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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.	**PLAINTIFFS DEFENDERS OF WILDLIFE ET AL.'S OPPOSITION TO STATE'S CROSS MOTION AND REPLY ON PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT** Case No.: 3-AN-06-10956 Civil
FRIENDS OF ANIMALS, INC., and THOMAS CLASSEN, Plaintiffs, vs. STATE OF ALASKA, BOARD OF GAME, AND COMMISSIONER OF FISH AND GAME, Defendants.	Case No.: 3AN-06-13087 Civil Consolidated with 3AN-06-101956 Civil
RONALD T. WEST, Intervenor/Plaintiff.	

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I. INTRODUCTION

Plaintiffs Defenders of Wildlife et al.'s ("Defenders") motion and the State's cross motion for summary judgment have now put in issue all Counts of the Second Amended Complaint, saving for Count VII concerning bounties, which is the subject of a separate summary judgment motion and for which separate briefing is also now completed. Defenders must note at the outset that the State has not supported its arguments with relevant record citations, has proposed incorrect standards of review for the Court to use in assessing Defenders' claims, and has inappropriately raised the specter of damage to village subsistence if the Court rules in Defenders' favor.

A. The State fails to support its arguments with citations to the record.

Defenders' Counts IV - VI and VIII concerning harvestable surplus and sustained yield rest on the statutory provisions that require the Board to consider certain information and take certain action. In some instances the State's response is that the statutory requirements are not what Defenders has alleged and in others it is that the Board of Game's ("Board") considered the necessary information and made the correct determinations. Defenders and the State agree that because this is a record review case the Court must determine the legitimacy of the Board decisions challenged in these Counts based on the administrative record before the Board at the time it made its decisions.

Throughout its briefing, however, the State does not specify which pages in the Board's record contain support for its arguments. Instead, the State refers

generally to its Exhibits but without specification of the pages in the Exhibits that support the State's arguments.[1] Making matters worse, the State's most recent filing refers either to a wrong Exhibit or to a Exhibit mislabeled in the State's briefing (Defenders has been unable to figure out which).[2]

It's not the Court's obligation to find support in the record for the State's assertions: "Rule 56 does not impose upon the … court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998). "To survive summary judgment, the nonmovant must submit or identify evidence in the record" supporting its position. Malacara v. Garber, 353 F.3d 393, 404 (5th Cir. 2003).[3] The State's failure to support its arguments with correct citations to specific pages of the administrative record impermissibly shifts the State's burden to the Court.[4]

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[1] See, e.g., *State's Opposition and Cross Motion Regarding Summary Judgment on Defenders of Wildlife, et al's, Counts IV, V and VI; on Friends of Animals, et al's Counts II, IV, and V and on Intervenor's Corresponding Counts* ("State Opp./Cross Motion"), at 4 n. 3; 6 n. 8; 8 nn. 11 and 13; 9 - 11 nn. 14 - 26.

[2] See, e.g., State Opp./Cross Motion at 12 nn. 41, 43 -45, referring to Exhibit B, which does not contain the remarks attributed to Mr. Regelin. Exhibit A also appears to be mis-cited; Defenders' copy of the State's Exhibit A is a 5 page legislative hearing summary. The document cited by the State as Exhibit A has at least 95 pages. See State Opp/Cross Motion at n. 33.

[3] See also Bagdonas v. Dep't of Treasury, 93 F.3d 422, 426 (7th Cir. 1996) ("court has no power to 'cure' the agency's failure to fulfill its responsibilities by combing the record on its own in search of a theory that might support the agency's decision"); Indiana Forest Alliance, Inc. v. U.S. Forest Service, 2001 WL 912751 *5 (S.D. Ind. 2001) ("It is not the function of the court to conduct an unguided search of the record in search of evidence to support or refute any party's position"); U.S. v. Dunkel, 927 F.2d 955, 956 (7th Cir.1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); San Luis Obispo Mothers for Peace v. N.R.C., 751 F.2d 1287, 1325 - 26 (D.C. Cir. 1984) ("Judges are not historians charged with isolating the 'true' basis for an agency's decision when its ostensible justification proves unconvincing."); E. I. du Pont De Nemours & Co. v. Train, 541 F.2d 1018, 1037 - 38 (4th Cir. 1976) ("The strained effort in the EPA brief to justify the agency [rule making] actions leaves us in a state of extreme confusion. We have examined every record reference made by EPA. They are cryptic, mystic, and enigmatic. If there is to be any worthwhile judicial review of agency action, that action must be presented and supported in a manner capable of judicial understanding.").

[4] Ironically, in the *State's Reply to Friends of Animals et al.'s Opposition to the State's Cross-Motion for Summary Judgment* (Aug. 9, 2007), the State indicates that "It is impractical for this Court, no matter how

(fn. cont.)

B. The State mischaracterizes the nature of Defenders' claims and thereby argues for an incorrect standard of review.

The State begins its discussion of the standards of review by asserting that the Board's regulations are "presumptively valid … it is presumed they were adopted in compliance with all applicable statues and regulations," citing AS 44.62.100 and Grunert v. State, 109 P.3d 924 (Alaska 2005). "State Opp./Cross Motion" at 5. This assertion impermissibly conflates two different standards of review.

Alaska Statute 44.62.100 establishes a rebuttable presumption "that the procedural requirements for the promulgation of administrative regulations have been satisfied." Kingery v. Chapple, 504 P.2d 831, 833 (Alaska 1972) (emphasis added). Defenders challenges the validity of 5 AAC 92.110 - 92.115 because these two regulations were adopted in violation of the procedural requirements of the APA. Consequently, it is only with regard to that claim (Count I of Defenders' Second Amended Complaint) that AS 44.62.100's presumption has any relevance.

It is true, as the State claims, that the "party challenging a regulation['s validity] bears the burden of showing that adoption of the regulation is inconsistent with the adopting agency's controlling statute." But this burden is satisfied when the challenger shows that the regulation either "is inconsistent with the Fish and Game Code or is unreasonable and arbitrary." Grunert, 109 P.3d at 937 (emphasis added). In contrast to the challenges to 5 AAC 92.110 - 92.115, Defenders challenges the validity of 5 AAC 92.108 and 5 AAC 92.125 because

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earnest and dedicated, to review even a portion of the evidence the Board has heard on point over the years." Id. at 6. But this is precisely why the State has the burden to cite where in the record it finds support for its arguments and why the Court has no duty to do it if the State does not.

they are "inconsistent with the Fish and Game Code," that is, inconsistent with AS 16.05.255 in the Code. Although these two regulations were enacted based on inadequate data, Defenders does not challenge them on that basis; thus, the deferential "unreasonable and not arbitrary standard" of review does not apply to Defenders' claims against 5 AAC 92.108 and 5 AAC 92.125. Grunert, 109 P.3d at 937.[5] The Court may apply its independent judgment to this determination.

The distinction between the two types of challenges to the validity of a regulation mentioned in Grunert is important because the State argues that "courts must be careful to avoid second-guessing, or substituting their judgment for the Boards' choices on decisions entrusted to the Board or within its area of expertise," and that "[j]udicial review of the Board's regulations consists primarily of ensuring that the agency has taken a hard look at the salient problems and has genuinely engaged in reasoned decision making.'" State Opp./Cross Motion at 5 - 6 (footnote omitted). However, Defenders has not asked the Court to "second guess" the underlying wisdom or efficacy of either 5 AAC 92.108 or 5 AAC 92.125.

Defenders challenges the two regulations because they are inconsistent with statutory requirements. The Court does not apply the "unreasonable and not arbitrary" standard of review to this kind of challenge. Instead, the Court's task is to determine if the regulations are "consistent" with AS 16.05.255. While undertaking that task, the Court applies the independent (substitution of) judgment standard of review to any questions of Constitutional and statutory interpretation

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[5] Defenders also challenges the validity of 5 AAC 92.125 because the regulation is based upon the illegally amended 5 AAC 92.110 - 92.115. See Count II of Defenders' Second Amended Complaint. The State mistakenly claims that Defenders challenges the validity of "5 AAC 85.045, 92.062, and 92.070." State Opp./Cross Motion at 5 n. 14.

that arise, and under that standard the Court gives no deference to the Board's interpretation. Jurgens v. City of North Pole, 153 P.3d 321, 326 (Alaska 2007) (footnote and citation omitted) ("We review questions of law, including the appropriate standard of proof, using our independent judgment.")

In short, in its Second Amended Complaint Defenders has not asked the Court to "make resource management decisions" that "substitute[s] its judgment" for a Board decision that balances "policy concerns." State Opp./Cross Motion at 20.[6] Given the nature of Defenders' actual challenges, therefore, it would be error for the Court to follow the State's suggestion and "give[ ] great weight" to the Board's and ADF&G's "expertise." Id. at 5. In deciding the legal issues raised in Defenders' summary judgment motion, it is the Court which is the expert, not the agencies. Benavides v. State, 152 P.3d 332, 335 (Alaska 2006) (footnotes and citation omitted) ("We apply our independent judgment to questions of statutory interpretation if a decision does not involve an agency's special expertise, adopting 'the rule of law that is most persuasive in light of precedent, reason, and policy.' ").

C. The State's assertions that the predator control programs were implemented in response to a subsistence crisis are unfounded and legally irrelevant.

The State's remarks about subsistence deserve attention only because they are obviously intended to sway the Court by raising the specter that if predator control programs are stopped, the Court might damage "village" subsistence activities. State Opp./Cross Motion at 4.

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[6] In every single case the State cites for its "don't second guess the Board" proposition, the challengers had attacked a regulation's wisdom and asked the court to strike down it down for that reason. See cases cited in State Opp./Cross Motion at 5 -6 nn. 15 - 24, 20, n. 83

The State claims that in GMU 19A "Local Native leaders informed the Board that entire villages were only able to harvest one or two moose in the 2004 and 2005 seasons," other areas "have suffered declines [of harvested moose] and subsistence users in those areas are … suffering" and that this "is precisely the situation the Legislature foresaw and sought to avoid when it enacted the intensive management law, AS 16.05.255(e)(g)." Id. (footnote omitted).

If the State's characterization of the legislative history were entirely accurate, nonetheless it has no relevance to the question before the Court. That question is whether the Board's regulations are consistent with relevant statutory provisions. In any event, the State's characterization of the law and the facts is inaccurate.

As to the law, the Legislature did not enact the intensive management requirements with the specific purpose of protecting "subsistence," and the State's Exhibits A and B do not prove otherwise. State Opp./Cross Motion at 4 n. 13 and accompanying text.[7] The word "subsistence" is not used in the intensive management provisions of AS 16.05.255(e) or definitions in (j); subsistence is addressed in AS 16.05.258.

As to the facts, while Defenders of Wildlife, The Alaska Wildlife Alliance, and Sierra Club are all concerned about the effect of State game management policies on village subsistence users, the record make its evident that such concerns are not the motivating force for the Board's decision making. Attached at Exhibit 65 is a chart showing moose and caribou hunting seasons by GMU and

[7] The State's Exhibit A relates to a 1993 Senate Resources Committee hearing concerning SB 77, and does not mention subsistence. Exhibit B relates to a 1994 House Resources Standing Committee hearing on SB 77, and the word subsistence also is not mentioned by any legislator as motivating support for SB 77's passage.

sub-unit.[8] The chart shows hunting seasons for moose and caribou within the GMUs subject to predator control programs. A review of the chart indicates the instances when the Board has acted to restrict either non-local or non-Alaskan hunting in some way. The State cites only to moose hunting in Unit 19A to support its broad assertions about subsistence users, as that is the one area and the one hunt that is strictly limited through Tier II permitting. In this same unit, however, caribou hunting season is a general hunt, open to all Alaskan and non-Alaskan hunters.[9]

As can be seen from the chart, only those areas with permit hunts beginning with a "T" are managed as subsistence hunts, or Tier II hunts, where the State attempts to limit users to those with a subsistence priority.[10] In GMU 19D, the entire area is open to caribou hunting by all (i.e., rural and non-rural residents) Alaskan and non-Alaskan hunters alike.[11] Most of GMU 19D is open to moose hunting by all Alaskan and non-Alaskan hunters, with only the 19D-east area restricted to Alaskan hunters. There are no Tier II hunts for moose or caribou in GMU 19D.[12]

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[8] The chart is an abbreviated version of the hunting regulations for 2007-2008, available at http://www.wildlife.alaska.gov/regulations/pdfs/regulations_complete.pdf (last visited Aug. 13, 2007).

[9] Exhibit 65 at 4, showing "harvest" hunt for caribou in GMU 19D. "Harvest" is the shorthand for a general season, the least restrictive of the four types of hunts, requiring only the filing of a free "harvest ticket" with ADF&G. See also http://www.wildlife.alaska.gov/regulations/pdfs/regulations_complete.pdf at 12 (last visited Aug. 13, 2007).

[10] Tier II is defined to mean "when the board has identified a game population that is customarily and traditionally used for subsistence and where, even after non-subsistence uses are eliminated, it is anticipated that a reasonable opportunity to engage in the subsistence use cannot be provided to all eligible residents." ADF&G 2007-2008 Hunting Regulations at 23. (available at http://www.wildlife.alaska.gov/regulations/pdfs/regulations_complete.pdf (last visited Aug. 13, 2007)).

[11] Exhibit 65 at 4.

[12] Id.

In GMU 16 caribou hunting is also open to all hunters under a general hunt.[13] Moose hunting in GMU 16A, part of which was added to the predator control areas in 2006, is open to all hunters. Only the mainland portion of the GMU 16B moose hunt is managed as a Tier II hunt, and that hunt has a very large number of urban hunters participating.[14]

Only in GMU 13, which is road accessible to most Alaskans and is a hunting area for the bulk of the hunters from Anchorage, the Mat-Su Valley and Fairbanks,[15] are both moose and caribou regulated by Tier II hunts. There are literally thousands of Alaskans who participate in hunting this area, and permits in the subunit are the basis of frequent litigation over the State's rural subsistence management. See State v. Manning, 161 P.3d 1215 (Alaska 2007). This year over 3,000 permits where issued for the Nelchina Caribou hunt,[16] and there are a similar number of permits issued for moose hunters every year.[17] Only in this area, where urban Alaskans saturate the hunt, is hunting for both moose and caribou restricted to Tier II prioritization amongst users.

The Board has not declared a Tier II hunt for subsistence users in other predator control areas, despite the State's claim that "subsistence users in those areas are also suffering." State Opp./Cross Motion at 4. At Exhibit 66 is a compilation of ADF&G's statistics from the most recent years available showing that in the predator control areas, local "village" residents make up a

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[13] Id. at 3.

[14] Exhibit 65 at 3 and Exhibit 66 at 9.

[15] State's Opp./Cross Motion, Exhibit 7 at 32.

[16] See State's Press Release at http://www.adfg.state.ak.us/news/2007/7-27-07_nr.php (last visited Aug. 13, 2007).

[17] See State's Opp./Cross Motion, Exhibit 7 at 861 (Record Copy 193 at 19, May 2006 Board meeting).

disproportionately small portion of hunters and most of the hunters are non-residents of the area, including non-residents of Alaska. Information in this Exhibit demonstrates that the Board's real goal is not tied to protection of local, Alaskan subsistence users within the predator control areas.

The State's insinuation about damage to subsistence also is based on the unwarranted assumption that if the Court finds the predator control implementation plan regulations invalid, predator control would halt indefinitely. The Board's emergency enactment of new predator control program regulations after the *Friends of Animals v. State* decision disproves that assumption.

In the end, the State's discussion of subsistence should be seen for what it is --- a ploy intended to distract the Court from the actual legal issues before it. The State repeatedly cites subsistence to the Court in order to bestow an urgency to the current programs that simply does not exist. Advocacy for and against predator control has been ongoing since well before Statehood. By the State's own admission, predator control programs take years to show results, assuming there is money available to even properly document the programs and their results. The programs are intended to increase hunting opportunity for all classes of hunters, including out of state hunters who are the basis of the guide/outfitting industry, and the thousands of hunters who live in Anchorage, Mat-Su and Fairbanks. Because these programs may have very long-term effects on game management, they require and deserve careful scrutiny. They are not emergency aid programs that must continue at all costs, without regard to public input or applicable law.

II. COUNT I: NOTICE/RIGHT TO COMMENT 5 AAC 92.110 - 92.115

With respect to Count I, Defenders has shown that the Board eliminated the regulatory criteria governing wolf and bear control programs without giving the

public a meaningful opportunity to comment on the changes in violation of the APA. The State claims that Defenders' argument is based "largely" on assertions that the Proposal Book did not include any of the proposed changes and suggest that the Court should ignore the Proposal Book and instead focus on the public notice, which the State alleges indicates that the Board might make regulatory changes for "enumerated topic areas … broadly defined areas." *State's Reply to the Defenders of Wildlife, et al, and Friends of Animals, et al, Oppositions to the State's First Motion for Partial Summary Judgment* ("State's Reply") at 2 -3, 4 (filed July 9, 2007). According to the State, that was enough to satisfy the APA. Id. at 4.

The State's argument, however, ignores the fundamental purpose of the APA's notice and comment requirements. The purpose is to give interested members of the public adequate information so that they can exercise their statutory right to comment and engage in a meaningful exchange of views with the agency about proposed regulatory changes.

Here, the State does not claim that the public received adequate information so that it could comment meaningfully on the changes the Board made to 5 AAC 92.110 - 92.115. Indeed, given that the notice was so oblique and Proposal 32 steered the public in an entirely different direction than ADF&G's proposal 32A, there could be no basis for such a claim.

The record shows that the changes the Board made to 5 AAC 92.110 - 92.115 had not even been under serious consideration within the Board or ADF&G until a ruling in *Friends of Animals v. State,* Case No. 3AN-03-13489, issued after the public notice was issued. In that case, on January 17, 2006, Judge Sharon Gleason determined that the predator control programs violated 5 AAC 92.110 for several reasons. See *Defenders' Memo. in Support of Motion for*

Preliminary Injunction, Exhibit 2 at 26 (Nov. 17, 2006). Almost immediately following this decision, at an emergency meeting convened on January 26, the Board adopted emergency regulations to allow wolf control to continue for the rest of the winter. A regularly scheduled Board meeting occurred a few days later. It is apparent from the transcript of this regularly scheduled meeting that the Department of Law and ADF&G staff had come prepared to propose new regulatory language for 5 AAC 92.110 - 92.115 in response to the *Friends of Animals v. State* decision two weeks earlier. One can reasonably surmise that after the decision in *Friends of Animals v. State* on January 17, but before the Chairman Fleagle formally brought up the subject before the Board on January 29, the Board and ADF&G staff had had private discussions about it. In any event, Chairman Fleagle explained why he brought the subject up, as follows:

> …because of the recent ruling [Judge Gleason's January 17, 2006 Order in FOA v. State], we have determined that by a special meeting last Wednesday, . . . that our 125 programs were in need of overall [sic] because of the court's ruling. We did that. At the time, we did not deal with 92.110 which is the – 91.100 and 115 [sic] which are the road maps, basically, in the regulations that the state how these programs are to be written and since those were the major reason for the invalidation of the 125 programs, I feel that it's warranted at this time to take up the 92.110 and 115 issues…."

State's Reply to Plaintiffs Oppositions to the State's First Motion for Partial Summary Judgment, Exhibit 1, at 5 (January 29, 2006 BOG Transcript). While Chairman Fleagle explained the reasoning, it was ADF&G 's Matt Robus who introduced ADF&G's proposal 32A to amend 5 AAC 92.110 - 92.115.[18]

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[18] Proposal 32A is at Exhibit H to the State's *Memorandum of Points and Authorities in Support of State's First Motion for Partial Summary Judgment* (filed May 24, 2007). It should not be lost on the Court that proposal 32A is completely unlike Proposal 32. The latter is written in narrative form. Proposal 32A, in contrast, is in the regulatory format of the AAC and clearly indicates what additions and deletions would be made to 5 AAC 92.110 - 92.115. Its format proves that had the agencies truly wanted to inform the public about changes that they intended to make to the regulations, they could easily have done so by making a

(fn. cont.)

Referencing the requirements that the regulation applied to all predator control plans, Mr. Robus stated "the fact that every time they were written [the 5 AAC 92.125 plans] they didn't exactly follow this checklist [in 5 AAC 92.110 - 92.115] is what got us – what got those [5 AAC 92.125] regulations declared invalid." State's Reply, Exhibit 1 at 15. The Department of Law representative at the meeting, Kevin Saxby, further explained that the 5 AAC 92.110 - 92.115 requirements had been used as a basis for lawsuits against the Board: "The practical effect is that what you have done is you've created a litigation strategy for anyone who wants to challenge you." Id. at 18. He argued that the regulation might be intended to ensure better decision making, but would cause the Board future losses in court:

> It's often been necessary or deemed necessary for the legislature to impose restrictions like that on agencies [requirements for decision making] but the valid public policy reason for doing so is when the legislature doesn't trust the public agency to make good decisions and is willing to sacrifice a number of perfectly valid decisions through court losses in order to force the agency in a specific decision making process.

Id. at 19.

After these presentations, Chairman Fleagle took pains to make it clear that his goal was to "make sure we don't give room for a [legal] challenge where possible… ." Id. at 29. Then, after the Board voted to gut the requirements in 5 AAC 92.110 - 92.115, he asked Mr. Saxby if the new versions could be given expedited review and implemented prior to the March, 2006 Board meeting when the Board was scheduled to adopt new predator control programs to replace the

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copy available for public review at the time of the public notice. It is obvious, however, that neither ADF&G nor the Board were interested in listening to the comments of non-governmental organizations and other members of the public who follow predator control closely and who would have been furiously opposed to the proposal to gut 5 AAC 92.110 - 92.115.

emergency regulations set to expire in May of 2006. Mr. Saxby assured him that could happen. Id. at 30. At the end of the discussion Chairman Fleagle again expressed the Board's wishes that the amended regulations become effective prior to the March meeting. Id. at 30 - 32.

While this sequence of events shows that the subject of these changes to 5 AAC 92.110 - 92.115 had not arisen before the public notice and Proposal Book were issued, nonetheless the State claims the notice was adequate to inform the public that the Board intended to re-write 5 AAC 92.110 -92.115 in order to eliminate the requirements concerning predator control programs. But it is clear that at the time the notice was issued and public comments gathered on proposals in the Proposal Book, that the Board, ADF&G, and the Department of Law had not yet formulated any thing remotely related to the changes to 5 AAC 92.110 - 92.115 that were belatedly introduced and eventually enacted.

The transcript of the Board's meeting demonstrates that it was not until just two weeks before the changes were made, in direct response to the January 17 ruling by Judge Gleason and well after the public notice and Proposal Book had been issued, that the agencies invented their proposal. The Board, ADF&G and the Department of Law's actions obviously were not intended to address an issue raised in the public notice, or the Proposal Book, or in public comments, but were intended to respond to an alleged regulatory "problem" emanating from the *Friends of Animals v. State* decision.

Because the facts evident in the Board's own record do not support the State's argument, the State tries to excuse the Board's conduct. The State argues that "because of the nature of their work, their constituencies, and their composition," and the alleged "statutorily required [need] to immediately act on information that comes in whether or not there is any proposal on point," Board

members must be able to "make regulatory changes based on information gathered during the meeting whether or not such changes were proposed ahead of time." State Reply at 4 - 5, 6 (emphasis added). There is, however, no statute that exempts the Board from the APA's public involvement requirements because of the citizen composition of the Board or because of the subjects the Board deals with. While the State cites AS 16.05.255(f) - (g), AS 16.05.258, and AS 16.05.255(i), these statutes neither exempt the Board from the normal APA requirements nor set deadlines that would make compliance with the requirements either burdensome or impossible. See State Reply at 7 - 8.[19]

In this instance, there was no reason for the Board to act hurriedly on ADF&G's proposal 32A, and in fact the State does not offer any justification for the Board's haste or explain why public comment was not solicited on the proposal beforehand. Nor does the State offer an explanation why ADF&G misleadingly titled it "proposal 32A" when it really had nothing to do with the snow machine use issue at the center of Proposal 32.

Contrary to the implication in the State's briefing, Defenders does not claim that the Board may not alter a properly announced regulatory proposal in response to public comments or in response to "information arising during the meeting." State's Reply at 7. Alterations of a proposed change to the regulations are permissible, but they must be reasonably related to what the public was told would be put in play and upon which they might comment. If the alterations adopted in the final rule regulation run too far a field from those in the proposal, the public

[19] When a true emergency exists --- and the State does not claim that one existed here --- the APA provides for it by excusing public notice. See AS 44.62.250. In essence, the State asks this Court to invent another exception similar to the emergency exemption provided by statute.

will be deprived of its right to make meaningful comments on them. In other words, to protect the public's right to comment the final regulation must be the logical outgrowth of the proposed regulatory change.

The State claims that not to be the case, citing Gilbert v. State, Dep't of Fish and Game, 803 P.2d 391 (Alaska 1990), Sheperd v. State Dep't of Fish and Game, 897 P.2d 33 (Alaska 1995), and Stepovak-Shumagin v. Bd. of Fisheries, 886 P.2d 632 (Alaska 1994) for the proposition that the Supreme Court "upheld regulations that were adopted out of whole cloth, or based upon radically-altered proposals, based upon information arising during the meeting, that had not been contemplated by the preexisting proposals." State Reply at 7 and n. 9. None of these cases stands for the State's radical interpretation of the APA, however.

In Gilbert the Court found there had been no "informative summary" violation of the APA when fisherman challenged a regulatory change that had in fact been included as Proposal Number 232 in a Board of Fisheries Proposal Book, which along with the public notice was "distributed statewide [before the Board's meeting] and was available to the public." 803 P.2d at 393. The facts in Gilbert obviously contrast sharply with those here, where no proposal in the Proposal Book reflected any thing like the changes the Board actually made to 5 AAC 92.110 - 92.115. In the State's second-cited authority, Sheperd, the Supreme Court found only that the "guides had offered no evidence in support of their assertion that notice was inadequate." 897 P.2d at 38 n. 3. In the State's third-cited authority, Stepovak-Shumagin, the challengers to a fisheries regulation did not claim a violation of the APA's public involvement requirements. 886 P.2d at 635. In short, these three cases do not remotely support the State's absolutely ludicrous interpretation of the APA to the effect that regulations may be "adopted out of whole cloth, or based upon radically-altered proposals." State Reply at 7.

If the Court accepts it, the State's interpretation of the APA would mean that as long as the agency gives the public an opportunity to comment, the agency doesn't have to give the public any real idea about what it should comment on. This empties the statutory right to comment of any substance.

The State also claims that the Board "directly told the public … that it was considering repealing or amending 5 AAC 92.110 and .115 and invited public comment on that point." State's Reply at 8 (emphasis added). This assertion is based on the statement in the notice that the Board "may adopt, amend [sic] repeal or take no action on the subject matters listed below" and then identifies "Predator Control Implementation Plans" as a subject matter. Id. Neither 92.110 or 92.115 was cited in the notice, however, so clearly the public was not "directly told" either might be amended or repealed. The notice's allusion to the plans could only have misled the public to think otherwise, since predator control implementation plans are codified in 5 AAC 92.125, not in 5 AAC 92.110 - 92.115. The latter two regulations do not contain "predator control implementation plans." They are substantive regulations guiding what considerations the Board must apply before the adoption of those plans.

Later in its brief the State claims that Defenders' argument is "premised on the idea that the public must be informed of every factor or issue the Board intends to consider … or the opportunity to comment is useless." State's Reply at 18 (emphasis added). But Defenders do not made such a broad claim. Indeed, a central purpose of the comment process is to solicit from the public information on what it believes might be the relevant factors the agency should consider. To that end, however, the public must be informed about which regulations apply to a

decision in time to allow for meaningful commentary, and it is this error in the Board's process that forms the basis for Defenders' Count I.[20]

Defenders' Count I is not based on a theoretical or hyper-technical deficiency in the public notice. It is based on the public involvement purposes of the APA and on record facts that plainly show that there was no way the public could reasonably have anticipated and commented on what the Board might do to 5 AAC 92.110 - 92.115. If the APA's public involvement requirements have any meaning, then the Court must grant Defenders' motion on Count I.

III. COUNT II: THE ILLEGAL USE OF SECRET RULES

Although the Board illegally repealed portions of 5 AAC 92.110 - 92.115 in January 2006, the State now claims that it later decided to apply the very same regulations in May 2006 when it adopted 5 AAC 92.125. Because the public was left in the dark about this maneuver, pursued solely to enhance the State's future litigation position, it could not tailor comments to the regulatory criteria the Board applied. This prevented the genuine exchange of views that the APA contemplates, violated the public's right to comment, and necessarily leads to the conclusion that 5 AAC 92.125 is invalid, as claimed in Defenders' Count II.

A. Estoppel does not apply to Defenders' legal argument that the State violated the APA.

In defending against Count II, the State claims that when the Board adopted 5 AAC 92.125, the "Board conducted an entire meeting under the assumption that

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[20] Cf. AS 44.62.210(b) ("a regulation that is … amended, or repealed may vary in content from the summary specified in (a)(3) of this section if the subject matter of the regualtion remains the same and the original notice was written so as to assure that members of the public are reasonably notified of the proposed subject of the agency action in order for them to determine whether their interests could be affected by agency action on that subject").

following the earlier version of … [5 AAC 92.110 - 92.115] was the correct thing to do based, at least in part, on the advice given by the Defenders of Wildlife," that the "Board did precisely what Defenders" requested, and therefore Defenders "and their privies should be estopped" from arguing that the Board acted illegally. State's Reply at 12, 11. The State's claim of estoppel is without merit.

The doctrine of administrative estoppel applies only to formal administrative adjudications; it does not apply to informal adjudicatory proceedings, like the Board's rule makings that occurred here. Johnson v. Alaska State Dept. of Fish & Game, 836 P.2d 896, 908 n. 17 (Alaska,1991) ("Essential elements of adjudication" for purposes of preclusive use of prior administrative findings, include adequate notice to persons to be bound by adjudication, parties' rights to present and rebut evidence and argument, formulation of issues of law and fact in terms of specific parties and specific transactions, rule of finality specifying point in proceeding when presentations and final decision are rendered, and any other procedural elements necessary for conclusive determination of matter in question); see, e.g., Holmberg v. State, 796 P.2d 823, 826 (Alaska 1990) (applying the doctrine in a workmen's compensation hearing case).[21]

Even if the Board's proceedings were classified as formal adjudicative ones, the elements of estoppel are not present in this case. First, the State provides no proof that Defenders of Wildlife was in privity with any other party at the time it commented to the Board, and thus estoppel would not prevent Sierra Club or The Alaska Wildlife Alliance from raising Count II. Second, Defenders of Wildlife

[21] The estoppel case the State cited, at State Reply at 12 n. 29, Rockstad v. Erickson, 113 P.3d 1215, 1223 (Alaska 2005), did not involve an administrative adjudication of any kind.

has been consistent when informing the Board of the illegality of its actions. In other words, it has not taken "a position inconsistent with the one [taken] previously where circumstances render assertion of the second position unconscionable." Brandal v. State, Commercial Fisheries Entry Comm'n, 128 P.3d 732, 741 (Alaska 2006) (emphasis added) (holding that quasi-estoppel did not apply where the Commission had consistently advanced the position that appellant did not qualify for a permit). Thus, estoppel can not apply to Defenders of Wildlife either.

In any case, at bottom estoppel is an equitable doctrine. It would be inequitable to find that a public interest group, like Defenders of Wildlife, acted unfairly when it timely informed a State agency that it had violated the APA and thereby gave the agency plenty of opportunity to comply with the law before the agency changed position in reliance on its prior misconduct. The comments Defenders of Wildlife provided to the Board did not request that the Board follow the prior version of 5 AAC 92.110 - 92.115 without qualification. The comments opposed proposals that would adopt predator control programs, and in that context stated:

> These proposals would violate AS 16.05.255(e)-(g) and 5 AAC 92.110 if adopted. Although the Board attempted to repeal significant portions of 5 AAC 92.110 on January 29, it did so in violation of [the APA]. Thus this program must be consistent with the requirements of the earlier versions of 5 AAC 92.110.

Exhibit 20 at 5 to *Defenders et al.'s Memorandum in Support of Motion for a Preliminary Injunction* (Nov. 2006). The comments did not suggest that the Board follow the illegally altered version of the regulations without notice to the public. The Board's decision making and regulatory process was flawed, not because it relied on any advice from Defenders of Wildlife, but because it failed to amend regulations in accordance with the APA and it failed to inform the public what

regulations it intended to apply later. Ironically, had Defenders of Wildlife not objected to the Board's illegal actions, no doubt the State would now be claiming that Defenders of Wildlife failed to exhaust its administrative remedies, just as it has so claimed against intervenor West. See *State's Reply to Intervenor's Opposition to State's First Motion for Partial Summary Judgment*, at 21-22 (filed July 2, 2007) (claiming West failed to comment and thus exhaust remedies). Had the Board heeded Defenders of Wildlife's comments, it would have corrected its invalid APA process. Instead, the Board dismissed the comments and rushed to codify the new version of 5 AAC 92.110 and 92.115 prior to its adoption of the new predator control regulations.

As it turns out, the State's argument on Count II conclusively demonstrates that the Board acted illegally, not that it acted in heed to Defenders of Wildlife's comments. For, the State asserts that the "Board repealed the relevant portions of 5 AAC 92.110 and .115 based in part on advice from the Department of Law" that the portions were "legally unwise, unnecessary, and were inconsistent with statutory requirements." State's Reply at 13 (emphasis added). Of course, a "regulation is not valid or effective unless consistent with the statute … ." AS 44.62.030; see State, Dep't of Fish & Game v. Manning, --- P.3d ---, 2007 WL 1953675 *13 (Alaska 2007) (invalidating regulations that are inconsistent with the underlying statute). Thus, the State is claiming on one hand that the changes that the Board made to 5 AAC 92.110 - 92.115 in January 2006 were necessary because the old versions were invalid (i.e., "inconsistent with the statutes") and then on the other hand claiming the Board legitimately applied the old versions in May 2006. The State can't have it both ways. If the old versions of the regulations were "inconsistent with statutory requirements," then when the Board

applied them in May 2006 it applied invalid regulations. Consequently, the decisions the Board made based on those invalid regulations are necessarily invalid as well, just as Defenders claims in Count II.

B. The provisions in the old versions of 5 AAC 92.110 - 92.115 are standards of general application and can not be applied unless they are valid regulations.

In addition to its estoppel defense the State argues that there is no statutory requirement that the Board develop regulations setting forth its decision-making process, and thus the fact that the Board rid itself of the criteria in 5 AAC 92.110 - 92.115 is of no consequence. State's Rely at 13, 15 - 16; see id. at 15 ("Board decided … there was no need to set forth [in regulation] a specific procedural list of the factors" it would consider in its deliberations). This argument misses the point, which is that the Board could not use "standard[s] of general application … to implement, interpret or make specific the law … administered by it, or to govern its procedure" without first adopting them in accordance with the APA. AS 44.6.2640(a)(3) (defining "rule, regulation").[22] The fact that there may be nothing express in Title 16 directing the Board to adopt regulations governing its decision-making process concerning predator control is irrelevant. The relevant questions are whether the Board has used "standard[]s of general application," and if so, whether it first adopted them in accordance with the APA.

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[22] AS 44.62.640(a)(3) ("regulation" means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency…."regulation" includes "manuals," "policies," "instructions," "guides to enforcement," "interpretative bulletins," "interpretations," and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public").

Since the State asserts that at its May 2006 meeting the Board followed the repealed provisions of the old versions of 5 AAC 92.110 - 92.115 and since it is undisputed that the Board did not first [re-]adopt them in accordance with the APA, the question the Court needs to answer is whether any of the repealed provisions were standards of general application. The State claims they were not because the Board was seeking "flexible" standards:

> [B]y virtue of its decision to reinstate flexibility, the Board is essentially stating that the topics it is considering are not necessarily 'standards of general applicability' … . If there were 'standards' applied, they were specific to this case …[and] were not generally applicable.

State's Reply at 16 - 17. An agency, however, cannot avoid the classification of a standard as one of general application subject to the APA's rule making requirements simply by declaring that the standard may "not necessarily" be applied in the future, or is not general, or will only be applied once. If the standard has attributes showing it is one of general application --- as do the repealed provisions in 5 AAC 92.110 - 92.115 --- an agency declaring it otherwise doesn't make it so. Here, the repealed provisions included ones that applied across the State and required anyone engaged in predator control to abide by *The Wolf Conservation and Management Policy for Alaska*. See former 5 AAC 92.110(a) (Register 169 -April 2004) (commissioner "may, in accordance with this section, and consistent with *The Wolf Conservation and Management Policy for Alaska*, adopted by the Board on October 30, 1991, amended on June 29, 1993, and incorporated by reference in this section, conduct a wolf population or wolf population regulation program").

The State argues that the repealed portions of 5 AAC 92.110 - 92.115 were merely "checklists for the Board's decisional-process," solely related to the Board's "internal management of its deliberations and regulations drafting," and neither

affected the public nor were used in dealing with the public. State's Reply at 17. If that is true, then why were the repealed portions adopted and codified in regulations years ago? The answer to that question has already been provided in prior pleadings and proves that the repealed portions meet the definition of a "regulation."

Assistant Attorney General Kevin Saxby explained to the Board in January of 2006 that 5 AAC 92.110 - 92.115 had a long public involvement history:

> large series of meetings called the Wolf Summit that was held in '92 … there were representatives of different entities that had various interests. Consumptive user groups, subsistence groups, native groups, anti-hunting and animal rights groups and everyone in between … . And … the plan - an overall wolf management policy was developed which is referenced at the beginning of 92.110 and … then a series of regulatory changes were more or less agreed to … the board essentially decided among other things to adopt the current version … of 92.110 which lays out a very detailed process for adopting a wolf control plan.

Exh. 11 to *Defenders' Memorandum In Support Of Motion For Preliminary Injunction* (Nov. 2006) at 3-4; see also id. at 4 (concerning 5 AAC 92.115's history). The regulations that resulted from this public involvement process were not procedural checklists. They outlined for the public what substantive considerations that the Board would adhere to, and how predator control might occur.

The regulations did not simply restate procedures for the Board to follow that were already in statutes. Cf. Messerli v. State, 768 P.2d 1112, 1118 (Alaska 1989) (finding DNR's Policy and Procedures Manual within the "internal management" exception because it merely recited statutory procedures). Instead, the regulations implemented and made specific the game management statutes. See id. at 1117 ("an indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency"). The

regulations outlined how the public would be dealt with in that they established the "methods and means" parameters for predator control. See former 5 AAC 92.110(b)(2), - 92.115(b)(2) (Register 169, April 2004). In short, the regulations are unlike the typical "internal regulation" of personnel matters within a state agency exempted from the APA's rule making requirements. AS 44.62.640(a)(3) ("internal matters"); cf. Coghill v. Boucher, 511 P.2d 1297, 1302 (Alaska 1973) (holding that supervision of personnel and activities relating to the conduct of a statewide election is not "internal management of a state agency."); see also Alyeska Pipeline Service Co. v. State, Dept. of Environmental Conservation, 145 P.3d 561, 573 (Alaska 2006) (noting that the APA requires formal rulemaking when an agency alters its previous interpretation of a statute); cf. Sierra Club v. Atlanta Regional Com'n, 255 F.Supp.2d 1319, 1345 n. 16 (N.D.Ga. 2002) (citations, footnote and internal quotations omitted) ("fact that an agency need not employ rulemaking in order to exercise its discretion on a case-by-case basis does not mean it … has not resorted to a rule of general applicability which limits its discretionary function").

IV. COUNT III: GAME MANAGEMENT PLAN REQUIREMENT

With respect to Count III, Defenders has shown that none of the predator control implementation plans authorizing airborne or same day airborne hunting of wolves were preceded by the adoption of game management plans as required by AS 16.05.783. In response, the State first claims that Senator Seekins, the sponsor of SB 155 (which added the "game management plan" language to AS 16.05.783 in 2003) intended "game management plan" to mean the same thing as a "predator control program" in 5 AAC 92.125. State's Reply at 22. If that were true, when

drafting SB 155 why didn't Senator Seekins use "predator control program" or "predator control implementation plan" instead of "game management plan"?

It is readily apparent that Senator Seekins did not intend "game management plan" to mean the same thing as a 5 AAC 92.125 predator control implementation plan. Minutes of a committee meeting that paraphrases a remark from Senator Seekins proving exactly that: "The board then decides whether or not it want [sic] a predator control program in the game management plan." State Reply at 21 (emphasis added). The Minutes also contain this description of a question from Senator Seekins to the same effect:

> CHAIR SEEKINS asked Mr. Rosier, regarding his statement that game management programs including predator management plans have been in effect for some these districts for quite some time, how that happens.

State's Reply, Exh. 3 at 11 (emphasis added); see also Exhibit 57 to *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* ("Defenders' Opp.") (quoting Senator Seekins, "[F]irst there must be a game management plan for a particular game management unit … in place and there must also be an intensive program in place for that GMU.") (emphasis added). While the State claims that Senator Seekins was referring to a predator control implementation plan already in place for GMU 19, State Reply at 22, in fact he never mentioned that plan and the sequence of testimony during the hearing does not show such a reference was intended.

There is no evidence in the legislative history that the Legislature intended a "game management program" or "plan" under AS 16.05.783 to mean the same thing as a "predator control implementation plan" under 5 AAC 92.125, or the same thing as an "intensive management program" under AS 16.05.255(e). What is evident from the plain language of these statutes, their legislative histories, and

the context of their passage is that the Legislature expected predator control programs or plans to be preceded by the adoption of more comprehensive game management plans, such as those already in place, adopted by ADF&G after extensive public involvement processes, and now posted on ADF&G's website.[23]

V. COUNTS IV - VI: HARVESTABLE SURPLUS

In their opening brief Defenders showed that former legislator Bert Sharp successfully sought amendments to AS 16.05.255 in order to require ADF&G to inform the Board what the specially-defined "harvestable surplus" of a prey population might be. It was his belief that once it was so informed, the Board was more likely to enact predator control programs and thereby make more prey available to hunters. As a result of the Sharp-sponsored amendments, AS 16.05.255 now requires the Board to take into account "harvestable surplus" whenever it sets "population and harvest goals and seasons" and again before it adopts "intensive management programs." Id. (g), (e). There is no evidence in the administrative record, however, that ADF&G ever made "harvestable surplus" estimates available to the Board or that the Board ever considered what the "harvestable surplus" might be in any of its decision-making. And the State in its briefing does not claim that there is evidence in the record to that end.

Instead, the State again mischaracterizes Defenders' argument. The State asserts that there is nothing in AS 16.05.255 that requires the Board to set a "specific, single harvestable surplus number for a given big game population."

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[23] See Alyeska Pipeline Serv. Co. v. DeShong, 77 P.3d 1227, 1234 (Alaska 2003) (internal quotations omitted) ("[i]n interpreting a statute, we consider its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent, with due regard for the meaning the statutory language conveys to others").

State Opp./Cross Motion at 7; see also id. at 7 ("there is no explicit mandate for the Board to actually set an specific harvestable surplus number or range"). Defenders, however, has not claimed the Board must do that, but does claim that ADF&G must inform the Board of the estimated "harvestable surplus" (or failing that the Board must estimate "harvestable surplus" itself), as uniquely defined in AS 16.05.255(j)(1), before the Board sets "population and harvest goals and seasons" and again before it adopts "intensive management programs." Id. (g), (e). Population and harvest goals might be set many years before the Board is asked to address the need for an intensive management program. Thus, it makes sense that the Board must also consider the relevant harvestable surplus estimates both initially when the goals are established and later when intensive management is being considered.

The State basically disavows the statutory definition of "harvestable surplus." It claims instead that harvestable surplus is "a term of art that is foundational to the art and science of wildlife management" and admits that the "statutory definition differs from the classic definition in several ways, but that is not relevant to this argument." State Opp./Cross Motion at 8, and n. 28. Of course, the differences between what the State claims is the definition of harvestable surplus and the statutory definition is very relevant to Counts IV - VI, which allege that the statutory definition has illegally been ignored in the Board's decision making. The Board may not ignore the statutory definition just because it does not match some other commonly understood definition or one it or ADF&G uses. Benavides v. State, 151 P.3d 332, 335 (Alaska 2006) (footnote omitted; emphasis added) ("unless words have acquired a peculiar meaning, by virtue of statutory definition or judicial construction, they are to be construed in accordance with their common usage"). Thus, the Court must apply the interlocking

definitions in AS 16.05.255 in order to insure the Board followed the statute. Alyeska Pipeline Serv. Co., 77 P.3d at 1234 (must give "due regard for the meaning the statutory language"). The Court may not apply a different definition of "harvestable surplus" even if it agrees that the definition the State offers is more attuned to the "art and science of wildlife management." State Opp./Cross Motion at 8. Accordingly, the State's lengthy discussion of the agencies' definition of harvestable surplus and how harvestable surplus, as they define it, is the "end product of prior management … not the starting point," is completely irrelevant here. Id. at 9.

The State argues further that under Defenders' interpretation of AS 16.05.255, determining the uniquely-defined harvestable surplus would be impossible, because "there is simply no logical way to determine the number of offspring from a population without knowing the number of animals, male and female, within that population." Id. at 10. The statute does not require this kind of exactitude. See AS 16.05.255(j)(1) (emphasis added) ("harvestable surplus" defined as the "number of animals that is estimated"). There is nothing in AS 16.05.255 or in other governing statutes which requires perfection in the population number estimates that ADF&G or the Board uses, and Defenders has not claimed that any particular level of precision in data is required.

ADF&G often estimates prey population numbers, the ratio of cows to bulls, birthrates, population productivity, and so on, and the Board has used these estimates as a basis for adopting population and harvest goals, adopting intensive management programs, and making allocation decisions. See 5 AAC 92.125. (multiple estimates of various wildlife numbers and population numbers throughout). Again, Defenders' claim is that because the Board's administrative record contains no "harvestable surplus" estimates at all, the Board obviously did

not consider any, which is a condition precedent to the approval of any intensive management program under AS 16.05.255, the Board acted illegally when it approved 5 AAC 92.125.

After misinterpreting Defenders' claim as one demanding that the Board take a "formulaic approach," the State then goes on to claim that the approach "was specifically rejected by the Legislature." Id. at 11. It quotes ADF&G's Wayne Regelin on the meaning of SB 250 to the effect that ADF&G did not think it wise for a "mandatory fixed number of harvestable surplus" to be written into the law and then claims this as proof that ultimately the Legislature rejected any requirement that the Board have before it an estimate of harvestable surplus before approving an intensive management program. State Opp./Cross Motion at 12. It is not clear whether the State is referring to the way it defines harvestable surplus in its brief as a term of art --- which, as explained above, is not relevant to Defenders' claims --- or is referring to AS 16.05.255(j)(1)'s actual definition of harvestable surplus. In any event, the State cites Exhibit B to its Summary Judgment Motion as containing Mr. Regelin's testimony, but Exhibit B relates to a 1994 House Committee hearing that does not include testimony from Mr. Regelin. More to the point, the 1994 hearing had nothing to do with SB 250 (or its definition of "harvestable surplus"), which was not introduced until 1998.

Finally, the State claims the very same arguments Defenders makes here were made and rejected in *Friends of Animals v. State.* While admitting the court's ruling in that case is not binding on Defenders, the State claims the ruling nonetheless has "persuasive" value. Id. at 13 - 14. While Judge Gleason's *Order on Motions for Summary Judgment* (Jan. 17, 2006) addressed harvestable surplus,

it did so in a very limited way. [24] Without further elucidation, Judge Gleason's *Order* adopted an earlier determination she had made, in denying plaintiffs' second motion for injunctive relief, that the "Board was not required to make a 'harvestable surplus' calculation when establishing the prey population and harvest objectives … ." Id. at 18. If this Court reviews the pleadings in that case, however, it will find that the parties had not provided Judge Gleason with the relevant comprehensive legislative history for SB 250 (the passage of which included the enactment of the "harvestable surplus" definition and related requirements) at the time of her rulings. As Defenders has explained, this history shows that the Legislature intended that ADF&G provide a specially-defined "harvestable surplus" estimate to the Board before it made its predator control decisions. Moreover, in the *Friends of Animals v. State* case, unlike here, the plaintiffs did not claim that the estimate must be provided before the Board adopts an intensive management program, but only argued about the relationship of harvestable surplus to the setting of population and harvest goals. See in *Friends of Animals v. State*, Case No. 3AN-03-13489, *Plaintiff's Memorandum in Opposition to State's Motion for Summary Judgment and in Support of Cross-Motion for Summary Judgment*, at 13 - 14 (March 29, 2005). Thus, it would be a mistake for this Court to rely uncritically on Judge Gleason's limited ruling.

In the end, it is apparent that the Board, ADF&G and the State have confused the allowed harvest --- the amount of animals in a game population that the Board, in what the State calls an "allocation" decision, decides might be safely

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[24] The *Order* is reproduced at Exhibit 2 to the State's briefing accompanying its cross motion for summary judgment.

taken from the population because it is "surplus" --- with the unique definition and purposes of "harvestable surplus" in AS 16.05.255. Because of this error, when setting population and harvest goals in 5 AAC 92.108 and in approving intensive management programs in 5 AAC 92.125 the Board failed to comply with AS 16.05.255. Thus, the Court should grant Defenders' motion on Counts IV - VI and declare these two regulations invalid.

VI. COUNT VIII: SUSTAINED YIELD

Defenders has shown that the Board did not follow the sustained yield requirement either in AS 16.05.255 or in the Alaska Constitution in making decisions authorizing radical reductions of wolf and bear populations in predator control areas. The State disavows the application of sustained yield to predators but nonetheless claims the Board applied it. Neither the law nor the record supports the State's arguments.

A. AS 16.05.255's sustained yield requirement applies to predators.

In response to Defenders' claim that the Board failed to follow the sustained yield requirement in AS 16.05.255, once again the State mischaracterizes Defenders' position. Defenders does not claim that the "legislature intended the Board to achieve high levels of harvest of both predator and prey species." State's Reply at 23. Defenders' claim is that under AS 16.05.255, the Board "must manage all these game species in order to achieve a high level of human harvest …, subject to preferences among beneficial uses, on an annual or periodic basis." Defenders' Opp. at 46 (emphasis added). The "subject to preferences among beneficial uses" proviso in AS 16.05.255(j)(5)'s definition of sustained yield gives the Board statutory authority to decide levels of human harvest among the species, and over what periods of time, albeit subject to the sustained yield requirement.

See id. at 47 (Defenders acknowledging that "provided it is managed consistent with sustained yield, a game population may be allocated unequally as between uses and user groups"). Because AS 16.05.255's sustained yield requirement applies to all game species, including wolf and bear, before making its decision to radically reduce a wolf or bear population in a particular GMU the Board must analyze what the sustained yield rate would be for the populations in that GMU and over what period in order to insure its management decisions comply with the sustained yield requirement.

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.[25] The Board was required to establish a "record which reflects the basis for … [its] decision." Moore v. State, 553 P.2d 8, 36 (Alaska 1976). Because it did not, the Board's decision must be vacated. See Fed. Power Comm'n v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331 (1976) ("If the decision of the agency is not sustainable on the administrative record made, then the … decision must be vacated and the matter remanded … for further consideration."); Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 965 (9th Cir. 2005) (vacating a Forest Service decision when the court was

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[25] By way of comparison, in the timber context an allowable cut calculation computes the amount of timber that can be extracted from an area per year while maintaining a sustained yield of timber for the area over a specified rotation period. If DNR decided to have a timber sale in an area and specified the allowable cut but did not specify any rotation period, a court would not be able to determine whether the allowable cut was consistent with sustained yield.

Here, the Board has said wolf and bear populations may be immediately reduced 60 - 80% in certain GMUs. But the record evidences no discussion by the Board when, if ever, it expected that there would be any additional yield of wolves or bears allowed in those GMUs, or at what rate over time.

"unable to discern" from the administrative record that the Forest Service complied with a forest plan).

The State claims the Board's plans "are rife with references and directions for, [sic] sustained yield management of wolves and bears…. . [E]ach plan states as an explicit goal that viable populations, and ongoing hunting and trapping, of wolves and bears be maintained." State's Reply at 26. In support of that claim, the State cites uses of the phrase "sustained yield" in various parts of 5 AAC 92.125. State's Reply at 26 n. 79. But these bare uses of the phrase "sustained yield" do not reflect a sustained yield rate or period for any wolf or bear population or otherwise reflect places in the record where the Board considered what the sustained yield rate or period for the relevant populations might be.[26] Again, the Board was required to create "record which reflects the basis for … [its] decision" that sustained yield would be satisfied, and not just give lip service to the sustained yield requirement, as these un-illuminating references in 5 AAC 92.125 at most do. Moore, 553 P.2d at 36.

Even if, as the State claims, the Board intended to leave a "viable" population of wolves and bears in each predator control area, that intention would has no relevance. That a "viable" wolf or bear population may remain does not mean that they are in sufficient numbers such that there can be a "yield" from those populations, now or in the future. There is a "viable" population of Cook Inlet beluga whales, but the population is so small that hunting them is virtually prohibited, they are classified as depleted under the Marine Mammal Protection

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[26] In Appendix B to Defender's Opposition and Cross Motion (filed June 28, 2007), all references to sustained yield that appear in 5 AAC 92.125 are set out.

Act, and the federal government has proposed that they be listed under the Endangered Species Act.[27]

The State also argues that the sustained yield requirement in AS 16.05.255 does not apply to wolf and bear populations but only to populations of ungulates like moose and caribou. To support this argument, the State claims that the "intensive management law was written to require the Board to adopt regulations that reallocated prey from predators to hunters." State Reply at 23. Neither the language of AS 16.05.255 nor its legislative history supports the State's theory that there is a reallocation mandate in AS 16.05.255.

Alaska Statute 16.05.255 requires the Board adopt "harvest and population goals" for ungulate populations that have been specifically identified by the Board as important for human harvest with the ultimate goal of "maintaining high levels or provide for higher levels of human harvest" of those populations. Id. (e)(1) ("preferred use" of an "identified big game prey population"), (g) ("population and harvest goals"), (j)(2) (defining "high level of human harvest"). "Intensive management programs" are required only when the "depletion" or the "reduction in productivity" of the population has occurred that may lead to a "significant reduction in the allowable human harvest of the population" and enhancement of the population is "feasible" with "active management techniques." Id. (e)(2), (e)(3). According to the definition of "intensive management," those techniques might "includ[e] control of predation and prescribed or planned use of fire and other habitat improvement techniques." Id. (j)(4).

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[27] See 72 Fed. Reg. 19854 (April 20, 2007).

Thus, it is not true that AS 16.05.255 mandates the "reallocation" of prey from predators to humans. It requires the Board to adopt intensive management programs in certain circumstances within the Board's discretion, with the goal of "maintaining high levels or provide for higher levels of human harvest" of specified populations, designated by the Board. Id. (j)(2). Depending upon the facts on the ground and the actions the Board elects to take, this goal might well be achieved without a wholesale "reallocation" of prey from predators to humans through a dramatic reduction of predator populations.

Whether or not the State's premise is faulty, the State's interpretation of AS 16.05.255 to the effect that its sustained yield provision does not apply to any predator population is incorrect. "Sustained yield" is the "achievement and maintenance in perpetuity of the ability to support a high level of human harvest of game." AS 16.05.255(j)(5) (emphasis added). "Game" includes all mammals, not just ungulates. AS 16.05.940(19). In contrast, "identified big game prey population" means only a "population of ungulates." AS 16.05.255(j)(3). An "intensive management" program "means management" of a population of ungulates "consistent with sustained yield through active management measures…." Id. (j)(4) (emphasis added). "Management" must be "consistent with sustained yield," but the latter applies to "game," that is, applies to all mammals, not just ungulates. If it intended to exempt predators from the application of the sustained yield requirement in the statute, the Legislature could have used "identified big game prey population" in the definition of sustained yield or otherwise expressly excluded predators in some way. Instead, it carefully chose to use "game," thus making sure that all wildlife would be managed on a sustained yield basis. Only

this interpretation of AS 16.05.255 gives meaning to each word and phrase in the statute, as is required by the relevant principles of statutory construction.[28]

The State cites nothing in AS 16.06.255's legislative history indicating that the Legislature intended that sustained yield should not apply to predators. Had legislators expressed such an intention in committee hearings or on the floor of the House or Senate, it surely would have generated controversy and debate, if for no other reason than it would have been inconsistent with the longstanding, and Board-approved *The Wolf Conservation and Management Policy for Alaska*. The Policy promised that "Consumptive uses of wolf and prey populations will be provided for on a sustained yield basis." Id. at § A.2.[29]

Thus, the plain language of AS 16.05.255's provisions, their legislative histories, and the context of their enactment all indicate that sustained yield applies to wolves and bears. Alyeska Pipeline Serv. Co., 77 P.3d at 1234.

B. Alaska Constitution's sustained yield requirement applies to all wildlife, including predators.

Only if the Court finds that AS 16.05.255's sustained yield requirement does not apply to predators need it reach the question whether the Alaska Constitution, Article VIII, Section 4's sustained yield requirement --- which refers to "wildlife" --- covers predators and if so, whether the Board violated it.

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[28] See MRS v. State, 897 P.3d 63, 66 - 67 (Alaska 1995) (basic principles of statutory interpretation militate against an interpretation in a manner that renders a statutory provision meaningless); Homer Elec. Ass'n v. Towsley, 841 P.2d 1042, 1045 (Alaska 1992 (must interpret a statute so that "no part [is left] inoperative or superfluous, void or insignificant"); City of Kenai v. McLane, 821 P.2d 717, 719 (Alaska 1991) (Supreme Court interprets every word or provision in a statute as intended for a useful purpose so that force and effect is given to each, and so that no superfluous words or provisions are used).

[29] For the history of the Policy, see footnote 22 in Defenders' Opp. at 50 (filed June 28, 2007).

The State claims "wildlife" does not include predators, relying on two statements in January 1956 from within the Constitutional Convention's Committee on Natural Resources to the effect that it wasn't in the public interest to preserve certain predators (although these were not identified), and that predators (species again not specified) would not be maintained on a sustained yield basis. State's Reply at 25. The State acknowledges, however, that the "Court does not have to rely on the [Convention] minutes for a ruling on this issue," id., and, as explained in Defenders' opening memorandum, the Court should not rely uncritically on individual delegate's statements. See Warren v. Boucher, 543 P.2d 731, 735 (Alaska 1975) (noting that views expressed by individual delegates do not provide a reliable guide to what the constitutional convention as a whole intended, or what it meant to the voters who ratified the constitution.).

While it is true that when the meaning of a phrase in the Constitution is not obvious, "[the court] look[s] to the intent of the framers for guidance in interpreting the provision," Brooks v. Wright, 971 P.2d 1025, 1028 (Alaska 1999), it is also true that "absent some signs that the term at issue has acquired a peculiar meaning by statutory definition or judicial construction, we defer to the meaning the people themselves probably placed on the provision." Hickel v. Cowper, 874 P.2d 922, 926 (Alaska 1994). The State cites no evidence showing that when they voted on the Constitution, Alaska's voters were told by officials or otherwise thought that "wildlife" meant something other than its ordinary, dictionary definition, which is inclusive of all mammals.

In fact, the voters were advised in a voter's pamphlet that Article VIII's "primary purpose is to balance maximum use of natural resources with their continued availability to future generations" and to that purpose "all replenishable resources are to be administered, insofar as practicable, on the sustained yield

principle. See Exhibit 67, *A Report to the People of Alaska from The Alaska Constitutional Convention* (February 1956). All replenishable resources includes "fish, forests, wildlife and grasslands … ." Id. at § 7 (emphasis added). The *Report* gives no hint that "wildlife" did not mean all mammals. [30]

Indeed, it would be surprising had the Constitutional delegates intended some different meaning for "wildlife." The delegates had the opportunity to but did not duplicate in the Constitution the distinction that had existed in Alaska's territorial laws for many years between "game animals" (which included black and grizzly bear but not wolf) and "fur animals" (which included wolf and polar bear). See 1949 ACLA § 39-6-1. While there was no definition of "wildlife" in territorial game laws at the time of the Constitutional Convention, the federal Fish and Wildlife Coordination Act of 1934, which did apply to the Territory, defined "wildlife" to include all mammals without exception. See 16 U.S.C. § 666b ("'wildlife' … as used herein include[s] birds, fishes, mammals, and all other classes of wild animals").[31] In other words, the use of the all-inclusive word "wildlife" in Alaska's Constitutional provisions was not accidental.

The State suggests that the "subject to preferences among beneficial uses" phrase in Section 4, when coupled with the legislative finding that certain game populations should be managed for consumptive use, means that the "sustained yield clause presents no barrier to predator control." State's Reply at 26.

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[30] While the State claims the word "wildlife" in Section 4 of Article VIII does not cover predators, it does not try to reconcile this interpretation with the use of "wildlife" in Section 3 (common use clause) or Section 13 (water rights clause). Would a different or the same definition of "wildlife" apply in those sections? How likely is it that the framers intended different definitions for the same word, and if they did, that they would not have informed the voters of that fact in *A Report to the People of Alaska from The Alaska Constitutional Convention*?

[31] Act of Mar. 10, 1934, c. 55, § 8, as amended Aug. 14, 1946, c. 965, 60 Stat. 1082.

Defenders has not argued that the sustained yield clause forbids predator control, however. Rather, because the sustained yield clause (in both Section 4 of Article VIII and in AS 16.05.255) applies to predators, whenever the Board directs predator populations to be reduced to 20 - 40% of their former levels, as it has here, the record for the Board's decision must reflect that it considered what the sustained yield rate would be for them over a specified period in the particular GMU at issue.[32] Only when the administrative record reflects that information can the Court judge whether the Board made management decisions for the predator populations in accordance with sustained yield. Moore, 553 P.2d at 36. The State cites nothing in the administrative record for the Board's decisions evidencing such an analysis, however.

Moreover, the State's construction of Section 4 is grammatically incorrect. The State would have the Court interpret "subject to preferences among beneficial uses" as modifying "sustained yield principle." However, the phrase "subject to preferences among beneficial uses", which is separated by a comma from the rest of the language in Section 4, modifies the entire phrase "utilized, developed, and maintained on the sustained yield principle." Alaska Const., Art. VIII, § 4. When correctly interpreted this way, Section 4 means that the Constitution provides authority to grant preferences between uses in making utilization, development and maintenance decisions, but only so long as the wildlife, and all replenishable resources, are maintained on the sustained yield principle.

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[32] This is not to suggest that the Board must apply an exact predetermined quantitative or qualitative formula. See Native Village of Elim v. State, 990 P.2d 1, 7 (Alaska 1999).

VII. CONCLUSION

For the foregoing reasons Defenders requests that the Court deny the State's motion for summary judgment and instead grant Defenders' cross motion for summary judgment.

Respectfully submitted August 14, 2007 in Anchorage, Alaska

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