



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION

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NEW JERSEY OUTDOOR ALLIANCE;	)	<u>ADMINISTRATIVE ACTION</u>
SAFARI CLUB INTERNATIONAL; and	)	FINAL DECISION
U.S. SPORTSMEN'S ALLIANCE	)	
FOUNDATION,	)	OAL DKT NO. ENH 05799-19
	)	
Petitioners,	)	AGENCY REF. NO. AO2018-24
	)	
v.	)	
	)	
NEW JERSEY DEPARTMENT OF	)	
ENVIRONMENTAL PROTECTION; and	)	
CATHERINE R. McCABE,	)	
COMMISSIONER	)	
	)	
Respondents.	)	

This Order pertains to the dispute arising from Administrative Order 2018-24 (AO 2018-25) issued by Department of Environmental Protection (DEP) Commissioner Catherine R. McCabe on August 30, 2018, which closed State lands to black bear hunting effective as of the October 2018 segment of the black bear hunt. In its decision in New Jersey Outdoor Alliance et al. v. NJDEP, No. A-05250-18T4, 2018 WL 6005064, 2018 N.J. Super. LEXIS 2525 (App. Div. Nov. 16, 2018) ("New Jersey Outdoor Alliance"), the Appellate Division directed that there be a contested case proceeding in the Office of Administrative Law (OAL) to further develop the record and address fact-laden arguments by the New Jersey Outdoor Alliance, Safari Club International, and U.S. Sportsmen's Alliance Foundation (collectively, Petitioners) that the closure of State land to bear hunting is contrary to the scientific underpinnings of the 2015 Comprehensive Black Bear

Management Policy (“2015 CBBMP”), imperils public safety, and is otherwise arbitrary and capricious as set forth in Safari Club International, et al. v. New Jersey Department of Environmental Protection, et al., 373 N.J. Super. 515, 517-21 (App. Div. 2004), reaffirmed in New Jersey Outdoor Alliance, supra, 2018 WL 6005064, at \*8-10, \*12-13, 2018 N. J. Super. LEXIS 2525, at \*21-25, \*27-28.

As directed by the Appellate Division, on September 21, 22, and 23, 2020, an OAL proceeding was held, enabling the parties to present empirical evidence and an Administrative Law Judge (ALJ) to hear testimony of fact and expert witnesses and make appropriate credibility assessments and findings of fact. In an October 27, 2020 Initial Decision, the ALJ concluded that, based on the factual record established, Petitioners failed to prove their case by a preponderance of credible evidence. Petitioners filed exceptions to the ALJ’s Initial Decision and the Department filed a reply. Based on my review of the record, and for the reasons discussed herein, I ADOPT the Initial Decision.<sup>1</sup>

### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 20, 2018, Governor Philip D. Murphy issued Executive Order 34, 50 N.J.R. 2039(a) (Oct 1, 2018) (EO 34), directing the DEP Commissioner to take all necessary and appropriate actions within the Commissioner’s authority to protect black bears on lands controlled by the State of New Jersey, including deciding whether to close said lands to the hunting of black bears. Following issuance of EO 34, then-DEP Commissioner Catherine R. McCabe issued AO 2018-24 on August 30, 2018, ordering that all lands owned, managed, or otherwise controlled by the Department be closed to the hunting of black bears. The order was effective immediately and

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<sup>1</sup> It is noted that, subsequent to the date of the Initial Decision, the 2015 CBBMP underlying this matter expired on June 12, 2021 (see 53 N.J.R. 999(b)).



remains in effect today.

Following issuance of EO 34 and AO 2018-24, Petitioners made an emergent application to the Appellate Division to invalidate and enjoin the closure of State lands for the December segment of the 2018 bear hunt. The court denied Petitioners' emergent request, rejecting their contentions that the closure requires the adoption of state regulations. The court further concluded that Petitioners failed to meet their "considerable burden" of demonstrating they were entitled to injunctive relief nullifying the closure. New Jersey Outdoor Alliance, supra, 2018 WL 6005064, at \*1, 2018 N. J. Super. LEXIS 2525, at \*2. Pursuant to Rule 2:5-5(b), the court remanded the matter for the development of a plenary record and fact-finding in the OAL to address Petitioners' disputed and fact-dependent claims. Id. at \*2-3.

Pursuant to the court's remand, the parties conducted a three-day evidentiary hearing in September 2020 at which both expert and fact witnesses testified.

Anthony McBride testified as an expert in black bear management for the Department. Mr. McBride was a principal drafter of the 2015 CBBMP, and oversees the Department's black bear research project, which traps and marks (or tags) black bears, collects data, reports contacts, and estimates bear population. Mr. McBride prepared an expert report and testified about the 2015 CBBMP. He testified that the closure of State land to black bear hunting comports with the goals and objectives of the 2015 CBBMP to stabilize the black bear population consistent with the cultural carrying capacity. The cultural carrying capacity, which can change at different bear population levels, is the number of bears the human population can tolerate consistent with the ability of the habitat to sustain the population.

John McDonald, Ph.D., testified as an expert in black bear management and research species population estimation for Petitioners. He testified that the closure of State lands for black



bear hunting conflicts with the scientific underpinnings of the 2015 CBBMP and is not supported by the evidence. John Rogalo, the president of the New Jersey Outdoor Alliance also testified as a fact witness. He testified that starting in 2019-2020, he saw an uptick in bear visitations by his home, which borders on part of Allamuchy State Park in Sussex County.

The ALJ found all witnesses to be credible, but noted the expert witnesses, while generally agreeing on the information provided by the Department, disagreed on the conclusions to be drawn from it, particularly with regard to whether the inability to hunt on State land has (1) reduced the bear harvest significantly, (2) affected the ability to arrive at an accurate estimate of the black bear population, (3) placed the (human) population at risk, and (4) otherwise impacted the goals and objectives of the 2015 CBBMP. The ALJ noted that the Department relies on the Lincoln-Peterson index to estimate the black bear population, which is based on a capture-tag-recapture model. Utilizing the number of bears tagged in the current season, both on State and non-State land, observing how many of those tagged bears are harvested during the hunting season, and comparing the tagged harvest to the total harvest should, according to the Lincoln-Peterson index, result in a bear population estimate within a confidence range of 95% accuracy. The experts disagreed as to whether the closure of State lands affects the Lincoln-Peterson index estimation. Dr. McDonald opined that sampling for years 2018-2019, the first hunting seasons during which State lands were closed under AO 2018-24, is non-representative and is inaccurate because the Lincoln-Peterson index estimator relies on an assumption that all bears have an equal probability of being recaptured which, Dr. McDonald opined, is not the case when bears on State lands have no chance of being recaptured. Mr. McBride opined that the index estimation would not be affected by the State lands closure because bears roam all over the countryside and are not aware of whether they are on State or non-State land. Mr. McBride asserted that his opinion is supported by evidence presented from



bear hunts during 2015 to 2017, prior to the closure of State lands, comparing the tagged bears harvested on State lands to the tagged harvest on non-State lands, which Mr. McBride opined demonstrated the mobility of the black bears.

After hearing testimony and considering the documentary evidence, the ALJ made the following findings:

1. The documentary evidence was accepted as FACT: the statistics were prepared by DEP and were uncontested except as to the harvest rate and its effect on the total estimated bear population.
2. The most important fact, as expressed by Petitioners' expert, was the cyclical nature of the bear population, which is dependent on various factors including availability of food sources, weather, bear behavior, human behavior, hunting pressure, and harvest rates. The results of a current year harvest are not observed in in the next immediate harvest season. Rather, harvest results are observed over the next two to three years and are dependent on the continued harvest rates and the food supply available during those subsequent years.
3. The accuracy of the Lincoln-Peterson index for estimating the bear population is not undermined by the closure of State land to bear hunting, given its assumption that all bears have an equal opportunity to be harvested is based more on the difference between trap-happy and trap-shy bears, rather than the degree of sanctuary that may be created when State land or other land is off-limits to bear hunting. Both experts agreed that there will always be land on which bears cannot be harvested, and bears are not aware of the owner of the land on which they roam. The data showed that bears, including both tagged and untagged bears, wander off and on to State land in relatively equal proportions.
4. The closure of State land to bear hunting was not the sole or even primary cause of the



decline in bear harvests in 2018 and 2019, but that numerous factors led to the harvest drop-off, including bear behavior, weather, hunter behavior, and hunter participation.

5. The 2015 CBBMP does not require a 20% harvest rate; rather 20% is a target rate which should ensure the bear population is sustained consistent with the cultural carrying capacity.
6. The number of human-bear interactions are substantially equivalent for the years 2017 through 2020.
7. The closure of State lands created a sanctuary for black bears, both tagged and untagged, the effects of which can be observed within a two- to three-year cycle [time frame], as unharvested bears reproduce and resulting cubs mature and expand their habitats from State land.
8. DEP Commissioner McCabe was provided with the 2015 CBBMP and other documents that were sufficient for the Commissioner to make a determination as to whether State land should be closed to bear hunting.

In light of these findings, the ALJ concluded that Petitioners failed to show, by a preponderance of the credible evidence, that the closing of State land to bear hunting beginning in 2018 is contrary to the scientific underpinnings of the 2015 CBBMP, imperils public safety, and is otherwise arbitrary and capricious.

### **DISCUSSION**

In New Jersey Outdoor Alliance et al. v. NJDEP, No. A-0525-18T4, 2018 NJ Super LEXIS 2525 (November 16, 2018) (hereinafter “Outdoor Alliance”), the court directed the DEP to refer this matter to the OAL for a hearing to determine whether the closure of State lands to bear hunting conflicts with the scientific underpinnings of the 2015 CBBMP, imperils public safety, or is



otherwise arbitrary and capricious.

In her initial decision, the ALJ set forth the stipulated facts, made findings of fact, summarized the positions of the parties and the analysis of their respective experts, and set forth her conclusions of law. I ADOPT the ALJ's findings of fact, as fully supported by the record. I also ADOPT the ALJ's conclusions of law, which are supported in the record and in accordance with the relevant statutes and case law.

A key element in this matter is that the burden of proof lies with the Petitioners. In order to prevail, the Petitioners must show—by preponderance of credible evidence—that the decision to close State land to bear hunting was arbitrary and capricious. As the Court in *Outdoor Alliance* noted, “[t]he burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action.” New Jersey Outdoor Alliance, 2018 WL 6005064, at \*11, 2018 NJ Super LEXIS, at \*29, (quoting Lavezzi v. State, 219 N.J. 163, 171 (2014) (alteration in original) (quoting In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013))). Petitioners cannot simply claim that respondents failed to show some element, or that their expert was more credible; Petitioners must provide affirmative evidence of their contentions such that they make “a clear showing that [the agency decision] is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.” New Jersey Outdoor Alliance, 2018 WL 6005064, at \*11, 2018 N.J. Super. Unpub. LEXIS 2525, at \*29 (quoting J.B. v. N.J. State Parole Bd., 229 N.J. 21, 43 (2017))). Moreover, courts owe deference to administrative agencies. The Court in *Outdoor Alliance* itself highlighted this, writing “[w]e recognize the ‘final determination of an administrative agency . . . is entitled to substantial deference.’” Id. (quoting In re Eastwick Coll. LPN-to RN Bridge Program, 225 N.J. 533, 541 (2016))). In order to overturn an agency decision, there must be a “clear showing that it is arbitrary, capricious, or unreasonable, or that it



lacks fair support in the record.” Id. (quoting J.B. v. N.J. State Parole Bd., 229 N.J. 21, 43 (2017) (quoting In re Herrmann, 192 N.J. 19, 27-28 (2007))). As the courts have made clear in prior litigation regarding bear hunting, the decision to close State lands is within the Department’s inherent statutory authority as the owner and steward of State lands. Safari Club Int’l v. New Jersey Dep’t of Env’tl. Prot., 373 N.J. Super. 515, 519 (App. Div. 2004) (“Therefore, while the Council has authority to determine whether the territorial limits of a hunt will include State lands under the DEP’s jurisdiction, the Commissioner has ultimate authority to determine whether to open those lands to hunting.”); N.J.S.A. 13:1B-5(a) (“[T]he commissioner shall have authority to direct and coordinate the uses of all public lands under the jurisdiction of the department.”); N.J.S.A. 13:1B-15.101 (“The division shall, under the direction and supervision of the commissioner [...] Develop, improve, protect, manage and administer all State forests, State parks, State recreation areas, State historic sites, and State natural areas, excepting those regulated by interstate compact.”). Thus, the bar Petitioners must meet in order to prevail is a high one.

Petitioners put forth a number of arguments in support of their assertion that the decision to close State lands to bear hunting should be overturned as contrary to the standard applicable in this matter. Petitioners claim that the closure undermines the scientific underpinnings of the 2015 CBBMP by preventing an accurate accounting of the bear population. (Petitioners’ Exceptions 8.) Petitioners also claim that the closure violates the 2015 CBBMP by preventing the achievement of a 20% minimum harvest rate, which Petitioners argue is contrary to the black letter of the 2015 CBBMP and the broad intent of the 2015 CBBMP by allowing the bear population to grow, allegedly increasing bear-human interactions. (Petitioners’ Exceptions 2, 5.) Petitioners argue that the closure will create bear “sanctuaries,” the existence of which they alleged is both a direct violation of the 2015 CBBMP and contrary to its broader purpose. (Petitioners’ Exceptions 7.)





Petitioners also take exception to the import that the ALJ assigned to the “cyclical nature of the bear population,” contending that this finding is not supported by evidence in the record. (Petitioners’ Exceptions 3.) Finally, Petitioners argue that the closure is arbitrary and capricious because Commissioner McCabe did not support her decision with sufficient evidence. (Petitioners’ Exceptions 1.)<sup>2</sup>

I will address each of these arguments in turn.

## **I. REQUIREMENTS AND APPLICABILITY OF THE 2015 CBBMP**

### **a. Accounting for the State’s Bear Population**

Petitioners contend that the closure of State land to bear hunting will prevent the accurate estimation of the bear population in New Jersey utilizing the Lincoln-Petersen index which, Petitioners argue, undermines the State’s ability to craft appropriate bear management policy.

The Lincoln-Petersen index is used to estimate the black bear population. This method compares bears marked (or ‘tagged’) in an initial capture effort with bears sampled in a second capture effort (*i.e.*, a mark-recapture technique). The index formula utilized in New Jersey consists of an initial, non-lethal capture where bears are marked during research and nuisance control activities both on and off State land. The recapturing and resampling occur during the subsequent hunting season, when hunters are required to bring harvested bears to check-in stations operated by DEP’s Division of Fish and Wildlife (DFW). Harvested bears can include previously tagged bears. DFW later compares the number of bears tagged in the initial capture to tagged bears harvested, and then uses that derived ratio to estimate the total bear population by multiplying the

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<sup>2</sup> I find that Petitioners’ additional Exceptions, 4 and 6, are either redundant of the other Exceptions or trivial. Exception 4 takes issue with the Initial Decision characterizing the goal of the CBBMP’s goal as “reducing” the bear population as opposed to “reduc[ing] and stabiliz[ing] the population,” and disputes whether the 2020 population estimates were “official.” Exception 6’s primary contention is that the Initial Decision found the Department’s expert witness more persuasive than the Petitioners’.



ratio by the total number of bears harvested. Stated another way, the ratio of tagged bears harvested in the hunting season compared to the entire harvest in the bear hunt equals the ratio of bears tagged for research and control that year compared to the entire black bear population. (1T43:10-44:61.)

Petitioners' expert, Dr. McDonald, testified that limiting the ability to harvest bears on State land would undermine one of the assumptions underlying this method by creating a segment of the bear population available for the initial capture but not the subsequent harvest. (2T128:15-129:10.) However, the ALJ found credible the Department's expert, Mr. McBride, who provided substantial evidence that bears travel freely between State land and non-State lands and that bears tagged on State land can, and do, move to non-State lands. The ALJ cited pre-closure data demonstrating that more than 50% of bears tagged on State land were later harvested on non-State land. (Ex. R-4 at 18, Table 3; Initial Decision at 11.) Thus, the ratio of tagged bears harvested to all tagged bears should essentially remain the same as the number of bears harvested to the total bear population despite the closure since each tagged bear represents a proportion of untagged bears whether located on- or off- State land. Contrary to Petitioners' assertion, the ratio of tagged to untagged bears can reasonably be assumed to be the same precisely because of the data that identifies where tagged bears are located at the time of harvest. I agree with the ALJ and DEP's expert who both concluded that the closure of State lands to hunting does not violate the model's assumption that all bears have an equal opportunity for capture. (1T45:21-46:23.) Indeed, Petitioners' expert agreed with this premise, testifying that this assumption is valid if the ratio of tagged bears to untagged bears is equal on and off State lands.<sup>3</sup> For the same reason, the ALJ

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<sup>3</sup> Petitioners take exception to the phrase "[t]he ratio of marked bears to unmarked bears is equal on and off lands if this assumption is made." Initial Decision at 24. However, the court presumably meant what Dr. McDonald testified, namely that "this assumption is valid if the ratio of marked bears to unmarked bears is equal on and off state lands." (3T27:1-27:11.)



properly rejected Petitioners' contention that the "clustering" of high-quality habitat undercuts the model's assumption of equal opportunity for capture.

The ALJ was within her authority in finding the Department's expert's conclusions more logically followed from the evidence than Petitioners' expert's conclusions on this particular matter: "It is within the province of the finder of facts to determine the credibility, weight, and probative value of the expert testimony." (Initial Decision at 34) (citations omitted).

**b. Nonattainment of an Annual 20% Bear Harvest Rate**

The 2015 CBBMP recognized that the New Jersey black bear population could sustain annual harvest rates of 15-20% with little or no decline in population size. To protect against overharvest, the 2015 CBBMP established an upper annual harvest limit of 30%. Where the 20% harvest rate was not reached in October, or after the first six days of the December segment of the bear hunt, the 2015 CBBMP allowed for additional harvesting but only up to 30%. See 47 N.J.R. 2840, 2849-50 (Nov. 16, 2015). Petitioners argue that the closure of State lands to bear hunting violated the CBBMP by preventing the attainment of a 20% harvest rate. This argument has several elements. First, that the closure necessarily reduced the total amount of bears hunted. Second, that the 2015 CBBMP established the 20% harvest rate as necessary to ensure that the bear population did not increase. Third, that the inability of hunters to reach the 20% harvest rate would result in a theoretical increase in the State's black bear population, which would in turn result in a theoretical increase in dangerous bear-human interactions. Petitioners failed to meet their burden of proving the first and second elements of this alleged causal chain.

*i. The Harvest Rate Impact of Closing State Land to Bear Hunting*

Between 2016 and 2019, the average annual black bear harvest rate was 17.93%. Four complete hunting seasons occurred between the implementation of the 2015 CBBMP and the OAL



hearing with the following harvest rates: 25.9% (2016), 16.3% (2017), 14.2% (2018), and 15.3% (2019). (Initial Decision 32). The prohibition on State land has been in effect for the latter two of these hunting seasons. Although the harvest rate declined following the 2018 closure of State lands to bear hunting, the largest decrease had already occurred. Petitioners' expert, who testified that harvest rates declined in 2018 and 2019 relative to 2016 primarily because of the closure of State land, failed to explain the more drastic harvest reduction between 2016 and 2017. (3T62:1-3.)

In his testimony, the Department's expert explained the numerous factors that influence harvest rates, including increased caution exercised by bears as they learn to avoid humans, changes in hunter behavior, including consideration of the difficulty of removing a large bear carcass from the woods if the hunter has previously harvested a bear, and the decrease in hunter participation evidenced by the documented decrease in the number of permits issued since 2016. (1T58:15-19; 1T130:22-131:17.) Petitioners' own expert acknowledged that these factors influence harvest rates, particularly noting that bear hunters represent a minority of overall hunters, most of whom seek to harvest only one bear in their hunting careers given the difficulty of the pursuit. (1T130:22-131:17; 2T90:2-97:8.<sup>4</sup>)

Petitioners also claim that because the bears harvested on non-State lands remained "at about the same level" during the closure of State lands, other factors (such as changes in hunter behavior) must have had no effect on the harvest rate. However, Petitioners failed to establish why the absolute number of bears harvested on non-State lands would have been expected to remain the same. Given that the hunting season was calibrated to produce a particular harvest rate, not an absolute number of bears harvested, Petitioners should have expected that the absolute

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<sup>4</sup> Petitioners' expert attributes changes in hunter behavior and participation to the closure of State lands, while DEP's expert attributes those changes to other factors, but both agree that changes made by hunters could affect the harvest rate.



number of bears harvested would vary across seasons irrespective of the land upon which they were harvested.

For these reasons, I find that the ALJ was correct in concluding that Petitioners failed to meet their burden of proving that the decline in bears harvested was caused by the closure of State lands to bear hunting.

*ii. The Nature of Harvest Rates Established by 2015 CBBMP*

Petitioners argue next that the closure of State land to bear hunting violates the 2015 CBBMP, which they assert mandates attainment of a 20% annual harvest rate. In support of this argument, Petitioners first assert that the closure would cause the harvest rate to remain below 20%. Second, Petitioners assert that the closure violates public policy more broadly by undermining the 2015 CBBMP's objectives of controlling the bear population and thereby, bear-human incidents.

First, in support of their position that the 2015 CBBMP establishes a mandatory 20% annual harvest rate, Petitioners rely upon provisions of the 2015 CBBMP that permit an additional four-day hunting segment in December if the October and initial December segments do not yield a 20% harvest rate. The ALJ rejected Petitioner's argument, explaining that 20% rate is a target and not a mandate. The ALJ's conclusion was supported by the Department's expert, the principal author of the 2015 CBBMP, who described the 20% rate as a "guide" to ensure an appropriate harvest rate. (Ex. R-4 at 13-14.) In fact, since promulgation of the 2015 CBBMP, the 20% harvest rate was attained in only one year—25.9% in 2016. And, despite the drop in bears harvested since then, both the bear population and the number of bear-human incidents have decreased from 2015 levels. (Initial Decision 32.)

Petitioners' argument that the 2015 CBBMP requires a 20% harvest rate represents a



fundamental misunderstanding (or misrepresentation) of the conservationist aims of the 2015 CBBMP. The 2015 CBBMP specifically states that “harvest rates can be used as a guide to prevent overharvest of bears,” noting research that “black bear populations can sustain annual harvest rates of 15-20%.” (DEP’s Exhibit 3, 10) (emphasis added.) Indeed, the 2015 CBBMP was careful to note that harvest rates were best set below 30% to “sustain a population over the long term.” (DEP’s Exhibit 3, 10). In short, the harvest rate is a reflection of the 2015 CBBMP’s goal of protecting and maintaining the black bear population and, therefore, could not have served as the basis for the ALJ to find a mandatory goal for the elimination of black bear exists. I concur with the ALJ’s refusal to adopt such a position.

Second, in support of their broader public policy argument, Petitioners assert that the closure would undermine the 2015 CBBMP’s objectives of controlling the bear population and bear-human incidents. Petitioners claim that the closure of State lands has already caused the bear population to rebound to pre-2015 CBBMP levels and argue that a rise in bear-human incidents cannot be far behind. (Petitioners’ Exceptions 5.) As discussed above, Petitioners failed to meet their burden of proving that the closure of State lands was in fact the cause of a reduction in number or rate of bears harvested since 2018. Petitioners have similarly failed to demonstrate that the closure is the cause of a population increase.

Additionally, Petitioners speculate that the closure of State land to bear hunting could cause public safety concerns. Petitioners have not demonstrated that either the bear population or the nature and extent bear-human interactions are such that affirmative population reduction measures are necessary. Nor have Petitioner’s established that a more liberal hunting policy is the appropriate means for addressing the risks Petitioners speculate. The facts preceding the 2015 CBBMP and the facts existing at the time of the OAL hearing are instructive on this score. In



2014, there were 196 Category I incidents (*i.e.*, where a bear poses a threat to public safety or property) and 1,221 Category II incidents (*i.e.*, where a bear is a nuisance but not a threat to public safety or property). In 2018, there were 74 Category I incidents and 368 Category II incidents. In 2019, there were 57 Category I incidents and 346 Category II incidents. While the OAL record also reflects increases in incidents during 2020, by the time the OAL record was closed in October 2020, the number of incidents was on track to be approximately one-half of the incidents in 2014.<sup>5</sup> (DEP’s Exhibit 10; Initial Decision 32-33.)

In the face of these facts, Petitioners next argue that the 2015 CBBMP does not establish a fixed target for reducing incidents below pre-CBBMP levels, and that the fact that incidents were below those levels at the time of the OAL record was closed does not automatically mean that the CBBMP goals have been met. (Petitioners’ Exceptions 4.) Petitioners are correct that the 2015 CBBMP’s “management goal is to decrease and stabilize the black bear population at a level consistent with the available habitat and cultural carrying capacity.” However, the Department determined in 2018 that the “black bear population in New Jersey is beginning to stabilize at a level that DFW believes is consistent with the cultural carrying capacity for this species in the state.” (HC Ex. 1-D at DEP000048.) Petitioners having offered no evidence that contradicts this finding, I find that the ALJ was correct in concluding that AO 2018-24 did not undermine the 2015 CBBMP by closing State lands to hunting.

## II. THE ‘CYCLICAL’ NATURE OF THE BEAR POPULATION

Petitioners take exception to the ALJ’s characterization of the relationship between the harvest rate and the bear population as “cyclical.” (Exception 3.) Petitioners are concerned with a

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<sup>5</sup> This evidence was borne out, as shown in the Department’s Bear Activity Report for January 1 through December 21, 2020. [https://www.nj.gov/dep/fgw/pdf/bear/activity\\_ytd20.pdf](https://www.nj.gov/dep/fgw/pdf/bear/activity_ytd20.pdf). Moreover, the Bear Activity Report for January 1 through June 21, 2021 records an overall decline in incidents compared to 2020. [https://www.state.nj.us/dep/fgw/pdf/bear/activity\\_ytd21.pdf](https://www.state.nj.us/dep/fgw/pdf/bear/activity_ytd21.pdf). I take judicial notice of both reports.



more technical, biological definition of the word “cyclical,” stating that “unlike species such as snowshoe hares or ruffed grouse, whose populations increase and decrease at predictable time intervals, bear populations do not increase or decrease in predictable cycles.” (Petitioners’ Exceptions 3.) However, it is clear from the Initial Decision that the ALJ intended a more colloquial use of the term cyclical, referring to a course or series of events. I find that the ALJ correctly observed that “[t]he results of a harvest cannot be known in the next harvest season, but rather over the next two to three years, and is, of course, also dependent on the continued harvest rates and the food supply available during those subsequent years.” (Initial Decision 34.) Moreover, the fact observed by the ALJ—that a change in the harvest rate would not be felt in the bear population immediately, but two to three years later—was supported by testimony from Petitioners’ own expert:

Q: So that, when we look at this, it’s very cyclical in terms of, when they’re harvested then you can see the – a change within the next two years, as opposed to that same year. Does that seem right?

A: That seems about right – Yup.  
[3T105:22-106:6].

Accordingly, the use of the term “cyclical” does not present a basis for determining that the ALJ’s finding was incorrect or unsupported by the record.

### **III. THE POTENTIAL FOR BEAR SANCTUARIES**

Petitioners take exception to the ALJ’s finding “that the closure of state lands has essentially created a sanctuary for black bears,” *i.e.*, areas where bears “are less likely to be threatened.” (Initial Decision 38, 25.) Petitioners argue that such sanctuaries violate the 2015 CBBMP because of a statement in the 2015 CBBMP noting that “[i]n order for bear management in New Jersey to be successful, the owners/managers of these properties [closed to bear hunting] should be encouraged to allow bear hunting.” (Petitioners’ Exceptions 7; Ex. J-C, 47 N.J.R. at





2850.) I find that the ALJ was correct to read this statement as a recommendation and not a rule. (Initial Decision at 46 (“nothing in [the 2015 CBBMP] required that state land host a bear harvest”).) Indeed, to read this statement as a strict rule would negate the Department’s proprietary authority to manage State lands under its purview—authority that has been clearly recognized by the Appellate Division. See Safari Club Int’l v. New Jersey Dep’t of Env’tl. Prot., supra, 373 N.J. Super. at 519.

Petitioners next contend that the creation of sanctuaries constitute grounds for declaring AO 2018-24 arbitrary and capricious because the closure of State lands to bear hunting will endanger public safety. According to Petitioners, bear sanctuaries allegedly pose a risk to the humans in surrounding areas because of increased bear concentrations. (Petitioners’ Exceptions 7.) As with their broader public safety arguments addressed above, Petitioners fail to meet their burden of proof in this respect. Petitioners’ expert was unable to quantify the concentration of bears in the alleged sanctuaries and testified that adult bears would nonetheless leave the alleged sanctuaries and travel to areas where hunting is permitted. (3T42-43.) This conclusion is supported by record facts, which demonstrate that bears move freely between State and non-State lands. (1T45:21-47:7.) As the ALJ aptly noted, “bears are not aware of the owner of the land on which they roam.” (Initial Decision 36.)

Accordingly, I find that the ALJ was correct to conclude that the effective creation of bear sanctuaries did not violate the 2015 CBBMP and that the closure of State land to bear hunting was not otherwise arbitrary and capricious.

#### **IV. RECORD EVIDENCE**

Lastly, Petitioners argue that AO 2018-24 was arbitrary and capricious because it was not supported by sufficient evidence and was not based on, and directly conflicted with, scientific



support. Petitioners first argue that Commissioner McCabe did not herself review enough documentation at the time of her decision to issue AO 2018-24. (Petitioners' Exceptions 1). However, Petitioners fail to demonstrate how the DEP's chief executive's review of documents prepared by and consultations with Department personnel constitutes a lack of evidential support for the subject administrative action. (1T102:3—103:5.) The Appellate Division's remand of this matter to OAL for the purpose of further building the evidential record supports this conclusion. See New Jersey Outdoor Alliance, *supra*, 2018 WL 6005064, at \*13, 2018 NJ Super LEXIS, at \*33. Such further evaluation would be obviated were the Department able to present only those materials personally reviewed by its chief executive at a single point in time, when that executive's decision was based on the expertise and counsel of expert staff with personal knowledge of further empirical information.

Petitioners also argue that AO 2018-24 lacked scientific support because it allegedly contradicted an earlier 2018 summary statement by DFW cautioning that a reduction in hunting could lead to an increase in bear-human interactions. (Initial Decision 14-15.) This is a restatement of Petitioners' broader public safety arguments addressed above, and with respect to which Petitioners fail to meet their burden of proof. In sum, Petitioners' recurring argument is that the Department is prohibited from taking any action that Petitioners assert would impede or undermine the objectives of the 2015 CBBMP. According to Petitioners, because the reduction of bear-human interactions is a 2015 CBBMP objective, the closure of State land to bear hunting is necessarily contrary to the scientific evidence and AO 2018-24 must be arbitrary and capricious. (Petitioners' Exceptions 1.) The record evidence contradicting Petitioners' argument is recited above and will not be repeated here.

As the parties' respective experts debated at length before the ALJ, the relationship



between State land closures and bear-human incidences is complex, dependent on various factors including availability of food sources, weather, bear behavior, human behavior, hunting pressure, and harvest rates. Qualified experts can, and in this case have, reach different conclusions based on the record evidence. The same can be said of an agency's chief executive or of a factfinder. That Petitioners would have reached a different outcome based on their reading of the record evidence does render Commissioner McCabe's decision to issue AO 2018-24 arbitrary or capricious, much as it does not render the ALJ's decision erroneous. As the Appellate Division emphasized in referring this matter to the OAL for further factfinding, "the final determination of an administrative agency . . . is entitled to substantial deference." New Jersey Outdoor Alliance, supra, 112018 WL 6005064, at \*11, 2018 NJ Super LEXIS, at \*29 (quoting In re Eastwick Coll. LPN-to RN Bridge Program, 225 N.J. 533, 541 (2016)).


The burden of proof rests with Petitioners to demonstrate that the closure of State land to bear hunting was arbitrary and capricious, not with the Department to demonstrate that the objectives of the 2015 CBBMP would be met by AO 2018-24. Petitioners having failed to carry their burden of proof, I find that the ALJ was correct to affirm Commissioner McCabe's decision to close State land to bear hunting.

### **CONCLUSION**

For the reasons set forth above, I ADOPT the ALJ's Initial Decision of October 27, 2020.

IT IS SO ORDERED.

Dated: September 1, 2021

  
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Shawn M. LaTourette, Commissioner  
NJ Department of Environmental Protection



NEW JERSEY OUTDOOR ALLIANCE, SAFARI CLUB INTERNATIONAL, AND U.S.  
SPORTSMEN ALLIANCE FOUNDATION

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION;  
and CATHERINE R. McCABE, COMMISSIONER

OAL DKT. NO.: ENH 05799-19  
AGENCY REF. NO.: AO 2018-24

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