in the record.” Univ. Cottage Club of Princeton, N.J. Corp. v. N.J. Dep’t of Env’t Prot., 191 N.J. 38, 48 (2007). In this case, the 2022 CBBMP is not arbitrary, unreasonable, capricious, contrary to law, or unsupported by the record. It meets all procedural and substantive requirements, and should be upheld.

While Appellants clearly disagree with the 2022 CBBMP, “simple disagreement, even if based on contradictory expert opinions, is insufficient to overcome the presumption of reasonableness ascribed to respondents’ findings.” Animal Prot. League of N.J. v. N.J. Dep’t of Env’t Prot., 423 N.J. Super. 549, 562 (App. Div. 2011) (citing United Hunters Ass’n of N.J. v. Adams, 36 N.J. 288, 292 (1962)). And Appellants have not overcome that presumption here.

Appellants misunderstand and misconstrue wildlife management concepts, bear population data, and Supreme Court requirements. The 2022 CBBMP contains all available L-P Estimates, was not substantially changed on adoption, meets all Supreme Court requirements, and is not otherwise arbitrary, unreasonable or capricious. Appellants’ arguments are meritless and should be rejected.

A. The 2022 CBBMP Contains All Available Lincoln-Petersen Population Estimates and Was Not Substantially Changed on Adoption.

Appellants’ claim that the 2022 CBBMP omits or misrepresents black bear population data is incorrect. (Pb10-18). So too is their related argument that the adopted 2022 CBBMP included substantial changes from the proposal. (Pb19-21). Both are based on Appellants’ misunderstanding of three critical concepts: (1) Fish & Wildlife’s current methodology for L-P Estimates; (2) the difference between a population estimate and a population projection; and (3)

the difference between the 2022 CBBMP's proposal summary and substantive content.

The Council's technical and policy judgment to include all available, comparable L-P estimates in the 2022 CBBMP is reasonable, scientifically sound, and supported by the record. As discussed above, Fish & Wildlife has generated L-P Estimates based solely on data from Segment A of the black bear hunting season since 2016. See (Pa1894). Accordingly, an L-P Estimate using data from Segment A is considered comparable to L-P Estimates from recent years in evaluating the status of the black bear population and impacts of the CBBMP. Ibid.; (Pa1919-20). In 2022, however, there was no black bear hunt during Segment A of the hunting season from which to obtain data, and such comparable estimate could not be generated. (Pa1894; Pa1919-20).

However, Appellants instead argue that the Council did generate a population estimate in 2022, by projecting that the black bear population would approach or exceed 4,000 bears within two years. (Pb8). Second, they attempt to calculate their own L-P Estimate for 2022, of 1,614 bears, using Segment B, rather than Segment A data. (Pb6-7). Neither of these values is a comparable L-P Estimate, and Respondents properly declined to rely on them as such.

In 2022, Fish & Wildlife projected that the black bear population in the northwest portion of the State would "approach or exceed 4,000 bears within the

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next two years if immediate measures to control the population [are] not implemented[,]” and discussed this projection in the proposal summary for the 2022 CBBMP. 54 N.J.R. 2206; (Pa7). As explained by the Council, a population projection is not the same as a population estimate. (Pa1919-20). Population estimates contained in the 2022 CBBMP “were calculated using a Lincoln-Petersen Index and represent the bear population on the day before the hunting season of the year estimated.” (Pa1904). Population projections, on the other hand, forecast, or model, future population values given specific scenarios, and are calculated based on litter sizes, along with other data. (Pa1894); see also e.g. (Pa225-26) (“Projected Black Bear Population in Research Study Area with no further hunting seasons other than the 2003 Black Bear Hunting Season” and “Projected Black Bear Population in Research Study Area with a harvest rate of 0.3 females/square mile during Black Bear Hunting Seasons.”). The difference between a projected future population and an estimated present population is obvious enough that it should go without saying that one cannot be equated with the other.

Similarly, Appellants’ L-P Estimate of 1,614 bears, based on recapture data from the December 2022 bear hunt, reveals no error by Respondents. As explained, because Fish & Wildlife has calculated L-P Estimates based upon Segment A data since 2016, only an L-P Estimate generated using Segment A

data is considered comparable to L-P Estimates in recent years. (Pa1894; Pa1919-20).

For much the same reasons, there was no substantial change in the adopted CBBMP that required an additional round of notice and comment. See (Pb19); (Pa1894). Pursuant to the APA, “‘substantial changes’ means any changes to a proposed rule that would significantly: enlarge or curtail who and what will be affected by the proposed rule; change what is being prescribed, proscribed or otherwise mandated by the rule; or enlarge or curtail the scope of the proposed rule and its burden on those affected by it.” N.J.S.A. 52:14B-4.10.a. No such changes were made here. (Pa1894).

Specifically, Appellants’ claim that the 2022 CBBMP was substantially changed due to misrepresented bear population data is incorrect. (Pb19-21). For one, as explained, the population projection discussed in the rule proposal was not a population estimate, nor is Appellants’ self-calculated L-P Estimate comparable. For another, the population projection cited by Appellants was discussed in the proposal summary, not in the text of the proposed 2022 CBBMP itself. Compare 54 N.J.R. 2206, 2208 with 54 N.J.R. 2211-27; see N.J.S.A. 52:14B-4(a)(2) (explaining rule summaries as required by the APA). Accordingly, that reference was not, nor could it have been, removed from the

text of the adopted 2022 CBBMP.⁷ There was no substantial change. (Pa1894). Appellants' arguments must be rejected.

B. The 2022 CBBMP Meets the Requirements Established By Precedent.⁸

The 2022 CBBMP meets the standard that our Supreme Court established in U.S. Sportsmen's All. Found. v. N.J. Dep't of Env't Prot., 182 N.J. 461 (2005). In that decision, the Court noted that a CBBMP must consist of "more than vague statements of general aspiration." Id. at 477. It requires "a thorough statement of guidelines that set forth not only end-point objectives but also the means that should be used to attain those ends[,] and "should at least include the broad preservation goals . . . the tools at the [Council's] disposal to accomplish those goals, and most importantly, the factors that should be considered when determining which tools will be utilized." Id. at 477-78

In this case, Appellants claim that the 2022 CBBMP contains neither (1)

⁷ Furthermore, any and all changes to the text of the adopted 2022 CBBMP are self-evident and can be easily ascertained within the adoption itself. (Pa1900-15). ("Full text of the adoption follows (additions to proposal indicated in italics and boldface with asterisks ****thus****, deletions from the proposal indicated in italicized braces with asterisks ****{thus}****)[.]").

⁸ This court has previously addressed many of the substantive claims set forth in Points III and IV of Appellants' brief in cases challenging prior CBBMPs. See Animal Prot. League of N.J., 423 N.J. Super. 549 and League of Humane Voters of N.J. v. N.J. Dep't of Env't Prot., 2019 N.J. Super. Unpub. LEXIS 350 (App. Div. Feb. 13, 2019). (Da1). Respondents cite the aforementioned unpublished opinion for historical and factual purposes only.

end-point objectives, nor (2) “factors to be considered when determining whether to hold a bear hunt.” (Pb22-27). However, the 2022 CBBMP has both. While the Council did not select Appellants’ desired end-point objectives of “bear population number or number of bear complaints that, once reached, will cancel the bear season,” (Pb23), the 2022 CBBMP finds that a harvest rate of 20% is needed to effectuate a population reduction, and recommends that the season be closed should harvest rates reach 30%. (Pa1901; Pa1905). Accordingly, the CBBMP has end-point objectives, as required.

The 2022 CBBMP also includes “factors to be considered when determining whether to hold a bear hunt.” (Pb26). Specifically, it sets forth an integrated black bear management strategy which discusses tools available for bear management, including population management, along with considerations regarding their use. (Pa1903-11); see also (Da4) (rejecting Appellants’ argument that the 2015 CBBMP did not set end-point objectives or describe factors to be considered, as “the Council set an identifiable harvest rate and provided a list of its bear management tools with discussion of how certain factors influence use of certain tools.”).

Appellants’ claims that Respondents have not complied with controlling precedent are belied by the 2022 CBBMP which contains the requisite end-point objectives and factors.

C. Appellants Fail to Demonstrate that the 2022 CBBMP is Otherwise “Scientifically Arbitrary and Capricious.”

Appellants level an assortment of additional arguments to challenge the Council’s judgments and motivations, but all fall short of demonstrating that the 2022 CBBMP is arbitrary, unreasonable or capricious.

First, they challenge the propriety of a recreational hunt. (Pb27-28). However, the black bear hunting season in New Jersey is intended to serve management, recreation, and subsistence purposes. (Pa1893; Pa1897). Recreation is not an impermissible goal, as the Council is statutorily required to manage game animals, such as black bear, for recreational purposes. N.J.S.A. 13:1B-30. Pursuant to U.S. Sportsmen’s Alliance, 182 N.J. at 478, CBBMPs should also include the Council’s broad preservation goals - one of which is recreation. (Pa1902).

Appellants next allege that the proposal summary for the 2022 CBBMP contained a “contradictory” environmental impact statement. (Pb28). That is based on their belief that black bears “self-regulate” and that the 2022 CBBMP permits “30% of the total number of bears [to be] killed.” (Pb28-30). However, black bears do not “self-regulate” in the way Appellants’ imply. (Pa1895). Rather, “[l]eft unchecked, the black bear population would increase until it reached biological carrying capacity[.]” Ibid. As explained by the Council,

“[a]llowing the black bear population to continue to increase to a level where the reproductive rate may decline or death may occur would not only be irresponsible to the species but could also increase nuisance complaints and threaten public safety.” Ibid.

Further, it is inaccurate to equate a 30% harvest rate with 30% of the total bear population, because “harvest rate” and “total bear population” are simply separate concepts.⁹ See (Pb30). It is similarly inaccurate for Appellants to claim “[t]here is no scenario . . . that cancels the bear hunt[,]” id., when the Game Code provides that “the Director shall close the season if the harvest rate reaches 30 percent[,]” N.J.A.C. 7:25-5.6(a), and any hunting or trapping season, including the black bear season, may be closed when “deemed necessary to protect wildlife or human health or safety[,]” N.J.A.C. 7:25-5.1(g).

Appellants next argue that the CBBMP violates the public trust doctrine because it does not consider “the nonhunting majority of New Jersey residents.” (Pb30-31). That ignores the plain language of the 2022 CBBMP, which

⁹ “Harvest rate equals the number of harvested bears that were tagged in the current calendar year within bear management zones (BMZs) open to hunting divided by the number of bears that were tagged in the current calendar year that are available for harvest (total number of bears tagged in the current year within BMZs open to hunting minus known mortality of such tagged bears and number of such tagged bears known to have left the BMZs that are open to hunting).” N.J.A.C. 7:25-5.6(a).

explicitly recognizes black bears as a resource valued for wildlife appreciation and observation, and which seeks to facilitate recreation and manage the black bear population while still “[s]ustain[ing] a robust black bear population as part of New Jersey’s natural resource base.” (Pa1901-02).

Nor did the Council fail to consider cultural carrying capacity.¹⁰ (Pb31-32). The Council evaluates cultural carrying capacity by tracking black bear incidents and complaints. See (Pa1904; Pa1906-07). And the Council has clearly explained the connection between incident levels and cultural carrying capacity, noting that “[w]hen the [black bear] population reaches a point that there is a concern for public safety it is an indication that cultural carrying capacity . . . has been exceeded.” 54 N.J.R. 2206; (Pa9-10). That these metrics—black bear incidents and complaints—are not the specific type of public input or survey that Appellants prefer does not render the 2022 CBBMP arbitrary, unreasonable or capricious. (Pb31-32).

Likewise, despite Appellants’ disagreement, (Pb32-33), the Council’s finding that hunting is safe is well-supported. (Pa1893; Pa1905). This is particularly true as compared to the safety risks posed not only by aggressive

¹⁰ Cultural carrying capacity “is the number of bears that can co-exist compatibly with the local human population in a given area, in concert with the biological carrying capacity of the land to support bears.” (Pa1901).

black bear encounters, but also other bear incidents that affect public safety, such as vehicle strikes. Compare (Pa207) with (Pa369-82).

Lastly, Appellants seem to argue that the 2022 CBBMP is arbitrary, unreasonable, and capricious because the Council has not recommended, as the exclusive approach, the non-lethal method Appellants espouse as “the most effective way to reduce human/bear conflicts.” (Pb33). However, “[i]n adopting an integrated strategy, [the] Council recognize[d] that both lethal and non-lethal methods are necessary to manage black bears.” (Pa1903). This includes, as Appellants support, the control of human-derived food. Id. at 1909-10.

Appellants’ simple disagreement with the Council’s well-reasoned decision to adopt a more comprehensive, integrated approach toward black bear management is no basis to find that the 2022 CBBMP is arbitrary, unreasonable or capricious. There is ample basis in the record to support the Council’s judgments and the 2022 CBBMP should be upheld.

CONCLUSION

For these reasons, the 2022 CBBMP should be upheld.

Respectfully submitted,

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MEMBER OF THE NJ BAR

December 11, 2024

Via eCourts Only

Patricia Shaw, case manager

Superior Court of New Jersey, Appellate Division

Richard J. Hughes Justice Complex

PO Box 006

Trenton, NJ 08625-0006

Re: New Jersey Black Bears (Ursus Americanus), Animal Protection League of NJ, Angela Metler, Doreen Frega, and Susan Russell v. Shawn LaTourette, in his capacity as NJDEP Commissioner; NJ Department of Environmental Protection, Dave Golden, in his capacity as Assistant Commissioner of the Division of Fish and Wildlife; the NJ Division of Fish and Wildlife; Frank Virgilio, in his capacity as Chairman of the NJ Fish and Game Council, and the NJ Fish and Game Council; Docket Number: A-000672-23

Dear Ms. Shaw,

This office represents appellants New Jersey Black Bears, Animal Protection League of NJ, Angela Metler, and Doreen Frega in the above-captioned matter.

Please accept this amended letter brief in lieu of a more formal reply brief.

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PRELIMINARY STATEMENT

In their brief, Respondents changed their reason for omitting damaging scientific data regarding the bear population. Respondents' new reason for omitting the data from the comprehensive black bear management policy that they adopted in 2023 ("Adopted CBBMP") contradicts the record and further demonstrates their bad faith efforts to garner public support for a recreational bear hunt. If Respondents had told the truth – that they plan to hold two recreational bear hunts per year regardless of the bear population – they could have held legal recreational bear hunts but there would have been even less public support, and they could not have convinced Governor Murphy to approve an emergency bear hunt in November of 2022. By adopting a policy designed to conceal data and disguise a recreational hunt as a necessary population management hunt, Respondents adopted a policy that is bad faith, arbitrary and capricious. Also, the Adopted CBBMP cannot be separated from the emergency hunt that was overturned by this court (Animal Prot. League of N.J. v. N.J. Fish & Game Council, 477 N.J. Super. 145 (App. Div. 2023), holding that the NJ Fish and Game Council's finding of imminent peril was "clearly erroneous," Id. at 166.), since the emergency adoption was the concurrent proposal for the Adopted CBBMP.

The Adopted CBBMP, codified at N.J.A.C. 7:25-5.6, should be overturned and the bear hunt canceled because:

- Respondents’ omission of their bear population data is arbitrary and capricious;
- Respondents’ adoption of the bear policy violated the Administrative Procedure Act at N.J.S.A. 52:14B-1 et seq. because the adopted policy is substantially changed from the proposed policy;
- The adopted rule fails to satisfy the requirements set by the Supreme Court; and
- The adopted rule is scientifically arbitrary and capricious.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Appellants incorporate by reference the statement of facts and procedural history from their July 22, 2024 amended brief.

LEGAL ARGUMENT

I. Omission of the 2022 Hunt Data is Arbitrary and Capricious (not raised below)

Arguments about the omission of bear population data were not raised below because Appellants could not have predicted that Respondents would omit important scientific data from their Adopted CBBMP.

A. The Data from a December Hunt Segment is Comparable

In response to public comments, Respondents claimed that they were “unable” to generate a Lincoln-Petersen (“L-P Estimate”) estimate for 2022 because it took place during December (“Segment B”) only; and were “unable” to include data from the 2022 hunt in the proposal because it took place after the proposal was published; but also that “all available 2021 and 2022 data” would be

included in the Adopted CBBMP. (Pa1894¹, response to comment 47). However, the 2022 hunt data was completely omitted from the Adopted CBBMP. Even if Respondents were “unable” to generate an estimate, they conceded that all available data should be published in the Adopted CBBMP. That data was not included because it would have been damaging to their claim that the state had 4,000 bears in September of 2021 (Pa288) and November of 2022 (Pa7, Pa20, Pa114, Pa118, Pa230, Pa236, Pa288, Pa398, Pa1769) because the public could have performed the simple L-P Estimate calculation and figured out that the bear population was only 1,614.

A year after responding to public comments, Respondents no longer claim that they are unable to produce an L-P Estimate for 2022, but that such an estimate would not be “comparable” to estimates from previous years. (Pb10, 12).

Respondents’ argument is disingenuous.

Respondents do not deny that the L-P Estimate for the bear population for 2022 shows a population of only 1,614 bears. They claim only that the December hunt (“Segment B”) data is not “comparable” to the data from an October hunt (“Segment A”) (Pb10, 12), but this claim contradicts the record and the Adopted CBBMP itself.

¹ Page numbers beginning with “Pa” refer to Appellants’ July 22, 2024 appendix. Page numbers beginning with “Pb” refer to Appellants’ July 22, 2024 amended brief. Page numbers beginning with “Db” refer to Defendants’ October 23, 2024 brief.

In a graph labeled “Figure 3” in their November 15, 2022 Adopted Emergency Rule and Concurrent Proposed Rule (“Proposed CBBMP”), Respondents compared L-P Estimates from years when the bear hunt occurred only during segment B (the years 2005, 2010, 2011, 2012, 2013, 2014, and 2015) with years for which Respondents used only the estimates from Segment A (2016, 2017, 2018, 2019, and 2020). (Pa53). In 2023, in their updated graph labeled “Figure 3,” Respondents continued to compare the Segment B L-P Estimates from years 2005, 2010, 2011, 2012, 2013, 2014, and 2015; with the Segment A L-P Estimates from 2016, 2017, 2018, 2019, and 2020. (Pa1904).

Respondents also compared Segment B data from 2014 and 2015 to Segment A data of more recent years in their November, 2022 slide show (Pa386) to justify an emergency bear hunt. In 2021, Respondents went all the way back to 2003 to compare Segment B data from 2003, 2005, 2010, 2011, 2012, 2013, 2014, and 2015 to Segment A data from 2016, 2017, 2018, 2019, and 2020 in their slide show for an emergency bear hunt. (Pa282a).

Respondents’ many, recent comparisons of Segment B data to Segment A data show that the data is comparable, and their argument that the data was omitted because it was not comparable is disingenuous and contradicts the record.

In 2021 and 2022, Respondents claimed there was “bear population growth” (Pa280, Pa281, Pa1904), and claimed that the bear population was “rapidly

increasing” (Pa23), “increasing” (Pa289, Pa398, Pa1904), and “growing” (Pa3, Pa18, Pa20, Pa23, Pa53, Pa69, Pa93, Pa286, Pa1770). However, their contention is contradicted by their own claims that the bear population would reach 4,000 during 2021 (Pa288) as well as in 2022 (Pa7, Pa20, Pa114, Pa118, Pa230, Pa236, Pa288, Pa398, Pa1769). If the bear population had been rapidly increasing in 2021 and 2022, as Respondents claim, their own bear population estimate would have gone up from 2021 to 2022, but instead remained steady at 4,000. This court recognized that the Council’s 2021 comprehensive black bear management policy contained “the same objectives, figures, and recommendations” as the Proposed CBBMP issued in 2022. Animal Prot. League of N.J. v. N.J. Fish & Game Council, 477 N.J. Super. 145, 164 (App. Div. 2023)

The number of bears is important because the Adopted CBBMP relies on a claim that the bear population is growing, and this claim is directly contradicted by the data. Furthermore, the Fish and Game Council and the Division of Fish and Wildlife were likely afraid that the CBBMP might not be adopted at all if the truth about the bear population became public, because the last time the data showed that the bear population was less than half of the figure used to justify the hunt, the DEP Commissioner canceled the bear hunt (U.S. Sportsmen’s Alliance v. NJDEP, 372 N.J. Super. 598, 600-603 (App. Div. 2004), rev’d U.S. Sportsmen’s Alliance v. NJDEP, 182 N.J. 461 (2005)). In 2004, Commissioner Bradley

Campbell wrote in a letter to the NJ Fish and Game Council that "[t]he data does not currently document the rapidly expanding population supposed at the time of the last game code adoption." Id. at 601. After hearing Respondents' figure of 4,000 bears, many commenters thought there were too many bears and that there was a correlation between the bear population and bear complaints (Pb18), showing that public support for a bear hunt was based on an incorrect bear population estimate.

B. A Projection is a Type of Estimate, and Respondents Relied on their Estimate of 4,000 bears

In the wake of the 2022 hunt data that showed Respondents that their estimate of 4,000 bears was much too high, Respondents have been distancing themselves from their estimate as well as the 2022 hunt data. Respondents claim that the figure of 4,000 is a "projection" and not an "estimate" (Db11) and that they "declined to rely on" that projection (Db10). However, a projection is a type of estimate, just like an L-P Estimate is a type of estimate. Respondents use the words "projection" and "estimate" to refer to the same bear population estimate in their 2005 comprehensive black bear management policy (which was invalidated by this court in N.J. Animal Rts. All. v. N.J. Dep't of Env't Prot., 396 N.J. Super. 358, (App. Div. 2007)), on two different pages (Pa225-26). In Figure 7 (Pa225), Respondents titled their graph "NJ BLACK BEAR Research Area POPULATION

PROJECTION” while the caption below calls the graph a “Population estimate.”

On the next page (Pa226), Respondents’ captions below Figure 8 state both “Population estimate” and “Projected Black Bear Population.” Also, Merriam Webster defines “projection,” as used here by Respondents, as “an estimate of future possibilities based on a current trend.”²

Despite denying that they “relied” on their estimate of 4,000 bears, Respondents relied heavily on the figure to justify both the emergency hunt in the Proposed CBBMP as well as the multiyear Adopted CBBMP, as documented in the record:

- November 15, 2022 adopted emergency rule and concurrent proposed rule (Pa7, Pa20);
- Governor Murphy’s Executive Order 310 authorizing an emergency bear hunt (Pa114);
- November 10, 2022 NJ Division of Fish and Wildlife Bear Management Update – Frequently Asked Questions (Pa118);
- NJDEP Commissioner Shawn LaTourette’s November 15, 2022 letter to Fish and Game Council Chair Frank Virgilio (Pa230);
- November 28, 2022 letter from Fish and Game Council Chair Frank Virgilio to Dante DiPirro, Esq., denying an application for a stay (Pa236);

² <https://www.merriam-webster.com/dictionary/projection> (last visited November 20, 2024).

- September 14, 2021 Black Bear Management Emergency Rule slide show (Pa288);
- November 15, 2022 Black Bear Management Emergency Rule slide show (Pa398);
- NJDEP Commissioner Shawn LaTourette’s Administrative Order 2022-22 (Pa1769); and
- October 2, 2023 Adoption of the Comprehensive Black Bear Management Policy, response to comment #44 (Pa1894).

The Adopted CBBMP is arbitrary and capricious not because they removed most mentions of the incorrect figure – agencies should not knowingly spread false information – but because they concealed the correct data and failed to change a policy that was based on incorrect data. Merely removing the incorrect data, without adjusting the policy based on the correct data, cannot save the Adopted CBBMP from being arbitrary and capricious. While the removal of incorrect data is not in itself arbitrary and capricious, it does constitute a substantial change that should have triggered a new publication in the NJ Register and new public comment period under N.J.S.A. 52:14B-4.10, as discussed previously. (Pb19).

The last vestige of the incorrect data in the Adopted CBBMP lies in Respondents’ replies to public comments (Pa1894, response to comment #44).

By denying that they relied on their own estimate of 4,000 bears, Respondents want to make it seem like they do not plan bear hunts around data other than L-P Estimates from Segment A, and any other data is not “comparable” (Db10). By arguing that neither the 2022 bear hunt data nor the incorrect estimate of 4,000 bears are comparable, Respondents are trying to find an excuse for omitting the most recent bear population data. However, the Lincoln Petersen data from Segment B is comparable, as discussed above; and Respondents stated that the 2022 data should be included in the Adopted CBBMP (Pa1894, response to question 47).

C. Rule Summaries are Part of the Rule Proposal

"Where rule-making is concerned, the purpose of the procedure set forth in the (Administrative Procedure Act) is to give those affected by the proposed rule an opportunity to participate in the rule-making process not just as a matter of fairness but also as 'a means of informing regulators of possibly unanticipated dimensions of a contemplated rule.'" Fed. Pac. Elec. Co. v. N.J. Dep't of Env'tl. Prot., 334 N.J. Super. 323, 340-41 (App. Div. 2000), citing In re the Adoption of Regulations Governing Volatile Organic Substances in Consumer Prods., N.J.A.C. 7:27-23, 239 N.J. Super. 407, (App. Div. 1990), (quoting American Employers' Ins. v. Commissioner of Ins., 236 N.J. Super. 428, 434, (App. Div. 1989)). The procedure in the Administrative Procedure Act includes the

publication of the summary of the proposed rule (N.J.S.A. 52:14B-4(a)(2)) as well as the main body of the proposed rule. Respondents seem to want to be able to write whatever they want in a rule summary and then simply omit that information from the adopted rule without violating the portion of the Administrative Procedure Act that would require a new round of public comments if there are substantial changes to a rule after the proposal is published.

A summary of the proposed rule is supposed to be a summary of the proposed rule, and not a free opportunity to publish specious data to garner public support for a scientifically flawed proposal, without repercussions. While Respondents do not use the figure of 4,000 bears elsewhere in main text of the Proposed CBBMP or the Adopted CBBMP, the summary (Pa7, Pa20), as well as the agency's presentations at meetings (Pa383), the adoption document ((Pa1894, response to comment #44), and their Frequently Asked Questions (Pa117) repeat the figure. Also, both the Adopted CBBMP and the Proposed CBBMP state that the bear population is "growing" (Pa53, Pa1904), which is contradicted by the 2022 data. Hundreds of commenters who supported the bear hunt stated that there were "too many" bears (Pa1890, comment 27); or "numerous" bears (Id.). The public's conception of the number of bears could only have come from the estimate of 4,000 bears because this was the only bear population estimate that

Respondents released between the time they proposed the CBBMP and the end of the public comment period.

Omitting the 2022 bear population estimate that contradicted the Adopted CBBMP and the Proposed CBBMP, was bad faith, arbitrary, and capricious, and the Adopted CBBMP should be invalidated.

II. The Issues have not been Litigated Before (not raised below)

Respondents claim that Appellants' claims have been litigated previously (Db13, fn. 8), but do not understand that each CCBMP is different and therefore presents a different set of facts. Additionally, the Adopted CBBMP is based on an inflated bear population estimate and the false pretense that the bear population is growing, and must be viewed through that lens.

The argument about whether the substantive issues have been litigated before was not raised below because Appellants could not have known that Respondents would claim that the Adopted CBBMP has been substantively challenged before. The substantive arguments were raised below. (Pa1889, comment 18; Pa1941; Pa1973; Pa1988).

III. The Adopted CBBMP is Arbitrary and Capricious (raised below Pa1889, comment 18; Pa1941; Pa1973; Pa1988)

The substantive flaws of the Adopted CBBMP are arbitrary and capricious.

By calling the 30% harvest rate threshold an “end-point objective” as required by the Supreme Court in US Sportsmen's Alliance v. NJ DEP, 182 N.J.

461, 477-78 (2005). (Db14), Respondents are saying the goal of their comprehensive black bear management policy is to kill 30% of the bear population every year. Nowhere in the Adopted CBBMP is this stated as a goal. Respondents had found that the state's bear population can withstand a harvest rate of 25% (Pa211) and also found that a productive black bear population like New Jersey's can sustain losses of 20-25% from all sources of mortality (Pa522). The 30% threshold is not a goal, but a guardrail to prevent too many bears from being killed in the recreational hunt. If Respondents wish to state that killing 30% of the bear population annually is their goal regardless of the number of bears or the number of bear complaints, they should drop the pretense of wanting to reduce bear complaints (especially since hunting is ineffective for reducing bear complaints (Pb33-39)) or to control a "growing" bear population that is actually shrinking (Pb15-16) and be honest with the public about their purely recreational bear hunt with an end point goal that exceeds the maximum sustainable harvest rate determined by their own scientists.

Regarding the factors to be considered when determining whether to hold a bear hunt, required under US Sportsmen's Alliance v. NJ DEP, 182 N.J. 461, 477-78 (2005), Respondents merely claim that such factors are included but fail to list any such factors. (Db14). They are unable to list such factors because there are none; the Adopted CBBMP calls for two bear hunt seasons every year, regardless

of any factors. Citing a decision on the 2015 CBBMP (Db14) is unpersuasive because the 2015 CBBMP is a completely different rule. This appeal concerns the Adopted CBBMP that was adopted in 2023 based on an incorrect population estimate; not the 2015 CBBMP.

Respondents are also denying scientific findings in the record that show that black bears will self-regulate. (Pb28-29, Pa488, Pa570, Pa587, Pa793, Pa855, Pa953, Pa1024) Self-regulation means that when resources are scarce or plentiful, litters of cubs will be smaller or larger, respectively. (Id.) For their contention that bears do not self-regulate, Respondents cite their own response to public comments (Pa1895, response to connect 50), which contains no scientific citations and directly contradicts the record and their own previous writings. Respondents reported that numerous studies found that bears eating high energy human foods like garbage, corn fields, and birdfeeders, have higher fertility and reach sexual maturity earlier, and cited those studies. (Pa488) Furthermore, citing their own response (Pb15, citing Pa1895, response to connect 50) that did not exist before the CBBMP was adopted is not a citation to the record.

Regarding safety, Respondents ask the court (Pb18) to compare the 34 human fatalities from hunting accidents (Pa207) with bear incidents where there is not a single human fatality (Pa369-82), while they call hunting “safe” (Db17).

The lack of a cultural carrying capacity determination is another reason the the Adopted CBBMP is arbitrary and capricious. Respondents' claim that "black bear incidents and complaints" is their metric for cultural carrying capacity but have failed to state a threshold of incidents and complaints that indicate cultural carrying capacity has been reached. This is further indication that Respondents are trying to pass off a recreational hunt as a management hunt that depends on the bear population or the number of complaints. If the goal of the Adopted CBBMP is to bring the bear population down to meet cultural carrying capacity, Respondents would define a number of bears or a number of incidents for cultural carrying capacity. Respondents' graph shows approximately 1,500 bear "incidents" in 2022, which is an extremely low number considering that (1) an "incident" can be a bear sighting that is not a conflict; (2) New Jersey's human population is over 9 million according to the U.S. Census; and (3) the complaints are unverified and even a former NJDEP Commissioner points out they are unreliable as scientific evidence (Pa1985). As discussed previously, while New York and Pennsylvania survey the public to determine cultural carrying capacity (Pb24), in New Jersey, the closest thing to a recent cultural carrying capacity survey is the public comments, which are overwhelmingly against a bear hunt (Pb17-18, Pb24-25). The people of New Jersey overwhelmingly enjoy seeing our wildlife alive, and 95.7% of NJ residents are willing to adopt measures to peacefully coexist with bears. (Pb25, Pa539-40).

On the one hand, Respondents claim that their metric for bear management is “bear incidents and complaints” (Pb17) but contradicted themselves when they admitted they “did not select Appellants’ desired end-point objectives of ‘bear population number or number of bear complaints’” (Pb14).

Lastly, Respondents mischaracterize Appellants’ argument as challenging “the propriety of a recreational hunt.” (Db15). Appellants clearly state that Respondents “are allowed to hold a recreational bear hunt,” (Pb39) but cannot do so with a scientifically arbitrary and capricious rule that contradicts the record, fails to meet Supreme Court requirements, and violates the Administrative Procedure Act.

CONCLUSION

Because the Adopted CBBMP is arbitrary and capricious, fails to meet Supreme Court requirements, and was not adopted in substantial compliance with the Administrative Procedure Act, the Adopted CBBMP should be invalidated and the New Jersey black bear hunt should be canceled.

Respectfully submitted,

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