

ORDER ON MOTION

-----

ANIMAL PROTECTION LEAGUE OF NEW JERSEY,  
THE HUMANE SOCIETY OF THE UNITED STATES,  
FRIENDS OF ANIMALS, ANGELA METLER, AND DOREEN FREGA  
V.

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-001019-22T4  
MOTION NO. M-001826-22  
BEFORE PART E  
JUDGES: CARMEN MESSANO  
LISA ROSE

NJ FISH AND GAME COUNCIL; FRANK VIRGILIO IN HIS CAPACITY AS CHAIR OF THE NJ FISH AND GAME COUNCIL, NJ DEPARTMENT OF ENVIRONMENTAL PROTECTION, SHAWN M. LATOURETTE IN HIS CAPACITY AS COMMISSIONER OF THE NJ DEPARTMENT OF ENVIRONMENTAL PROTECTION;  
PHILIP D, MURPHY IN HIS CAPACITY AS GOVERNOR OF THE STATE OF NEW JERSEY

MOTION FILED: 12/02/2022 BY: APPELLANTS  
ANSWER FILED: 12/05/2022 BY: RESPONDENTS

SUBMITTED TO COURT: December 05, 2022

ORDER

-----

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS, ON THIS 6th DAY OF DECEMBER 2022, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANTS

MOTION FOR STAY DENIED AND OTHER

SUPPLEMENTAL:

Appellants Animal Protection League of New Jersey, Humane Society of the United States, Friends of Animals, Angela Metler, and Doreen Frega, move for an emergent stay of the December 2022 black bear hunt pending appeal of the November 15, 2022 decisions of respondents Fish and Game Council (Council), its chairperson, Frank J. Virgilio; the Department of Environmental Protection (DEP), its commissioner Shawn M.

LaTourette (Commissioner); and Governor Philip D. Murphy, authorizing the adoption of a new Comprehensive Black Bear Management Policy (CBBMP) and related amendments to the Game Code, N.J.A.C. 7:25-5 to -5.39, as emergent regulations under the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31. The sole issue before this court is whether appellants have demonstrated, by clear and convincing evidence, entitlement to injunctive relief under the factors set forth in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), and Garden State Equality v. Dow, 216 N.J. 314, 320 (2013). Because we conclude appellants failed to satisfy these factors, we deny appellants' motion for a stay and dissolve the interim stay issued pursuant to Rule 2:9-8.

I.

The history of our state's black bear hunting, including the plethora of litigation surrounding the hunt, is well chronicled. Indeed, lawsuits have been initiated by some of the same appellants. See e.g., Animal Prot. League of N.J. v. N.J. Dep't of Env'tl. Prot., 423 N.J. Super. 549, 554-55 (App. Div. 2011), (affirming the DEP's decision that adopted the 2010 CBBMP). We confine our review to the issue before us, commencing with the most recent procedural history.

The record reveals between 2018 and 2020, state lands were closed to black bear hunting "to pursue and gauge the effectiveness of other non-lethal bear management techniques." Those techniques included educating the public about bear management, with an emphasis on eliminating access to "sources of human-derived food." Black bear hunting therefore was limited to private lands until the 2015 CBBMP expired in 2021.

Incidents reported to the DEP's emergency hotline are categorized based on their level of significance, the most serious of which are categorized as black bear damage and nuisance reports. According to the DEP's October 2022 report, between January 1 and October 21, 2022, black bear damage and nuisance reports increased 237 percent compared to the same time frame in 2021. State biologists estimated the black bear population in the northwest section of New Jersey was more than 3000 bears and "project[ed] that the bear population in this area will approach or exceed 4,000 bears within the next two years if immediate measures to control the population were not implemented."

On November 10, 2022, the Council publicly noticed its intention to consider the emergency adoption of the 2022 CBBMP and amendments to the Game Code. Authorization would permit a black bear hunt commencing December 5, 2022.<sup>1</sup>

---

<sup>1</sup> Under N.J.A.C. 7:25-5.6, the black bear hunting season consists of two segments. Segment A permits hunting for six consecutive days, commencing the second Monday of October. Segment B coincides with the

Appellants attended the public meeting held on November 15, 2022, and were afforded the opportunity to provide comments. Over their objection, the Council approved the emergency application, finding "an imminent peril exists to the safety, health, and welfare of the citizens of this State." That same day, the Commissioner approved the CBBMP, subject to three modifications: "(1) prohibiting the taking of cubs less than 75 pounds in weight; (2) prohibiting the taking of bears traveling with cubs less than 75 pounds in weight; and (3) restricting hunting for black bears within 300 feet of bait piles." The Governor also approved the emergent adoption and concurrent rule proposal on November 15.

On November 21, 2022, appellants sought from the Council and DEP a stay pending appeal of the adoption of the CBBMP and rule.<sup>2</sup>

On November 28, 2022, the Council denied the stay; on November 29, 2022, appellants filed an emergent application with this court seeking: (1) "[a]n order declaring invalid the Council's emergency rule authorizing a black bear hunt and the CBBMP," and (2) "[a] stay and/or preliminary injunction." On November 30, 2022, we granted a temporary stay of the black bear hunt under Rule 2:9-8, and issued a briefing schedule. On December 2, 2022, appellants filed a notice of appeal from the November 15, 2022 agency decisions.

On December 2, 2022, respondents filed an emergent application challenging our interim stay. That same day, we denied the application and respondents filed an emergent application with the Supreme Court. The following day, the Court denied respondents' application.

## II.

The gravamen of appellants' motion for a stay pending appeal is that "the Council adopted the emergency rules without adequate evidence of imminent peril to the public and exceeded its statutory authority." They contend respondents' projected increase in the bear population is

---

deer hunting season, see N.J.A.C. 7.25-5.27, commencing the second Monday following Thanksgiving and ending the following Saturday. If the harvest rate reaches thirty percent, the hunting season concludes. N.J.A.C. 7:25-5.6(a). If the harvest rate at the end of the December segment is below twenty percent, the hunt will be extended for an additional four consecutive days. N.J.A.C. 7:25-5.6(b).

<sup>2</sup> According to appellants' application for emergent relief and merits brief, the Council did not publish the "content" of the approved rules until November 18, 2022. Respondents counter that the DEP posted "[a]ll documents" sometime during the evening of November 15, 2022. Neither party supported its contention with citation to the record.

speculative because its current population estimate was not scientifically determined and was improperly based on the number of bears killed during the outdated 2020 hunt. Appellants contend they have satisfied the criteria for a stay pending appeal.

Well-established principles guide our review. A party seeking injunctive relief, such as a stay pending appeal "must demonstrate by clear and convincing evidence," see Guaman v. Velez, 421 N.J. Super. 239, 248 (App. Div. 2011), each of the following factors: (1) relief is necessary to prevent irreparable harm; (2) there is a reasonable probability of success on the merits that rest on settled law; and (3) the balance of the relative hardships favor that party, Crowe, 90 N.J. at 132-34. When, as in the present matter, "a case presents an issue of 'significant public importance,' a court must consider the public interest in addition to the traditional Crowe factors." Garden State Equality, 216 N.J. at 321 (quoting McNeil v. Legis. Apportionment Comm'n, 176 N.J. 484, 484 (2003)).

Appellants argue they have demonstrated irreparable harm via five independent bases: (1) deprivation of their procedural rights under the APA; (2) harm to the black bear population; (3) their interest in individual bears will be harmed if those bears are killed; (4) Metler's use and enjoyment of her property will be diminished; and (5) Metler will "fear for her safety caused by hunting accidents."

Initially, we are not convinced appellants' right to due process was violated under the APA. Appellants acknowledge they attended the public meeting and provided comment. Appellants also contend they were unable to have their experts review the emergency proposal and submit comments.<sup>3</sup> That inability, however, did not offend the APA. See N.J.S.A. 52:14B-4(c) (permitting emergency rulemaking "without prior notice or hearing, or upon any abbreviated notice and hearing that . . . [is] . . . practicable"). Although the Council rejected appellants' comments, they were provided notice of the hearing and afforded the opportunity to be heard.

We acknowledge, however, that when the bear hunting season commences and bears are invariably killed, some harms embodied in appellants' remaining contentions may be irreparable.<sup>4</sup> Nonetheless,

---

<sup>3</sup> In a separate order, we denied appellants' motion to supplement the record with documents that were not presented to the Council.

<sup>4</sup> See Animal Welfare Institute v. Martin, 668 F. Supp. 2d 254 (D. Me. 2009), aff'd, 623 F.3d 19 (1st Cir. 2010) (recognizing "the proper test for determining irreparable harm is effect on the species as a whole, not on individual members of the species, unless the take of an individual member has been demonstrated to affect the species as a whole." Id. at 264 (emphasis added)).

consideration of the remaining Crowe factors militates against granting a stay. As to the second factor, appellants' contentions do not rest on well-settled law. Stated another way, although we have upheld previous CBBMPs that were not adopted pursuant to an emergency regulation, see Animal Prot. League of N.J., 423 N.J. Super. at 554-55, the parties have not cited, and our research has not revealed, any authority deciding emergency rulemaking for black bear hunting. Thus, appellants have not demonstrated a reasonable likelihood of success on the merits of their appeal.

Finally, we recognize the significant yet competing public interests underscoring both parties' arguments. For example, appellants contend the black bear population will be diminished and hunting accidents could occur. On balance, however, the public interest advanced by respondents is grounded in the protection of the public from the growing bear population and commensurate damage and nuisance incidents. In our view, the balance of hardships tips in respondents' favor.

We therefore conclude appellants have failed to meet their considerable burden of demonstrating entitlement of a stay pending appeal. The temporary stay issued pursuant to Rule 2:9-8 is dissolved. Appellants' appeal may proceed in due course.

FOR THE COURT:



---

LISA ROSE, J.A.D.

N/A STATEWIDE  
ORDER - REGULAR MOTION  
CLD