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ENVIRONMENTAL PROTECTION
DIVISION OF FISH AND WILDLIFE

Notice of Action on Petition for Rulemaking

N.J.A.C. 7:25-5.7(e)12; Methods and Restrictions for Wild Turkey Hunting

Petitioner: Nicholas Marchesani

Authority: N.J.S.A. 54:14B-4(f); N.J.A.C. 1:30-4.2 and 7:1D-1.1

Take notice that the Fish and Game Council (Council), after due deliberation, has denied the petition for rulemaking filed by Nicholas Marchesani (Petitioner) pursuant to N.J.S.A. 52:14B-4(f) and N.J.A.C. 7:1D-1.1. The petition was received by the Department of Environmental Protection on behalf of the Council on May 6, 2019. On June 17, 2019, a notice of receipt of the petition was published in the New Jersey Register at 51 N.J.R. 1072(a). Notice of Action referring the petition for further deliberation was published in the New Jersey Register on August 5, 2019 at 51 N.J.R. 1290(a).

Petitioner requested that the Council amend the Game Code, located within the Division of Fish and Wildlife Rules at N.J.A.C. 7:25-5, to repeal N.J.A.C. 7:25-5.7(e)12, which states, "The methods and restrictions for wild turkey hunting are as follows: ... 12. A person hunting turkeys shall not have in possession or control, a firearm or other weapon within 300 feet of a baited area during the turkey hunting seasons. A baited area is defined as the collection, deposit, concentration or unnatural gathering of feed including, but not limited to, corn, wheat, oats, or other substance that may constitute a lure or enticement to turkeys."

Petitioner asserted that the current rule is contrary to and conflicts with N.J.S.A. 23:4-24.2.

Petitioner stated that the statutory provision only prohibits possession of a weapon and hunting

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of turkey within 300 feet of a baited area if the person is elevated in a tree or is in a structure; it does not forbid baiting of turkey or possession of a weapon within 300 feet of a baited area. Petitioner further asserted that, while there are State statutes that forbid baiting of wild fowl and bears when hunting from the ground, there is no State statute that forbids baiting of turkey or possession of a weapon within 300 feet of a baited area when hunting turkey. Petitioner asserted that the Council's authority to adopt rules is to effectuate the statute and N.J.S.A. 13:1B-30 requires that any rules adopted must be based upon scientific investigation and research. Petitioner questions whether the Council has conducted research supporting a prohibition of weapon possession within 300 feet of bait while turkey hunting. Petitioner stated that penalties for violations are set by statute and that the Council has no authority to set the amount of a fine without a statutory provision. Petitioner indicated that the only fine statutorily set for hunting within 300 feet of bait is limited to hunting when elevated in a tree or in a structure of any kind, and the fine for that is \$50, not the \$74 contained in the rules. Petitioner further indicated that turkeys roost near food sources. However, a hunter using a call to attract a turkey on the ground has no way of knowing there is a food source that could be considered bait within 300 feet. The rule is alleged to unfairly punish innocent hunters and not be reasonable or appropriate as required by N.J.S.A. 13:1B-30 as it does not specify that the weapon must be loaded. The provision could result in an individual being in violation if an area containing feed is within 300 feet of where they park or where they are walking with an unloaded weapon to get to a hunting area. Lastly, it was asserted that the rule does not comply with the Administrative Procedure Act as it is contrary to and contradicts the relevant statute.

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N.J.A.C. 7:25-5.7(e)12 has been in effect since 1991. The language has been unchanged since 1991 except that the section within which it falls has been amended from time to time, and the paragraph has been broken down into numbered sections. None of these amendments have affected the wording of N.J.A.C. 7:25-5.7(e)12.

Under the Administrative Procedure Act, the definition of administrative rule states, in part: ““Administrative rule” or “rule,” when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency.” (N.J.S.A. 52:14B-2). In the case of N.J.A.C. 7:25-5.7(e)12, the rule reflects the Council’s implementation of the authority granted to it pursuant to N.J.S.A. 13:1B-30 and N.J.S.A. 13:1A-32. Under N.J.S.A. 13:1B-30, the Council, in addition to the specific provisions specified in other statutory provisions, is tasked with determining “under what circumstances, when and in what localities, by what means and in what amounts and numbers” the State’s fish and game resources may be pursued, taken, killed or possessed, in order to protect, propagate, increase, control and conserve these resources, and for their use and development for public recreation and food supply. In order to achieve these goals, the Council is given the authority to promulgate, amend, and repeal rules. N.J.S.A. 13:1B-32 further specifies the discretion granted to the Council to promulgate regulations to achieve the above referenced goals, including the discretion to establish where

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game animals may be pursued, taken, or killed, and to prescribe the manner and means for pursuing, taking, or killing any species or variety (N.J.S.A. 13:1B-32c and d, respectively).

How the Council chooses to implement through regulation its statutorily delegated duties with reference to a particular game resource depends on a number of scientific factors, such as the carrying capacity of an area for a species, the number of hunters licensed to hunt a specific species, safety factors, and whether the rule allows for “fair chase” and sporting methods of hunting.

In determining the specifics of the rule in 1990, the Council considered that turkeys had effectively been extirpated by the 1970s and that the 1977 reintroduction of turkeys in the northwest corner of the State, in parts of Sussex and Warren Counties, was successful. Since 1980, the Council determined that a turkey hunt would be allowed as long as the population remained at acceptable levels. Those acceptable levels, three to four turkeys per square mile on 250 square miles of range, were determined in 1977 when the turkeys were reintroduced. The acceptable carrying capacity levels would be achieved by implementation of certain hunting controls that would also provide a quality hunting experience. As warranted, additional controls were implemented over time, including the prohibition of hunting within 300 feet of baited areas in 1991, to ensure turkey populations remained at acceptable levels.

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The Council considers research conducted both in New Jersey and throughout the nation regarding turkey hunting and the specific controls put in place to ensure a recreational opportunity for sportsmen without endangering future population increases. For example, in the late 1970s and early 1980s the Council monitored peaks in turkey activity by aging live-trapped juvenile birds to establish hatching dates and used that data to determine the dates during which the season would begin and end. In order to reduce the chance of accidental hen harvest, the open season dates were established to include the time period in which hens lay eggs and incubate them. The designated open season dates additionally ensured that most breeding took place prior to the season when toms were plentiful and before they were hunted. Also, turkeys have extremely good eyesight and are easily spooked. In order to get the birds close enough to hunt them, turkeys are called to a stationary hunter to bring the turkeys within a shotgun's range. Incubating hens remain stationary on the nest for most of the day, making them safe from responding to a call and being hunted. The season timing also allowed for a sufficient remaining breeding period during the season and responsiveness of male turkeys to mating, including to the calls of hens. This was important because hunting turkeys in the spring was based upon the hunter's skill in attracting toms by calling.

In addition, to help inform its determination as to appropriate controls in establishing a turkey hunt after re-establishment of the species in New Jersey, the Council sent a questionnaire to Vermont, New Hampshire, Minnesota, Illinois, Iowa, Indiana, Ohio, and Kansas in the late 1970s and early 1980s because the numbers of birds were still relatively low and in a limited range when

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these states re-introduced turkey hunting. Through the questionnaire, the Council requested these states share their methods used to control the numbers of hunters hunting turkeys. The biology of turkeys and the other states' methods to control the number of turkeys hunted inform the Council's rulemaking to this day.

Lastly, the Council determined which firearm and ammunition type was preferred by hunters due to their success rate in hunting toms. The 12-gauge, semi-automatic shotgun was the preferred firearm. The effective range of a 12-gauge shotgun is 50 yards, but the shot can be lethal up to 100 yards or more. Because the skill in hunting turkeys is calling them, there is no reason to bait for turkeys. In other words, baiting for turkeys is not considered to be "sporting" and does not comport with the idea of "fair chase." For similar reasons, stalking is not allowed when turkey hunting (N.J.A.C. 7:25-5.7(e)2).

All of these controls (season dates, firearm and ammunition type, and no baiting) are important to keep the harvest of male turkeys within acceptable limits, ideally less than 25 percent of the male population. The number of turkey hunters in New Jersey is between 10,000 and 11,000 annually. If all or most of these hunters could take a tom in a given season because they were allowed to bait or stalk, the turkey resource would be severely negatively impacted (i.e., the harvest rate could far surpass 25 percent). The sound scientific investigation and research upon which these Game Code regulations were promulgated not only stands up to scrutiny today, but

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those same factors are examined regularly by Division staff to ensure that the turkey resource remains strong and healthy enough to be hunted.

The Council also examines non-scientific factors in determining hunting manner and means. The safety of hunters and non-hunters is always a prime concern for the Council. A hunter may be calling a tom in a forest where another hunter may be within 50 or 100 yards and unable to see that the calling hunter is not a tom. Since bait can cause large numbers of turkeys to congregate in a very small area, a person hunting near the bait can become a target if passing hunters were to notice and take aim at these feeding turkeys. Accordingly, the Council has determined that a turkey hunt including an allowance of hunting over bait while standing on the ground would be unsafe. The Council maintains this prohibition in the most recent Game Code.

The Council continues to monitor hunter shooting incidents. As late as 2015, the Division of Fish and Wildlife's Conservation Police investigated a hunting incident where a non-hunter was shot in the abdomen by a hunter while pruning vegetation with red shears. The male turkey's snood is red. In the hunter's excitement, he shot without knowing whether he was shooting at a turkey.

The Game Code, and specifically N.J.A.C. 7:25-5.7(e)12, was adopted by the Council in compliance with N.J.S.A. 13:1B-30. The Game Code was, and continues to be, based upon scientific investigation and research, and is promulgated both to ensure the continued viability of the resource and for the safety of both participating hunters and the general public.

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As indicated above, management of the State's fish and game resources occurs through a combination of statutory provisions and regulations promulgated by the Council in the exercise of the discretion granted it by the legislature to achieve the specified management goals. As indicated by the Petitioner, one of the statutory controls is codified at N.J.S.A. 23:4-24.2 which prohibits specified activities while elevated in a standing tree, or in a structure of any kind within 300 feet of a baited area. The rule, which restricts turkey hunting within 300 feet of a bait area *while positioned on the ground*, is not contradictory to N.J.S.A. 23:4-24.2, but is a complementary measure determined by the Council to be necessary to achieve the management goals specified in N.J.S.A. 13:1B-30.

With reference to the Petitioner's indication that there is an inappropriate \$74 penalty contained in the Game Code, rather than the \$50.00 penalty referenced in N.J.S.A. 23:4-24.2, The Game Code does not contain penalties. Further, as indicated above, the prohibition specified at N.J.A.C. 7:25-5.7(e)12 is not based upon N.J.S.A. 23:4-24.2. Instead, a violation of N.J.A.C. 7:25-5.7(e)12 would be subject to penalty under N.J.S.A. 23:4-12 which provides for a \$20 penalty for any violation of the Game Code. However, to address the Petitioner's assertion, if a violation of N.J.S.A. 23:4-24.2 were to occur, in addition to the \$50.00 statutory penalty court costs would be added. Any court costs incurred to challenge the penalty are outside of the Council's control.

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Finally, with reference to the Petitioner's concern that traveling to and from a hunting area could result in a violation of N.J.A.C. 7:25-5.7(e)12, "hunting" is defined at N.J.A.C. 23:1-1 as "...the possession of an instrument used to take wildlife in a condition that makes the instrument readily usable, while in a place or in proximity thereto where wildlife may be found". In addition, there are other requirements that are evidence that someone is hunting turkey, such as the requirement to have a call in the hunter's possession (N.J.A.C. 7:25-5.7(e)3); the hunter is not wearing hunter orange (N.J.A.C. 7:25-5.7(e)9) as turkeys can see color and will be spooked by it; the hunter has a shotgun with shot size no larger than No. 4 fine shot or smaller than No. 7 ½ fine shot (N.J.A.C. 7:25-5.7(e)10) or a bow and arrow; the hunter has in his possession a turkey permit (N.J.S.A. 23:3-27.1); and the hunter's weapon is available to be used. Conservation Police Officers will look at the totality of the circumstances before charging someone with illegally hunting turkey while standing within 300 feet of a bait pile. Merely walking or driving past a bait pile with a weapon that is in its case and not available to be used will not result in a violation of N.J.A.C. 7:25-5.7(e)12.