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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DEFENDERS OF WILDLIFE, a nonprofit
corporation, THE ALASKA WILDLIFE
ALLIANCE, a nonprofit corporation, and
SIERRA CLUB, a nonprofit corporation,

Plaintiffs,

vs.

STATE OF ALASKA, BOARD OF GAME,
AND COMMISSIONER OF FISH AND
GAME,

Defendants.

FRIENDS OF ANIMALS, INC.,
and THOMAS CLASSEN,

Plaintiffs,

vs.

STATE OF ALASKA, BOARD OF GAME,
AND COMMISSIONER OF FISH AND
GAME,

Defendants.

RONALD T. WEST,

Intervenor/Plaintiff.

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)
) **PLAINTIFFS DEFENDERS OF**
) **WILDLIFE ET AL.'S MEMORANDUM**
) **OF LAW IN SUPPORT OF MOTION**
) **FOR RECONSIDERATION**

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) Case No.: 3-AN-06-10956 Civil
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)
) Case No.: 3AN-06-13087 Civil
) Consolidated with
) 3AN-06-101956 Civil
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Plaintiffs Defenders of Wildlife, The Alaska Wildlife Alliance, and Sierra Club ("Defenders") respectfully move the Superior Court to reconsider that portion of its March 13, 2008 Order ("Order") on summary judgment concerning Count VIII of Defenders' Second Amended Complaint. Under Count VIII, Defenders argued that "when the Board adopted the plans in 5 AAC 92.125, the Board failed to apply sustained yield as is required by AS 16.05.255 and as is separately required by the Alaska Constitution, Article VIII, Section 4."¹ The nub of the argument is that because sustained yield applies to predators, the Board has to apply the principle to its management decisions, and the record has to reflect that populations are being managed in accordance with sustained yield. The Court determined that constitutional sustained yield applies, but overlooked the existing statutory definition of sustained yield, and failed to address Defenders' argument that the Board applied neither constitutional nor statutory sustained yield to predator populations in the control areas. Thus, Defenders move for reconsideration for both these reasons.

First, the Court "overlooked ... or failed to consider a statute." Alaska Civil Rule 77(k)(1)(i). The Court incorrectly asserts "[t]he term 'sustained yield' is not defined" in statute. Order at 43. In fact, the term "sustained yield" is defined in AS 16.05.255(j)(5).² "Sustained yield" applies to all "game," including wolves and bears:

¹ Plaintiffs Defenders of Wildlife et al.'s Memorandum in Opposition to State's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment (June 28, 2007), at 44.

² Defenders fully briefed this issue with citations to the relevant statutory definitions, and pointed out that both the statutory definition of "game" and regulatory definition of "big game" include wolves and bears, that "predator" and "prey" were not defined, and that some game animals are both predator and prey. See Plaintiffs Defenders of Wildlife et al.'s Memorandum in Opposition to State's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment (June 28, 2007), at 45-46; Plaintiffs Defenders of Wildlife et al.'s Opposition to State's Cross Motion and Reply on Plaintiffs' Cross Motion for Summary Judgment (August 14, 2007), at 31-32. The latter brief also includes a discussion of the statutory sustained yield definition. Id.

"sustained yield" means the achievement and maintenance in perpetuity of the ability to support a high level of human harvest of **game**, subject to preferences among beneficial uses, on an annual or periodic basis.

AS 16.05.255(j)(5) (emphasis added). Game is "any species of bird, reptile, and mammal, including a feral domestic animal, found or introduced in the state, except domestic birds and mammals." AS 16.05.940(19). Thus, the Court incorrectly concludes that "AS 16.05.255 does not mandate the use of a sustained yield principle to the management of predators, in general, or of bears and wolves, in particular." Order, at 43.

Second, the Court "overlooked or misconceived a material question in the case." Alaska Civil Rule 77(k)(1)(iii). After holding that the sustained yield clause in the Alaska Constitution applies to predators, *see* Order at 47, the Court decided a claim that Defenders has not made. The Court overlooked the claim that Defenders has made.

The Court found that the Board of Game did not violate the law in managing predators and prey in a way that favors the prey, stating as follows:

Board may opt to manage the interaction between particular predators and prey in a manner that reflects a determination that the relative survival of the prey is a more beneficial use than the survival of predators.

The Court finds that the management of wildlife resources may constitutionally include a selection between predator and prey populations, just as the management of fisheries may include the selection between fish stock. The Court finds that the Board has not acted arbitrarily or abused its discretion in its decision to institute the particular predator control programs at issue here. The supreme court's resolution of a similar challenge to fishery allocations is dispositive.

Order, at 47- 48 (internal footnotes omitted).

Defenders never claimed, however, that the sustained yield provision in either in AS 16.05.255 or in the Constitution prevented the Board from making unequal allocations of, or selecting between beneficial uses of, either prey or

predators. In fact, after discussing this topic Defenders stated exactly the contrary: "Thus, provided it is managed consistent with sustained yield, a game population may be allocated unequally as between uses and user groups."³

The claim that Defenders actually makes under Count VIII is that the Board acted illegally when it "did not consider the application of sustained yield to wolves and bears" and further that the record evidence shows wolves and bears in predator control areas are not being managed by the Board in accordance with sustained yield but instead are being managed under some notion of minimum viability.⁴ In briefing this claim Defenders pointed out that

[I]t is readily apparent that the Board did not consider the application of sustained yield to wolves and bears. In January 2006 the Board deleted references in 5 AAC 92.110 to the Wolf Conservation and Management Policy for Alaska, which Policy expressly required the application of sustained yield to wolves. In May 2006 the Board adopted Findings expressly disavowing the application of sustained yield to bears in predator control areas. See Findings of the Alaska Board of Game, 2006-164-BOG, Board of Game Bear Conservation and Management Policy May 14, 2006 at 4 ("Generally, bear hunting will be conducted on a sustained yield basis, **except in areas where a bear predation control program is authorized**") (emphasis added).

Id. at 50-51, and n. 22 (footnote omitted). Defenders further pointed out that

[T]here is no evidence in the administrative record for the May 2006 Board meeting (at which the predator control implementation plans challenged here were adopted) or any statement in 5 AAC 92.125 indicating an intent to manage wolves and bears consistent with the sustained yield requirement in AS 16.05.255(j)(5). Neither 5 AAC 92.125 nor the administrative record indicates what the "annual or periodic basis" under which the wolves and bears are to be managed in a GMU where predator control is authorized. AS 16.05.255(j)(5).

³ Plaintiffs Defenders of Wildlife et al.'s Memorandum in Opposition to State's Motion for Summary Judgment and in Support of Cross Motion for Summary Judgment (June 28, 2007), at 47.

⁴ Id. at 50.

Nor is there any finding of what is, or might be, the "high level of human harvest," as defined by AS 16.05.255(j)(2), of wolves and bears. What is apparent is that under each predator control implementation plan, the relevant wolf or bear population is to be reduced 60 - 80% as rapidly as possible, and once that reduction occurs, the reduced population will be kept at that level indefinitely. Whatever might have been the "high level of human harvest" before the reduction will no longer be possible. Indeed, once the wolf or bear population is reduced 60 - 80% even the lower harvest levels that have been reached before predator control was instituted could not be possible in the future.

Id. at 51.⁵ Earlier, Defenders also pointed out that

[b]ecause the Court's review is based on the administrative record before the Board at the time the Board made its decisions, "For a court to determine that an agency acted within its authority in adopting a regulation, it is vital that the agency clearly voice the grounds upon which the regulations [sic] was based in its discussions of the regulations or in a document articulating its decision." Tongass Sport Fishing Ass'n. v. State of Alaska, 866 P.2d 1314, 1319 (Alaska 1994) (internal citation omitted). This is because in deciding a motion for summary judgment when an agency's decision is challenged, the "function of the ... [court] is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." National Wilderness Institute v. U.S. Army Corps of Engineers, 2005 WL 691775 at 7 (D.D.C. 2005). If the agency's decision is not sustainable on its administrative record, the Court must vacate and remand the decision. Fed. Power Comm'n v. Transcontinental Gas Pipeline Corp., 423 U.S. 326, 331 (1976).⁶

Because of these well-settled principles of administrative law, at a minimum the Board's failure to address sustained yield of predators makes it impossible for the Court to determine whether the Board complied with the sustained yield mandates in AS 16.05.255 and Article VIII, Section 4 of the Alaska Constitution.

⁵ See also, Plaintiffs Defenders of Wildlife et al.'s Opposition to State's Cross Motion and Reply on Plaintiffs' Cross Motion for Summary Judgment (August 14, 2007), at 32 (footnote omitted) ("Here, there is no analysis in the administrative record indicating that the Board either considered or decided what might be sustained yield for the wolf and bear populations in the GMUs for which predator control implementation plans were adopted. The State cites to nothing in the administrative record indicating otherwise.").

⁶ Id. at 3.

Consequently, Defenders respectfully requests that the Court reconsider that portion of its March 13, 2008 Order on summary judgment concerning Count VIII of Defenders' Second Amended Complaint for Declaratory and Injunctive Relief.

Respectfully submitted on March 24, 2008 in Anchorage, Alaska.

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