

To: Alaska Board of Game (BOG),

On behalf of the hundreds of Alaska Wildlife Alliance (AWA) members, we OPPOSE Alaska Department of Fish and Game's RC009, an emergency request to reinstate regulations to reinstate bear and wolf removal to aid in achieving the Mulchatna caribou herd (MCH) intensive management (IM) objectives.

Background

On March 14, 2025 the Superior Court declared in Alaska Wildlife Alliance v. State of Alaska (Case No. 3AN-23-07495CI) that "the Proposal 21, adopted 5AAC 92.111(c), by the Alaska BOG on January 24, 2022, was unlawfully adopted and, therefore void and without legal effect. The matter is remanded to the Alaska BOG for further proceedings consistent with this opinion."

In the opinion, the Court clearly concluded that "the Alaska BOG violated Appellant AWA's right to due process of law, by failing to provide AWA with adequate notice or meaningful opportunity to be heard about a regulatory proposal, as is required by Art. 1, Sec 7 of the Alaska Constitution and amplified by provisions in the Alaska Administrative Procedures Act and Alaska BOG failed to comply with the sustained yield provision of Article VIII, Sec 4, of the Alaska Constitution by failing to consider all the important, relevant and material factor relating to the sustainability of a replenishable public wildlife resource prior to adoption of a regulatory proposal impacting a replenishable public resource."

Eight days later on March 21, 2025 at the Statewide Board meeting, ADF&G made a comment during oral reports that ADF&G will be submitting a petition to the Board of Game (Board) to reinstate the Mulchatna bear and wolf removal program, for deliberation during Miscellaneous Business at the Statewide meeting. Director Scott stated the petition was Record Copy 009 (RC009). At the time, RC009 was not available on the meeting website, nor were any petitions listed under the meeting agenda. Within five minutes of Director Scott's comment, RC009 appeared on the website, having clearly been authored in advance of the meeting and orchestrated to appear after his remarks. Shortly thereafter, it was reiterated by the Board that the deadline to sign up for oral testimony would close in just over 24 hours (10am Saturday, March 22nd). Oral testimony requires that individuals be in Anchorage, in person, with approximately 25 hours notice to sign up (sign up is also in-person only). The written public comment period for the Statewide meeting (where the new petition would be deliberated) closed on March 7th, two weeks prior to the petition being published. There is no public comment opportunity on this petition - ACs have never seen or deliberated a Mulchatna bear control proposal, nor has the public. Members of the public who wish to be heard were instructed to submit a "Record Copy", which is not guaranteed to be read by Board members prior to deliberation.

This, we believe, was an underhanded maneuver by ADF&G designed to defy the Court's orders and circumvent the public process.

It seems pre-adoption notice and public comment procedures do not apply when the Board promulgates an emergency regulation. It is largely for that reason that it is a “state policy” that “emergencies are held to a minimum and rarely found to exist” (AS 44.62.270).

By framing this bear control program as an “emergency” ADF&G hopes to bypass the concerns of the Superior Court by checking the regulatory boxes of an Emergency Petition as an administratively proficient, though hollow, alternative.

Alaska Wildlife Alliance Comments on the Emergency Petition

1. This is not an Emergency

The Board of Game must make two specific findings before proceeding with ADF&G's emergency petition.

- (1) A written emergency finding under AS 44.62.250(a) that ADF&G's petition justifies that a regulation is necessary for the immediate preservation of the public peace, health, safety, or general welfare; and
- (2) That the emergency identified in ADF&G's petition meets the definition of an emergency in 5 AAC 96.625(f).

The Board of Game cannot make these two required findings based on the information contained in ADF&G's petition, and thus the petition should be denied.

A. ADF&G's Emergency Petition Must be Denied Because it Fails to Provide Facts to Justify an Emergency Finding Under AS 44.62.250(a).

The Board of Game regulations state that “[i]t is the policy of the boards that a petition **will be denied** and not scheduled for hearing unless the problem outlined in the petition justifies a finding of emergency under AS 44.62.250(a).” 5 AAC 96.625(f) (emphasis added). AS 44.62.250(a) requires “a written finding. . . that the adoption of the regulation . . . is necessary for the immediate preservation of the public peace, health, safety, or general welfare.” The Board of Game regulations are clear that emergency findings are rare. 5 AAC 96.625(f); *see also* AS 44.62.270 (dictating that “emergencies are held to a minimum and are rarely found to exist.”).

In order for the Board of Game to make the necessary emergency finding, ADF&G's petition must contain factual information to justify this finding. 5 AAC 96.625(f); AS 44.62.250(a). ADF&G's emergency petition should be rejected without further consideration because it does not contain the factual information that would support an emergency finding. ADF&G does not get to supplement its petition at a later point and provide additional information to the Board of

Game. Any factual information necessary to support an emergency finding must be presented in the petition itself (AS 44.62.250(a)).

ADF&G states in RC009 that “[i]t will provide the Board with facts to prepare a statement supporting a finding of an emergency and the necessity to adopt an emergency regulation.” This is an admission from the agency that the information provided in the petition itself is not sufficient. That admission is a death nail for ADF&G’s petition because unless the information is presented in the petition itself, 5 AAC 96.625(f) mandates that the Board of Game deny the petition.

Even if the Board of Game considers additional information, ADF&G’s petition should still be rejected because “the problem outlined in the petition,” 5 AAC 96.625(f), does not justify an emergency finding. The problem outlined in ADF&G’s petition is that the Alaska Superior Court in *Alaska Wildlife Alliance v. State of Alaska* (Case No. 3AN-23-07495CI) struck down the Mulchatna predator control program, 5 AAC 92.111(c), as unlawfully adopted. The court held that the Alaska Board of Game failed to provide constitutionally required due process and failed to comply with the sustained yield provision of Art. VIII, Sec. 4 of the Alaska Constitution.

ADF&G’s petition does not address the two reasons this regulation was struck down as unconstitutional. Rather, ADF&G is simply asking the Board of Game to reinstate the “unlawfully adopted” regulation so that it can “achiev[e] the IM objectives” created by the “unlawfully adopted” regulation. ADF&G’s desire to continue operating under a regulation that was struck down as unconstitutional is not an emergency and does not justify a finding that a regulation is necessary for the preservation of public peace, health, safety, or general welfare.

B. There is No Unexpected or Unforeseen Event Threatening Game that Would Meet the Definition of an Emergency in 5 AAC 96.625(f).

The Board of Game regulations identify two categories of emergency petitions (1) subsistence hunting and (2) unforeseen, unexpected events. 5 AAC 96.625(f). ADF&G’s petition requests an emergency regulation in order to conduct an intensive management program under AS 16.05.255, which involves the state killing predators. Intensive management programs are not hunting, subsistence or otherwise, and thus ADF&G’s petition falls under the second category.

The Board of Game defines an emergency under this second category narrowly as (A) “an unforeseen, unexpected event that either threatens a fish or game resource” or (B) “an unforeseen, unexpected resource situation where a biologically allowable resource harvest would be precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.” 5 AAC 96.625(f). ADF&G’s petition does not raise either of these situations.

Moreover, ADF&G has presented no evidence as to how the striking down of a predator control program directly threatens the Mulchatna Caribou Herd, nor do they state evidence as to how this “emergency” action will result in the “immediate preservation” of health or welfare. ADF&G

states in its petition that “[n]ot being able to remove predators from the calving grounds in the spring of 2025 further threatens the recovery of the [Mulchatna Caribou Herd]” but there is no evidence provided to defend this claim.

What specifically is unforeseen, unexpected, or unlikely to be repeated?

Losing a court case that has been pending since 2023 is not an “unforeseen, unexpected event.” The State is routinely involved in litigation and is well aware that litigation challenging an agency action can result in a decision that strikes down an agency regulation. This case was filed nearly 18 months ago and the State knew the judge was retiring on March 17th, so ADF&G knew a ruling would be released between oral arguments (March 3rd, 2025) and the judge’s retirement (March 17, 2025), and that it was possible the State could lose.

It seems ADF&G may try to argue that, without Spring 2025 bear control, “a biologically allowable resource harvest would be biologically precluded by delayed regulatory action and such delay would be significantly burdensome to the petitioners because the resource would be unavailable in the future.” This is quite a stretch. Harvest of the Mulchatna herd has been closed for four years, and while MCH numbers are low compared to some historical numbers, they are notably higher than others. How does ADF&G measure the “delay” in MCH recovery when they do not yet know if the program works? What Feasibility Assessment can ADF&G reference as evidence for measuring success of bear culling on MCH, and how is that evidence so secure that ADF&G is creating an Emergency Petition to that end?

For context on MCH population’s range, the first aerial surveys for MCH were conducted in 1949 in which the population was estimated at 1,000 animals. For approximately 10 years between 1965-1974 the population is thought to have remained between 6,000 - 13,000 animals (Van Lanen et al 2018). The population then climbed and fell again, and has “been relatively stable at a low level ranging between 2018-2024 between 12,500 - 14,800 animals” (2024 MCH Population Assessment, Dec 2024 page 8). In the context of MCH population history, the 2024 estimated population estimate of 14,846 cannot be suddenly constituted as an emergency. Hunting has been closed on the herd since 2021. Despite this closure and the population numbers, the original proposal – Proposal 21 – adopted in January 2022 was also not treated as an emergency petition. The 11 years of both land-and-shoot and aerial-gunning wolf control in the Mulchatna Control Area prior to 2022 were also not enacted by Emergency Petition, and notably failed to reverse the downward trend of the MCH. In fact, AWA cannot find an Intensive Management program or wide scale predator control program that has ever been enacted by Emergency Petition. That last time the Department shot bears from the air was in the mid-1960s on Kodiak Island to reduce predation on cattle. It was abruptly discontinued facing broad public scrutiny. ADF&G has killed close to 200 bears during the 2 years that this unlawfully adopted program was in place, which means there are substantially less bears in this area than there were when the original proposal was adopted. If the Mulchatna Caribou Herd has been at a steady population for nearly five years, and there are almost 200 less bears, then there is no “credible

scientific evidence” that the court’s decision striking down the predator control program is threatening a game resource.

A helpful test of whether a situation constitutes an emergency within the meaning of AS 44.62.270 asks whether the “set of events is unlikely to be repeated”; a “finding of emergency follows a fact intensive inquiry into a set of events unlikely to be repeated” (Grunert, 139 P.3d at 1233). Since ADF&G has not clearly outlined what set of events led to this “emergency”, we cannot comment on this point. In December, 2024 ADF&G reported that between 2019 and 2024 the MCH has been “relatively stable between 12,500 - 14,800 animals”. What set of “unlikely events” transitioned this “relatively stable” population to a population requiring an emergency petition between December 2024 and March 26th, 2025? Can the Department point to a large MCH population loss in the past few months and prove that bear predation was the primary cause? Given bears are currently hibernating, we find this unlikely. The petition does not engage in an fact intensive inquiry, rather it simply states that the Board will receive information later.

2. ADF&G still has not presented “credible scientific evidence” of the bear population.

The court struck down the Mulchatna predator control program because ADF&G admitted it has no information about bear populations in Game Management Unit 17 and 18. Anecdotal evidence provided in the 2022 Board of Game meeting was not found to be legally sufficient. The court made it clear that in order to meet the requirements in the Alaska Constitution ADF&G needs “credible scientific evidence” about the bear population. RC009 does not have any evidence, let alone the “credible scientific evidence” that the court said was required.

The court found that the Board of Game “did not have adequate, relevant population studies or any genuine data about bear sustainability in the area of the control program prior to adopting a proposal that would have an obvious impact on a constitutionally protected public resource.” *Alaska Wildlife Alliance v. State of Alaska et. al.* (Case No. 3AN-23-07495CI), Order at 8 (March 14, 2025). Despite not having this information, ADF&G has killed almost 200 bears in the program area in the two years since this “unlawfully adopted” program was in place. To date, ADF&G still has not presented any information about how the Mulchatna predator control program has impacted bear populations and it has no baseline data on population levels that existed before it started implementing the program. Bears are a constitutionally protected public resource and the mass killing of 200 bears in this area has had an “obvious impact” on the bear population. The court’s order requires ADF&G to collect basic information about how the Mulchatna predator control program is impacting bears, information that it should have had prior to implementing the program in the first place. Ensuring that ADF&G does not blindly decimate the bear population in this area is rational, constitutionally required, and will not negatively impact the general public.

Traditional Ecological Knowledge

We want to make clear that Alaska Wildlife Alliance values TEK and considers it on par with western science - together both western and Indigenous scientific traditions paint a full picture of the biological situation on the ground.

When BOG created the original program it did so with what the Court described as “anecdotal” evidence that brown bear populations were high in the area.” Those anecdotes were provided by members of the public who testified at the meeting. It is important not to conflate “anecdotal evidence” with TEK, even if testifiers are Indigenous Knowledge holders. As part of the deliberations, AWA seeks TEK in the record about bears in the region, particularly the relationship between bears and caribou and bears and moose in the prospective program area. The latest TEK recordings we can find from the area is from 2018 Local Knowledge of the Mulchatna Caribou Herd and Habitat Change in Southwest Alaska (Local Knowledge of the Mulchatna Caribou Herd and Habitat Change in Southwest Alaska By James M. Van Lanen, published by ADF&G). The article is based on place-based interviews with TEK holders and is extremely informative. There is mention of predation of caribou by wolves, but not by bears. This is not to say that the testifiers in 2022 were inaccurate, and certainly not an argument that they should be disregarded - it is simply to state that best-practices for TEK include place-based interviews with responses reviewed before they’re published. Testimony before the Board of Game, while valuable, cannot be considered citable TEK unless it is collected holistically. The State has never provided a proposal regarding the Mulchatna Bear Control program, or hosted a working group about this herd’s recovery to gather such information. If the State would put this program through a true public process, it could generate responses from all Alaskans, including and especially TEK holders.

Conclusion

We cannot reasonably comment on how ADF&G defines this as an “emergency” because ADF&G does not explain it in the petition. How is the creation of the Predator Control program for bears “necessary for the immediate preservation of public peace, health, safety or general welfare”? If ADF&G argues for health or general welfare, they must be specific as to how the bear control program will directly preserve those conditions. If health or welfare are jeopardized by a lack of opportunity to hunt the Mulchatna Caribou Herd, why is this an emergency now and not years ago when the hunt initially closed, or in previous years when the herd stabilized between 6,000 - 12,000 animals? If this emergency petition is ultimately aimed at opening a Mulchatna caribou hunt, ADF&G must explain how bear control will lead to the “immediate preservation” of that hunt - does ADF&G anticipate opening a hunt on MCH after the 120 day emergency period ends? How can the Department conclude that killing bears this spring will lead directly to a recovery of the Mulchatna Caribou herd?

Nor does ADF&G's petition meet the second emergency situation identified by the Board of Game regulations. For one, a court decision is not "an unforeseen, unexpected resource situation." Moreover, the Mulchatna Caribou Herd has been closed to hunting since 2021. Thus, the "allowable resource harvest" has been closed and precluded by regulatory action for years. The only reason this is being presented as an emergency petition now is because the State is trying to circumvent the due process requirements that the court found lacking. The status of the MCH has not changed substantially and the harvest conditions for people have not changed. If anything, moose harvest seasons have been liberalized in the affected GMUs to provide for more subsistence harvest.

The court's order in *Alaska Wildlife Alliance v. State of Alaska* chastises the Board of Game for relying on "conclusionary opinions" instead of engaging with "credible scientific evidence." ADF&G's petition is only providing "conclusionary opinions" that do not have a basis in "credible scientific evidence." ADF&G has not provided any credible evidence of an actual emergency that would justify the findings the Board of Game needs to make.

This administrative maneuvering is likely unlawful, and in the eyes of our members, extremely unethical. We oppose this Emergency Petition because it was written and released in an orchestrated manner to provide just enough notice to pass the muster of an Emergency Petition, while ensuring there was not enough time for the public to meaningfully engage.