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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CENTER FOR BIOLOGICAL DIVERSITY,

Petitioner-Appellant,

vs.

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE
and JOE STOHR, Acting Director of the Washington Department of Fish
and Wildlife,

Respondents,

and

WESTERN FORESTRY AND CONSERVATION ASSOCIATION,
d/b/a/ WASHINGTON STATE ANIMAL DAMAGE CONTROL
PROGRAM, and WASHINGTON FARM FORESTRY ASSOCIATION,

Intervenors.

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Carol Murphy)

INTERVENORS' RESPONSIVE BRIEF

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I. INTRODUCTION

Washington's Constitution guarantees individuals the right to defend their private property against damaging wildlife, including the right to kill game animals where reasonably necessary. *State v. Vander Houwen*, 163 Wn.2d 25, 33, 177 P.3d 93, 97 (2008).

In 1996, Washington voters passed RCW 77.12.240 (the "Bear Statute") to prohibit recreational hunters from utilizing "unsporting" methods of hunting black bears. *See* CP3671.¹ In 2000, Washington voters passed RCW 77.15.194 (the "Trapping Statute") to prohibit recreational and commercial fur trapping in the state. *See* RCW 77.15.194(1)-(2). The proponents of both statutes understood that Washingtonians have a constitutional right to protect their property from damaging wildlife, and both statutes authorize landowners to utilize the otherwise prohibited hunting and trapping methods to protect their private property when wildlife conflicts arise. *See* RCW 77.15.245(1)(a) and 2(a); RCW 77.15.194(4)(b).

Each spring some black bears enter commercial forestry plantations and peel the bark from young trees. The bears do this to

¹ As discussed *infra* at 9-11, the Center for Biological Diversity improperly cites to the Clerk's Papers record (the "CP"), as opposed to the Administrative Record (the "AR"), as support for numerous factual assertions in this case. Intervenors' citations to the CP record in this paragraph is to the relevant Voters' Pamphlet which is, and was, offered to the Court as legal authority (legislative history) to assist the Court in interpreting key statutory provisions at issue in this case.

consume the nutrient-rich sap that underlies the bark. Peeling a tree causes the tree to either die or scar. *See* AR4587-4595 (including pictures illustrating problem). If the tree dies, it loses all commercial value, while scarring renders a significant portion of the log commercially valueless. *Id.* When a bear engages in peeling, it will often focus on a specific “hot spot” area causing major financial damage to the owner of the targeted tree farm. AR4590-93, 4399, 4762, 5018-19, 4415. For decades, timberland owners have obtained permission from the State to remove bears that are decimating their timber plantations. Generally, the only reasonably effective hunting methods for targeting the offending bears are banned for recreational use by either the Bear or Trapping Statute. *See* AR4086 (showing in 2014 it took on average 120 hunter days to harvest a single bear using recreational hunting tactics); AR4361 (removing problem bears without banned methods is “almost impossible”).

Given the need for more effective hunting techniques to target problem bears and consistent with the property damage exceptions in the Bear and Trapping Statutes, the Washington Department of Fish and Wildlife (“WDFW”) issues depredation permits to allow WDFW-authorized hunters to use the recreationally banned methods to remove bears that are causing documented timber damage on private property. The depredation permits are not issued to the public for recreational hunting, but instead require property owners to demonstrate significant property damage and to also retain a WDFW-authorized hunter to conduct the removal. WAC 220-440-210(2)-(3). In 2015, 100 such depredation

permits were issued, which was a decrease from 152 permits in 2010. AR4091.

In the spring of 2018, the Center for Biological Diversity (“CBD”) brought this case challenging WAC 220-440-210 and WAC 220-417-040, which give WDFW’s wildlife division the necessary authority to issue the depredation permits. Codified in early 2016 after approval in late 2015, these rules (the “2016 Rules”) were part of a package of 18 rules that were amended, repealed, or issued as part of an agency reorganization effort to shift wildlife-conflict management from WDFW’s Law Enforcement division to its Wildlife Program division. AR4199-200. The 2016 Rules were never intended to mandate how WDFW staff are to address individual problem bears. Determining the specific on-the-ground approaches to individual problem bears requires significant agency discretion given the complexity of wildlife conflicts and the myriad of situations in which they arise.

CBD’s leading allegation is that the 2016 Rules are beyond the scope of WDFW’s statutory authority because they violate the Bear and Trapping Statutes, and therefore violate Washington’s Administrative Procedure Act (the “APA”). RCW 34.05. CBD’s arguments rely almost entirely upon incorrect assertions that the rules authorize actions based on their silence.

CBD also attempts to portray the rules as arbitrary and capricious by referring this Court to a policy critique that CBD independently generated and submitted to the Court as “supplemental evidence.” The

superior court denied admission of the policy critique, and this Court should uphold that decision. CP3746-49. CBD created the critique solely to support this litigation and did not present it to WDFW during the rulemaking process. As such, it is not part of the administrative record before the Court and does not provide any information related to the validity of WDFW's decision "at the time it was taken" as required by RCW 34.05.562(1) to properly supplement the record. Additionally, it is a misleading presentation that is not reflective of facts on the ground.

In addition to challenging the 2016 Rules, CBD asserts that various 2018 guidance documents function as rules, and as such WDFW violated the APA by failing to submit those documents to formal rulemaking procedures. The 2018 guidance documents are merely forms that were used by WDFW to administer the 2018 depredation hunts. The 2018 guidance documents did not function as rules, and as such, were never required to go through formal rulemaking. This Court, however, need not consider that issue because the superior court found that CBD lacks standing to challenge the guidance documents, and CBD has not appealed the court's holding on that threshold issue.

II. STATEMENT OF ISSUES

A. Issues Identified by CBD²

1. In adopting WAC 220-440-210, did WDFW exceed its statutory authority by authorizing a category of black bear hunters to use bait that are prohibited from doing so by RCW 77.15.245?
2. In adopting WAC 220-440-210, did WDFW exceed its statutory authority by authorizing a category of black bear hunters to use hounds that are prohibited from doing so by RCW 77.15.245?
3. In adopting WAC 220-440-210, did WDFW exceed its statutory authority by authorizing the hunting of black bears near supplemental feeders in violation of RCW 77.15.245?
4. In adopting WAC 220-440-210, did WDFW exceed its statutory authority by authorizing the indiscriminate killing of black bears on commercial timberlands in violation of RCW 77.15.245?
5. In adopting WAC 220-417-040, did WDFW exceed its statutory authority by giving itself authority to issue trapping permits without making a requisite written finding in violation of RCW 77.15.194?
6. Was WDFW's promulgation of WAC 220-440-210 arbitrary and capricious because the agency failed to consider relevant issues?

² Consistent with RAP 10.3(b), Intervenors have reformulated CBD's identified issues, which was necessary because CBD inserted legal conclusions into its issues.

7. Was WDFW's promulgation of WAC 220-440-210 arbitrary and capricious because the agency willfully disregarded the opinions of its internal subject matter experts?
8. Did WDFW issue guidance documents that are subject to rulemaking requirements, but which failed to go through those requirements?
9. Did the superior court err in denying CBD's motion to supplement under RCW 34.05.562(1)?
10. Did the superior court err in denying CBD's motion to supplement as untimely?

B. Issues Waived on Appeal by CBD

1. CBD lacks standing to challenge the guidance documents. *See* holding at CP3753.
2. All claims against WAC 220-440-070. *Compare* CP28 (challenging three rules), *with* CBD's Opening Brief at 2 (challenging two rules).
3. All "as-applied" challenges to the 85 depredation permits that were issued in 2018. *See* dismissal at CP830-31.

III. COUNTER STATEMENT OF FACTS

A. Black Bears Cause Major Damage to Commercial Forestry Plantations.

Black bears are an abundant species in Washington, and the population supports robust recreational hunting seasons. AR4082-88. Each spring certain black bears enter commercial timber plantations and peel

the bark from young trees to feed on their sap.³ AR4587-4595. If a peeled tree is fully girdled (i.e., its full circumference peeled), it will die and lose all commercial value. AR4589-90. If a peeled tree is only partially girdled, the impacted area scars, causing the corresponding section of the harvested log to lose most (essentially all) of its commercial value. AR4595. Black bears that develop a tendency to peel trees often decimate commercial forestry plantations by focusing on “hot spots.” AR4590. Hot spots where the trees have been killed off cannot be replanted until the plantation is harvested, which generally takes decades given that bears target young plantations. AR4593. Tree farmers receive no financial compensation for these losses. *Id.* A hot spot on a small family tree farm can have disastrous financial consequences for the family. AR4415, 4587-4595, 4399, 4762, 5018-19. Unabated, black bears can cause millions of dollars in timber damage on an annual, statewide basis. CP350 (non-record discussion of damages associated with setting of bond by superior court).

³ Information regarding the peeling problem can be found throughout the relevant administrative record. *See, e.g.*, AR4587-4595. Intervenors also supported their motions to intervene with declarations that further discussed the peeling problem and quantified the millions of dollars in damages sustained by the timber industry annually. Intervenors previously cited those standing declarations to provide the superior court with an understanding of the peeling issue. *See* CP3642-44. If the Court desires more context, it may review that briefing; however, those standing declarations are not in the administrative record and are not evidence for this Court’s consideration.

Forest managers have long sought to control the risks posed by black bears to timber plantations. To reduce bear damage, landowners have taken numerous avoidance measures, including using supplemental feeders⁴ to dissuade bears from feeding on tree sap and also taking silvicultural steps in an effort to make the trees less attractive food sources. AR4587-4595, 4387. But even the best efforts cannot fully avoid the problem, and property owners do at times have to remove bears in order to protect their timber investments from ruin. *Id.*

B. Adoption and Scope of the 2016 Rules.

Given the risks that bears pose to timber investments, many landowners critically rely on WDFW to provide them with depredation permits to protect their investments. *See, e.g.*, AR4587-4595, 4367, 4370, 4399, 4762, 5018-19. The depredation program has existed for decades, and historically was overseen by WDFW's Law Enforcement division. The catalyst for the promulgation of the 2016 Rules was the transfer of depredation permitting responsibilities from WDFW's Law Enforcement division to the Wildlife Program division. AR4199-200. This was part of a

⁴ Supplemental feeders are located near vulnerable tree plantations during the spring peeling season and are stocked with a formulated food that is designed to be more desirable than tree sap, but less desirable than natural foods such as berries. The intent is that the bears eat from the feeders instead of peeling the nearby vulnerable trees, but then stop using the feeders once other foods become available. Certain peeling bears, however, never engage with the feeders and continue to peel trees.

significant agency reorganization effort that saw 18 rules amended, repealed, or newly issued. *Id.*

During the 2016 rulemaking effort, WDFW recognized that each instance of human-bear conflict is highly fact specific, and that expert agency staff needed significant discretion to determine how best to address conflicts. As a result, the 2016 Rules contain general procedural authorizations for WDFW's Wildlife Program division to issue depredation permits, but they do not attempt to strictly mandate how conflicts will be addressed on the ground. However, these individual permitting decisions remain constrained by both the Bear and Trapping Statutes, in addition to the 2016 Rules' procedures and all other legal requirements.

C. The Relevant Administrative Record.

The scope of the administrative record has become unnecessarily confused in this case. CBD's petition to the superior court asserted four claims. Claims 1 and 2 were "as-applied" challenges to 85 individual depredation permits that were issued in 2018. CP25-28. The superior court dismissed all of those as-applied challenges, and CBD has not appealed that dismissal. CP830-31. The administrative record for the as-applied challenges was identified as AR0015 to 4081. Documents in that AR range are not in the administrative record for this rulemaking appeal because they were not considered by WDFW during the rulemaking process. *See* RCW 34.05.558; RCW 34.05.566; *Aviation W. Corp. v. Washington State Dep't of Labor & Indus.*, 138 Wn.2d 413, 418, 980 P.2d

701, 704 (1999) (holding the administrative record in a rulemaking challenge is limited to “a compilation of the material considered by the agency in the rulemaking”). The rulemaking record is identified as AR4082 to 5024, and that is the sole record available to this Court for purposes of the rulemaking challenge. The administrative record appendix provided by WDFW properly identifies the administrative record that applies to the rulemaking claims, as opposed to the dismissed permit challenges. *See* Index to Agency Record at 1 and 69.

AR0001-14 are documents relevant to CBD’s challenge of the 2018 guidance documents. *See* Index to Agency Record at 1. Those documents are in the administrative record solely for determining whether they are rules that should have gone through the rulemaking process. They are not part of the administrative record for the rulemaking challenge.

CBD further confuses the record by making its case primarily on improper citations to hundreds of pages of never-admitted additional evidence. This additional evidence consists of a packet of documents that compose a policy critique that CBD assembled to support its position in this litigation. This policy critique packet did not accompany the comments that CBD submitted as part of the rulemaking process and was not part of the administrative record considered by WDFW. *See* AR4325-4336 (CBD’s comments submitted as part of the challenged rulemaking process). The superior court denied admission of this litigation-focused policy critique (CP3746-49), and arguments related to that decision are addressed in response to CBD’s appeal of the Motion to Supplement. *Infra*

at 37. To present the policy critique to this Court, CBD cites to the Clerk's Papers that contains a copy of the critique that was denied admission as evidence. The improperly cited policy critique documents are found at CP977 to 3543.⁵

IV. RULEMAKING CLAIMS ARGUMENTS

A. Standard of Review for CBD's Rulemaking Challenges.

CBD argues that the 2016 Rules are invalid. Under the APA, a rule is presumed valid unless the petitioner can show that the "rule violates constitutional provisions; the rule exceeds the statutory authority of the agency; the rule was adopted without compliance with statutory rule-making procedures; or the rule is arbitrary and capricious." RCW 34.05.570(2)(c).

CBD has identified seven issues related to the 2016 Rules' validity. Issues 1 through 5 argue that the rules exceed WDFW's statutory authority. CBD's Opening Br. (*hereinafter* "OB") at 3-4. Issues 6 and 7 argue that the adoption of the rules was arbitrary and capricious. *Id.*

CBD has the burden of proof on all of its rulemaking claims. RCW 34.05.570(1)(a). In evaluating the validity of an administrative rule, a reviewing court applies "the standards of the WAPA directly to the record before the agency." *Ass'n of Washington Bus. v. Washington State Dep't*

⁵ Consistent with the APA, the Court should strike and not consider all factual citations to the CP and incorrect AR. *US W. Commc'ns, Inc. v. Washington Utilities & Transp. Comm'n*, 134 Wn.2d 48, 73, 949 P.2d 1321, 1336 (1997) (striking non-record declarations).

of Ecology, No. 95885-8, 2020 WL 240321, at *3 (Jan. 16, 2020) (quoting *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993)). The court of appeals thus reviews de novo a petitioner's legal claims in light of the administrative record presented by the agency. RCW 34.05.566; RCW 34.05.370 (discussing how rulemaking administrative record is assembled). The appeals court does not review de novo the agency's assembly of the record, nor does it review de novo a superior court's evidentiary rulings on motions to supplement the agency record. See *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 76, 110 P.3d 812, 820 (2005) (stating that under the APA, "judicial review is limited to the agency record" and "new evidence is admissible only under highly limited circumstances"); *Okamoto v. State of Washington Employment Sec. Dep't*, 107 Wn. App. 490, 495, 27 P.3d 1203, 1205 (2001) (applying the "manifest abuse of discretion" standard to the appeal of a denial of a motion to supplement the administrative record).

1.) Standard for finding that a rule exceeds an agency's statutory authority—Issues 1 through 5.

"Administrative rules must be written within the framework and policy of the applicable statutes and so long as the rule is reasonably consistent with the controlling statutes an agency does not exceed its statutory authority." *Swinomish Indian Tribal Cmty. v. Washington State Dep't of Ecology*, 178 Wn.2d 571, 580, 311 P.3d 6, 10 (2013). This standard derives from the presumption that agency rules are valid if adopted pursuant to a legislative grant of authority. *Wash. Pub. Ports*

Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 646, 62 P.3d 462, 466 (2003). Thus, the key inquiry is whether a rule amends or changes a legislative enactment. *Swinomish*, 178 Wn.2d at 580. If no amendment or change is found, and a general grant of authority exists, then the rule is valid.

CBD does not contend that WDFW lacked a general grant of authority to promulgate depredation permitting rules, and the administrative record identifies voluminous statutory authority for the adoption of the 2016 Rules. *See* AR4118, 4123, 4161. These authorities include RCW 77.12.240, which gives WDFW the authority to “authorize the removal or killing of wildlife that is destroying or injuring property.” Rather than asserting a lack of general authority, CBD argues that the 2016 Rules conflict with the Bear and Trapping Statutes. OB at 16-17. Therefore, resolution of Issues 1 through 5 requires only a determination of whether the 2016 Rules amend or change the identified statutes.

2.) Standard for finding that a rule is arbitrary and capricious—
Issues 6 and 7.

When a rule is challenged as arbitrary and capricious, “the reviewing court must consider the relevant portions of the rule-making file and the agency’s explanations for adopting the rule as part of its review in order to determine whether the agency’s action was willful and unreasoning and taken without regard to the attending facts or circumstances.” *Washington Indep. Tel. Ass'n v. Washington Utils. & Transp. Comm'n*, 148 Wn.2d 887, 906, 64 P.3d 606, 616 (2003). Under Washington’s “willful and unreasoning” standard, if “there is room for

two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous.” *Id.* at 904 (quoting *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961, 970 (2002)).

Regardless of the nature of the agency action under review, the “scope of review under this standard is ‘very narrow’ and the party seeking to demonstrate that the action is arbitrary and capricious ‘must carry a heavy burden.’” *Neravetla v. Dep’t of Health*, 198 Wn. App. 647, 668, 394 P.3d 1028, 1040 (2017) (quoting *Pierce County Sheriff v. Civil Serv. Comm’n of Pierce County*, 98 Wn.2d 690, 695, 658 P.2d 648, 651 (1983)); see also *Fed. Way Sch. Dist. No. 210 v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145, 152 (2011). As to rulemaking decisions specifically, when a record “shows an evolutionary process whose final result is the rule at issue,” and where the challengers “had a full opportunity to present their views, and it is obvious that the [agency] considered them,” the rule is not arbitrary and capricious. *Washington Indep. Tel. Ass’n*, 148 Wn.2d at 910.

B. CBD’s Arguments that the 2016 Rules Exceed WDFW’s Statutory Authority are Without Merit—Issues 1 through 5.

Issue 1) WAC 220-440-210 did not amend or change the Bear Statute to improperly permit the use of bait to hunt black bears.

To prevail on Issue 1, CBD must prove that the rule “amends or changes” the statute. *Swinomish*, 178 Wn.2d at 580. If the rule is “reasonably consistent” with the statute, then the rule must be upheld. *Id.*

CBD incorrectly asserts that WAC 220-440-210 “gives WDFW unwarranted authority to issue bait permits to private trappers.” OB at 17. WAC 220-440-210 says nothing about how or when to issue a permit that allows baiting as a hunting method.⁶ The rule is entirely silent on the issue of baiting and does not expressly authorize WDFW to allow any category of persons to use baiting as a bear removal method. The rule does not change or amend the Bear Statute’s baiting requirements and prohibitions, and WDFW is surely capable of issuing permits according to the rule without violating the terms of the statute. CBD fails to cite any authority suggesting that a rule must recite every relevant statutory provision or that the absence of a specific limitation provides the agency unwarranted authority to act. The fatal inconsistency between WAC 220-440-210 and the Bear Statute that CBD alleges simply does not exist. *Compare* WAC 220-440-210, *with* RCW 77.15.245. Because WAC 220-440-210 does not amend or change the statute, the rule is valid.

The Court need go no further than the above facial review to uphold the superior court’s decision. But CBD’s analysis is not so limited. In an effort to prove that the depredation program is violating the Bear Statute, CBD refers the Court to documents taken from the administrative records of the 85 “as-applied” permitting challenges. *See* OB at 19-20. All of the as-applied challenges have been dismissed and not appealed, and

⁶ The rule also says nothing about trapping, which is more directly addressed by WAC 220-417-040, not WAC 220-440-210.

the records collected as part of those challenges are not part of the administrative record for this rulemaking challenge. *See supra* at 9. The Court should not allow CBD to resurrect its 85 dismissed as-applied challenges by arguing that a certain permitting decision was improper and therefore the rule must, *ipso facto*, be invalid. If CBD wished to make those arguments, it could have appealed the dismissal of the permitting decision claims, but it did not.

Setting aside CBD's improper reliance on non-record materials, the assertion that WDFW's post-rulemaking permitting decisions show the rules to be invalid also fails. CBD's as-applied challenges to specific permits are based on an incorrect interpretation of who the Bear Statute authorizes to use bait. OB at 19-20. The Bear Statute permits the use of bait to remove problem bears by "employees or agents of county, state, or federal agencies while acting in their official capacities for the purpose of protecting . . . private property." RCW 77.15.245(1)(a). CBD argues that the rule's requirement that all hunters must be "authorized by the department to participate in a black bear timber depredation removal effort" fails to satisfy the "employees or agents" requirement of the Bear Statute. OB at 17-18; *compare* RCW 77.15.245(1)(a), *with* WAC 220-440-210(3)(a).

CBD reaches this conclusion by arguing that the term "agent" in the Bear Statute should be given a technical legal definition, and a mere "authorization" by WDFW is insufficient to give rise to an agency relationship. OB at 18. Applying a technical legal definition to the term

“agent” in the Bear Statute is legal error. The Bear Statute was enacted by voter initiative. Courts are to interpret voter initiative statutes “according to the general rules of statutory construction.” *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 97, 758 P.2d 480, 483 (1988). Any “[j]udicial interpretation should focus on ‘the voters’ intent and the language of the initiative as the average informed lay voter would read it.” *Id.* (quoting *Estate of Turner v. Dep’t of Rev.*, 106 Wn.2d 649, 654, 724 P.2d 1013, 1015 (1986)). Courts “should not read into an initiative ‘technical and debatable legal distinctions’ not apparent to the average informed lay voter.” *Id.* (quoting *In re Estate of Hitchman*, 100 Wn.2d 464, 469, 670 P.2d 655, 658 (1983)).

The voters’ intent was that depredation hunters needed to be expressly authorized by an appropriate governmental body to use bait to remove a problem bear. CBD ignores this intent and presents a voter initiative interpretation methodology that is directly opposite of that laid out by the Washington Supreme Court. CBD’s argument is that, based upon a facial review of permits, WDFW’s authorized hunters do not satisfy the technical legal definition of an agent under Washington caselaw. OB at 18-19. Unlike CBD, no lay voter would engage in a technical caselaw analysis of agency law in interpreting the clause “employees or agents of county, state, or federal agencies,” or in determining whether the WDFW-vetted and authorized hunters were “agents” within the meaning of the Bear Statute. Instead, a lay voter would understand this language to mean that a person could hunt with bait only if

they had been specifically authorized by an appropriate governmental body to use bait to remove a problem bear. That is what WAC 220-440-210(3)(a) in turn requires by mandating that property owners retain hunters who have been “authorized by the department” to participate in depredation hunts. By mandating the use of pre-approved WDFW-authorized hunters, the rule is consistent with the statute because it does in fact require an authorized “agent” to conduct the hunt.

CBD’s assertion that various legal disclaimers found on the permits make the authorized hunters non-agents is misguided. OB at 19. Certainly, for legal liability purposes WDFW has an interest in not forming a technical legal agency relationship with all of its authorized depredation hunters. But as discussed above, the absence of a technical legal relationship is of no consequence because applying the technical legal definition of “agent” to the Bear Statute would be improper given its voter initiative origins. *See City of Spokane*, 111 Wn.2d at 97.

Issue 2) WAC 220-440-210 did not amend or change the Bear Statute to improperly permit the use of hounds to hunt black bears.

Issue 2 is similar to Issue 1 but involves the method of using hounds instead of bait. Thus, to prevail on Issue 2, CBD must again prove that the rule “amends or changes” the statute. *Swinomish*, 178 Wn.2d at 580. If the rule is “reasonably consistent” with the statute, then the rule must be upheld. *Id.*

CBD incorrectly asserts that WAC 220-440-210 gives WDFW “unwarranted authority to issue hounding permits to hunters who are not

landowners.” OB at 20. WAC 220-440-210 says nothing about using hounds to track or target problem bears. The rule is entirely silent on the issue and does not expressly authorize WDFW to permit any category of persons to use hound hunting as a bear removal method. The rule does not change or amend the Bear Statute’s hound hunting requirements, and WDFW is surely capable of issuing permits according to the rule without violating the terms of the statute. CBD fails to cite any authority suggesting that a rule must recite every relevant statutory provision. Again, as above, no fatal inconsistency exists. *Compare* WAC 220-440-210, *with* RCW 77.15.245.

As with baiting, CBD argues (again based on non-record evidence) that the hunters authorized by WDFW to remove problem bears using hounds are not “employees or agents” within the meaning of the Bear Statute. *See* RCW 77.15.245(2)(a) (different provision but same language that applies to baiting). For the reasons detailed above, CBD’s agency argument is incorrect because it attempts to apply a technical legal definition to the term “agent” which is improper when interpreting a voter initiative enacted statute. *City of Spokane*, 111 Wn.2d at 97.

CBD’s arguments related to using hounds are compounded by an additional error. When it comes to the use of hounds, the Bear Statute contains the following additional exception to the recreational ban: “A dog or dogs may be used by the owner or tenant of real property consistent with a permit issued and conditioned by the director.” RCW 77.15.245(2)(a). CBD’s argument is that while the depredation permits are

being issued to landowners, those landowners are improperly relying on “non-landowners” to perform the hunt. OB at 21-22. CBD argues that RCW 77.15.245(2)(a) strictly requires the landowner to be the actual person handling the hounds, tracking the bear, and shooting the bear.

CBD’s argument borders on absurdity because exceptionally few landowners have either 1) a pack of highly trained hounds, or 2) the ability to hunt bears with hounds. The lay voters that approved the statute surely did not intend to require that property owners personally hunt down problem bears. To interpret the statute to require the hound hunter to be the actual landowner would improperly render the exception meaningless. *State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740, 744 (2015) (the Court “must interpret statutes to avoid absurd results”); *see also Davis v. State ex rel. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554, 556 (1999) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”). By asserting the above interpretations, CBD asks this court to render RCW 77.15.245(2)(a) meaningless because essentially no landowners would be able to actually employ the use of hounds to protect their property from bears.

That the statute does not require the actual landowner to perform the permitted depredation hunt is confirmed by reference to the relevant voters’ pamphlet. The voters’ pamphlet made clear that the initiative was intended to both 1) prevent recreational hunters from using hounds, and 2) continue to allow property owners to avail themselves of this highly

effective bear removal method when their property was being damaged by bears.⁷ *See* CP3671. While CBD’s interpretation stays true to the recreational ban, it makes it nearly impossible for Washingtonians to protect their private property from bears. In other words, CBD endorses the parts of the initiative it likes and attempts to eliminate the portions it dislikes as a matter of policy.

Before the superior court, CBD objected to Intervenors’ offering of the voters’ pamphlet as legislative history. CP3680. CBD argued that legislative history would be appropriate only if the statute was ambiguous. CBD argued that the term “be used by” in RCW 77.15.245(2)(a) is unambiguous and requires that the actual hound hunter to be the actual landowner. If RCW 77.15.245(2)(a) unambiguously meant what CBD asserts it to mean, the statute would have expressly required the landowner “to be the hunter” or to “perform the hunt.” Directly contrary to CBD’s argument, by allowing hounds to “be used by” a landowner, the voters unambiguously made clear that the landowner did not have to be the hunter or do the hunting but instead simply required the landowner to be the end-of-the-line user of the service. When a landowner is permitted to conduct an activity — be it drilling a well, harvesting timber, or building a

⁷ While this case arises in the timber damage context, it must be noted that CBD’s interpretations would apply equally to all manner of property owners. As the administrative record shows, bear conflicts commonly arise in numerous circumstances. AR4087 (noting that bears getting into garbage is the most common problem, with conflicts related to orchards, timber, apiary (beekeeping), and livestock also being common).

house — it is essentially unheard of to require the landowner to physically, individually perform the permitted activity. Intervenor believe the statute unambiguously does not require the landowner to be the boots-on-the-ground hunter, but recognizes the superior court found the Bear Statute to be ambiguous before deferring to the interpretation proffered by both Intervenor and WDFW that the actual hunter did not have to be the actual landowner.

Issue 3) WAC 220-440-210 did not amend or change the Bear Statute to improperly permit the hunting of black bears near supplemental feeders.

Issue 3 is a request for this Court to take exceptional fact-finding and policy-analysis steps to invalidate WAC 220-440-210. Specifically, CBD asks the court to review its supplemental policy critique packet of documents and hold that WDFW has a bad policy related to supplemental feeder usage. OB at 24-27. CBD’s invitations are far beyond the review parameters of the APA. As plead, Issue 3 relates to whether WDFW exceeded its statutory authority in promulgating WAC 220-440-210; as such, CBD must prove that the rule “amends or changes” the statute. *Swinomish*, 178 Wn.2d at 580. If the rule is “reasonably consistent” with the statute, then the rule is to be upheld. *Id.*

Despite needing to prove that the rule amended or changed the statute, CBD acknowledges that based on the rule, statute, and administrative record, it cannot meet that burden. OB at 24. In light of this admission, CBD argues that the court should undertake a post-rulemaking

fact-finding mission to determine if WDFW’s “program” has violated the “intent and purpose” of the Bear Statute. *Id.* at 24-27. As recognized by the superior court in denying CBD’s invitation to engage in such a broad supplemental fact-finding mission, APA appeals are to be based on the administrative record, with the use of supplemental evidence permissible only in highly limited circumstances. RCW 34.05.558; *Motley-Motley, Inc.*, 127 Wn. App. at 76. CBD’s arguments go far beyond the proper parameters of the APA.

CBD’s argument also ignores the language of the Bear Statute. The Bear Statute does not treat supplemental feeders as bait and specifically reads: “Nothing in this subsection shall be construed to prevent the establishment and operation of feeding stations for black bear in order to prevent damage to commercial timberland.” RCW 77.15.245(1)(b). There is nothing in the statute that suggests if a supplemental feeding program fails to dissuade bears, a landowner cannot then apply for a depredation permit to protect their timber investments. In such an instance a removed feeder certainly is not functioning as bait.

Finally, the supplemental evidence being offered to suggest the improper use of feeders to bait bears for recreational hunting purposes is not reflective of facts on the ground.⁸ To support this litigation, CBD

⁸ Because this is an APA case, Intervenors have not presented a competing policy critique demonstrating the need for the depredation program. CBD may suggest its “evidence” has not been rebutted, but such a suggestion is incorrect because Intervenors’ submission of competing evidence would transform this APA case into a full-fledged litigated policy determination,

cherry-picked from public records requests and collected information from like-minded organizations. That information was packaged into a policy critique that was submitted to the superior court under the guise of supplemental evidence. CBD's citations to its policy critique are factually misleading; for example, CBD suggests throughout its brief that the critique proves that timber companies are intentionally operating an illegal recreational hunting program. *See e.g.* OB at 28-30. Timber companies have no interest in recreationally hunting bears, and they spend significant resources to avoid having to remove bears. Suggesting that WDFW and timber companies are somehow working together to create an exclusive bait hunting season is not supported by the administrative record and is simply absurd. AR4385 (small forest landowner rulemaking comment stating "[w]e ask for permits because we have real problems, not because we like killing bears or like all the costs/hassle that goes along with this process").

Issue 4) WAC 220-440-210 did not amend or change the Bear Statute to improperly permit the indiscriminate killing of black bears on commercial timberlands.

Issue 4, just like Issue 3, is a request for this Court to take exceptional fact-finding and policy-analysis steps to invalidate WAC 220-440-210 as a matter of policy. Again, as plead, Issue 4 asserts that WDFW

which is improper. Nevertheless, it is important for Intervenors to highlight that CBD's version of the post-rulemaking facts is incorrect.

exceeded its statutory authority, and as such CBD must prove that the rule “amends or changes” the statute. *Swinomish*, 178 Wn.2d at 580. If the rule is “reasonably consistent” with the statute, then the rule is to be upheld. *Id.*

CBD’s argument begins by asserting that the rule does not properly limit depredation permits to instances of actual property damage. OB at 28. This is simply incorrect. The rule expressly requires that timber damage be both 1) confirmed to have occurred in an area before issuance of a permit, and 2) later be verified by WDFW. WAC 220-440-210(2)(b)-(c). The rule unquestionably requires that permits only be issued to address confirmed instances of bear damage.

After incorrectly asserting that WAC 220-440-210 does not require damage to be confirmed, CBD’s arguments devolve into alleging a conspiracy in which “timber companies and their hunters routinely abuse [the rule] to plot overlapping permit zones to create large ‘hunting grounds’ in which hunters can recreationally run dogs after bears.” OB at 28. CBD bases its assertion that a clandestine recreational hunting season exists on “expert” opinion testimony it generated to support this litigation. OB at 29 (citing the Clauser Declaration that was never admitted as supplemental evidence). Certainly, WDFW cannot operate a recreational hunting season that allows the use of bait and hounds, but there simply is no such clandestine season. Timber owners rely on these depredation permits to protect their investments and it is absurd to suggest that these permits are being used for anything else. *See e.g.* AR4385, 4587-4595, 4367, 4370, 4399, 4762, 5018-19.

Additionally, much of what CBD points the court to in its policy critique are quotations taken out of context. Simply put, CBD has engaged in significant improper discovery and then cherry-picked information and quotes to support its case. The APA does not allow this. *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn. App. 444, 458, 204 P.3d 928, 934 (2009) (APA review is limited and courts do not have the capacity “to receive and evaluate” expert materials collected and presented by a litigant). If the Court allows petitioners to abuse the APA process by submitting policy critiques in the manner done by CBD, intervenors and defendant agencies will be forced to construct their own competing policy critiques every time a rulemaking challenge is brought. The APA was designed specifically to ensure that courts did not sit in a position of having to weigh the value of multiple competing policy critiques. *Washington Indep. Tel. Ass’n*, 148 Wn.2d at 904 (holding that if “there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous”). The Court should reject CBD’s effort to radically expand the parameters of an APA rulemaking review.

Issue 5) WAC 220-417-040 did not amend or change the Trapping Statute to give WDFW authority to issue trapping permits without making a requisite finding in writing.

Issue 5 shifts focus to WAC 220-417-040 and the Trapping Statute. To succeed on Issue 5, CBD must prove that the rule “amends or

changes” the Trapping Statute. *Swinomish*, 178 Wn.2d at 580. If the rule is “reasonably consistent” with the statute, then the rule is valid. *Id.*

Reviewing the rule and statute side-by-side reveals that WDFW can follow both the rule and the statute without any conflict. *Compare* RCW 77.15.194, *with* WAC 220-417-040. In an effort to create conflict, CBD incorrectly asserts that WAC 220-417-040 authorizes WDFW to issue a trapping permit without making the “finding in writing” that is required by the statute. *See* OB at 21-24. The Trapping Statute authorizes WDFW to issue a trapping permit “[u]pon making a finding in writing that the animal problem has not been and cannot be reasonably abated by nonlethal control tools or if the tools cannot be reasonably applied” RCW 77.15.194(4)(b). The challenged rule does not excuse this required finding and WDFW faces no conflict in complying with both the rule and statute.

CBD’s argument focuses primarily on the provision of the rule related to permit denials, as opposed to permit approvals. Specifically, CBD argues that the use of the word “may” in the rule’s permit denial provision gives WDFW discretion to grant baiting permits even if other appropriate nonlethal methods exist—in violation of the Trapping Statute. OB at 22 (citing WAC 220-417-040(14)) (hereinafter “Section 14”). Section 14 does not give WDFW the discretion to set aside the Trapping Statute’s requirements, nor is Section 14 designed to give WDFW additional discretion in deciding when to affirmatively issue a permit. Instead, Section 14 merely identifies a universe of reasons that might be

given to support a permit *denial*—including that “[o]ther appropriate nonlethal methods to abate damage have not been utilized.” Indeed, if CBD’s argument—which focuses on Section 14(a) and (b)—is correct, then Section 14(d) would give WDFW discretion to ignore every “federal or state law, local ordinance or department rule” in issuing bear permits. To argue that the word “may” in Section 14 gives WDFW discretion as to each subheading is unreasonable, because it would result in WDFW being entirely untethered from any law whatsoever.

Perhaps recognizing that Section 14 does not amend or change the Trapping Statute, CBD’s argument against WAC 220-417-040 quickly changes nature and becomes an as-applied challenge to specific permits. OB 22-24. As noted above, CBD challenged 85 individual permits as part of this lawsuit. Administrative records were compiled for those permitting decisions in parallel to the administrative record constructed for the rulemaking claims. All of CBD’s as-applied permit challenges were dismissed. CBD chose not to appeal those dismissals.

CBD attempts to revive its as-applied challenges by asking the court to review the legality of several permits. OB at 22 (seeking review of permits at AR376-78, 510-12, 1724-26, 2433-45, 3119-21, 2162-64).⁹

⁹ As discussed *supra* at 9, the administrative record for the as-applied permit appeals was identified as AR0015 to 4081. The rulemaking record relevant to this appeal is identified as AR4082 to 5024. Reliance on the administrative record created as part of a separate, dismissed, and non-appealed agency action challenge would be improper.

CBD does not, however, even carry the burden of showing that these permits were improperly issued. CBD simply cites to the final permits but does not undertake the task of looking at the permit applications or the records regarding WDFW's consideration of those permits. CBD is, essentially, asking this Court to look at the final permits and assume without evidence that the process leading to those permits was invalid. A fishing trip into WDFW's post-rulemaking permitting decisions is improper.

C. CBD's Arguments that the Adoption of the 2016 Rules was Arbitrary and Capricious are Without Merit — Issues 6 and 7.
Issue 6) WDFW's adoption of WAC 220-440-210 was not arbitrary and capricious for failing to consider relevant information.

To succeed on this issue CBD must prove that the adoption of WAC 220-440-210¹⁰ was “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Washington Indep. Tel. Ass'n*, 148 Wn.2d at 906. The APA establishes a “very narrow” scope of review “and the party seeking to demonstrate that the action is arbitrary and capricious must carry a heavy burden.” *Neravetla*, 198 Wn. App. at 668 (quoting *Pierce County Sheriff*, 98 Wn.2d at 695).

¹⁰ In its Issue 6 CBD does not identify which rule or rules it is actually challenging; by identification of Assignment 3, it appears that CBD is only challenging WAC 220-440-210.

CBD does not argue that the 2016 Rules are arbitrary and capricious based on the administrative record considered by WDFW. Instead, CBD argues that WDFW should have undertaken a much broader fact-finding mission before promulgating the rules. In particular, CBD argues that WDFW should have constructed and considered the policy critique that CBD now presents to the Court under the guise of “supplemental evidence.” *See* OB at 30-33.

CBD’s argument that WDFW should have considered additional information ignores key elements of the administrative record. For example, WDFW solicited comments and information from all concerned stakeholders as part of the rulemaking process. AR4200. CBD accepted this invitation and provided comments related to the proposed rules. AR4325-36. Those comments were considered and responded to by WDFW as part of the rulemaking. AR4303-25. The APA does not require an agency to undertake an independent in-depth investigation into a particular group’s position, particularly when that group has provided comments on a proposed action.

CBD also ignores the depth of information that is in the administrative record. For example, CBD argues that WDFW did not investigate the problem (OB at 31), but the record shows that WDFW considered information from numerous private property owners who were experiencing substantial property damage as a result of black bears. *See, e.g.*, AR4587-4595, 4367, 4370, 4399, 4415, 4761, 4805, 4807, 5018-19. Some small landowners reported bears damaging up to 65% of the trees in

their family plantations. AR4368. Other tree farmers reported the failure of costly non-lethal methods to protect their investments. AR4387, 4587-4595. Not only did WDFW understand the problem, it also understood the need to have a lethal removal option. *Id.*

Far from failing to investigate the issue, WDFW took comments from all relevant stakeholders, considered them in light of its agency expertise, and provided a Concise Explanatory Statement to explain the need and rationale for its decision. AR4199-4217. That statement identified the need for the rules, discussed the findings from the stakeholder commenting process, and provided a reasonable rationale for the final decision. *Id.*

CBD strains to argue that WDFW considered no science or the agency's strategic priorities in promulgating the 2016 Rules. OB at 33. This is simply incorrect. The administrative record includes a "Black Bear Status and Trend Report" and a "Wildlife Conflict Status and Trend Report." AR04085-92. These reports provided information about the state's black bear population, the existence of conflicts, and the need for a wide range of tools to address conflicts. These reports were written based on various scientific studies that are cited in the reports and included by reference WDFW's game management plans. AR4087, 4091-92. From a scientific and game management perspective, this information confirmed that the species was not at any risk due to depredation hunting, and that human-bear conflicts existed that needed to be addressed by the agency.

The above reports also confirmed that there were hundreds of confirmed black bear complaints each year in Washington (890 in 2010, 444 in 2014, 512 on a yearly average), largely related to human garbage. AR4087-88. The reports also show that the bear population can sustain heavy recreational hunting (166,089 hunter days in 2014, data going back to 1996) and significant harvest (1,471 bears in 2014, data going back to 1996). AR4086. By comparison, there were only 100 depredation permits issued in 2015. AR4091. These reports also showed recreational hunting methods to be highly inefficient at targeting bears (120 days per kill in 2014; 435 days per kill in 1999). *See also* AR4583 (WDFW-authorized master boot-hunter acknowledging it takes him 30 days to remove a problem bear without banned tactics). WDFW also conducted a State Environmental Policy Act (“SEPA”) analysis to ensure no adverse environmental impacts. AR4231-46, 4299 (email explaining SEPA analysis timeline). It is clear from the record that WDFW understood the problem, the population trends, the science, the potential solutions, and the need for a lethal removal option.

Finally, undertaking the level of extremely in-depth investigation demanded by CBD would have not been warranted given that the 2016 Rules were never intended to provide guidance as to how every human-bear conflict was to be handled. The 2016 Rules were intended to shift wildlife-conflict responsibilities from the Law Enforcement division to the Wildlife Services division. AR4303-25. Understanding the context of the rulemaking is critical in determining whether the level of analysis

undertaken by the agency was willful and unreasoning. Here, WDFW never intended to enact policies aimed at lowering the number of bear conflicts across the state or to mandate how each conflict was to be addressed, nor do the statutes require such a detailed level of management. Instead, WDFW was simply enacting a procedural mechanism to allow the issuance of a permit if it was determined depredation hunting was the best management approach based on facts on the ground.

The rule was not a conclusory action taken without regard to the surrounding facts and circumstances as alleged, and CBD has not carried its heavy burden of proving the rulemaking decisions were willful and unreasoning. *See Washington Indep. Tel. Ass'n*, 148 Wn.2d at 906.

Issue 7) WDFW's promulgation of WAC 220-440-210 was not arbitrary and capricious for willfully disregarding the opinions of its internal subject matter experts.

To succeed on this claim, CBD must prove that adoption of WAC 220-440-210¹¹ was “willful and unreasoning and taken without regard to the attending facts or circumstances.” *Washington Indep. Tel. Ass'n*, 148 Wn.2d at 906.

CBD argues that WDFW knew that depredation hunting was not “scientifically supportable or economically justified,” and that the agency “willfully disregarded” this information. OB 34. CBD makes this

¹¹ In its Issue 7, CBD does not identify which rule or rules it is actually challenging. By identification of Assignment 3, it appears that CBD is only challenging WAC 220-440-210.

argument by citing to its policy critique, not the administrative record. *See* OB at 34-37. In making an argument based entirely on its policy critique, CBD seeks to radically expand the “very narrow” avenue for challenging agency actions that is created by the APA and it fails to meet its heavy burden. *Neravetla*, 198 Wn. App. at 668 (quoting *Pierce County Sheriff*, 98 Wn.2d at 695.)

Even if this Court permits CBD to argue this issue (which would be erroneous), CBD cannot demonstrate that WDFW acted arbitrarily or capriciously. Most notably, CBD’s policy critique does not show that WDFW ignored the opinions of its staff members. As discussed above, the administrative record shows that WDFW considered population trends, conflict trends, depredation needs, science, and agency objectives in promulgating the rules. *Supra* at 30-32. Its decision not to include every agency email on the topic in the administrative record does not show that WDFW did not consider the opinions of its staff in analyzing this information. There is nothing in the record to support CBD’s claim.

Additionally, WDFW’s staff expertise was taken into consideration in responding to CBD’s comments, and the comments of numerous other stakeholders. *See* AR4325-4336 (CBD’s comments), AR4303-25 (WDFW’s response to CBD’s comments). While CBD has presented the Court with a policy critique, it has failed to prove that WDFW “willfully disregarded” the opinions of its staff.

D. CBD’s Challenges Against the 2018 Guidance were Properly Dismissed — Issues A and 8.

In addition to challenging the 2016 Rules, CBD asserts that various “Unpublished Rules” are actually “rules” within the meaning of the APA and are therefore invalid for having not gone through the formal rulemaking process. OB at 37. CBD calls these documents “Unpublished Rules.” This term is incorrect as the superior court properly found them to be guidance documents—merely administrative forms—and not rules. The superior court disposed of this claim on standing grounds: “The Court finds that Petitioner lacks standing to raise the claim that the protocols, forms and documents used in 2018 (the “2018 Guidance”), were actually agency rules that did not go through the rule-making process.” CP3753. After dismissing this claim for lack of standing, the superior court, in the alternative, ruled that the 2018 Guidance were not rules. *Id.*

Given the threshold standing issue, the Court must address Intervenors’ Issue A—whether CBD has standing—before reaching Issue 8.

Issue A) CBD has waived its appeal of the lower court’s standing decision.

The superior court’s opinion was clear: CBD lacks standing to challenge the guidance documents. CP3753. The opinion went on to hold that “*Even if Petitioner had standing*, the Court finds that the agency was not required to go through the rule-making process on the 2018 Guidance.” *Id.* (emphasis added). CBD’s opening brief is entirely silent on

the threshold standing issue. It assigns no error to the standing decision, makes no arguments related to standing, and cites no authority related to standing. The word “standing” does not appear in the brief.

Washington law is clear: “[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), and fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.” *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629, 632 (1995). Stated differently, if “an appellant’s brief does not include argument or authority to support its assignment of error, the assignment of error is waived.” *Riley v. Iron Gate Self Storage*, 198 Wn. App. 692, 713, 395 P.3d 1059, 1071 (2017). The basic principle that appeals courts do not “consider arguments that a party fails to brief” has been reinforced by the Washington Supreme Court as recently as 2018. *Sprague v. Spokane Valley Fire Dep’t*, 189 Wn. 2d 858, 876, 409 P.3d 160, 172 (2018).

CBD has not assigned error to the standing decision. OB at 2-3. CBD does not make any arguments related to standing or cite any authority on the issue. The Court should dismiss CBD’s claims against the 2018 Guidance for lack of standing, which was the superior court’s dispositive reason for dismissing the claim.

Issue 8) The 2018 Guidance documents are not rules under the APA.

Recognizing that the guidance documents have no impact on the validity of the 2016 Rules, Intervenor deferred to WDFW on the 2018

Guidance issue before the superior court, and largely defer to WDFW on this claim again here. *See* CP3659-60. As recognized by the superior court, the ten pages that CBD identifies as “Unpublished Rules” (AR0001-10) are simply forms that are required to administer a hunt. CP3753. Those forms do not operate as rules, and they certainly do not establish, alter, or revoke any benefits or privileges conferred by law. *See* RCW 34.05.010(16). If such basic forms were considered rules within the meaning of the APA then almost all agency paperwork would be required to go through the formal rulemaking process, creating an administrative nightmare for all state agencies.

V. MOTION TO SUPPLEMENT ARGUMENTS

CBD also appeals the superior court’s Order Denying Petitioner’s Motion to Supplement Agency Record.¹² *See* CP3746-49. While CBD initially sought admission of 135 documents before the superior court, it now limits its appeal to a sub-set of 28 documents. *Compare* OB at 41, *with* CP903. The 28 documents presented by CBD are not part of the administrative record and were never considered by WDFW during the rulemaking. *Aviation W. Corp.*, 138 Wn.2d at 418 (“[T]he record is merely a compilation of the material considered by the agency in the rulemaking.

¹² CBD filed a standalone motion with the Court of Appeals seeking to bypass this appeal. Intervenor’s responded to that motion, and this Court deferred ruling on that motion until it heard the merits of this appeal. Intervenor’s incorporate the arguments from that response into this response, and vice versa.

It can be likened to a big cardboard box into which copies of things considered are thrown”). WDFW filed a certified administrative record in accordance with RCW 34.05.566(1), and CBD agreed that the identified administrative record was complete. *See* CP527-602, CP771.

A court may consider evidence outside of the administrative record “only under highly limited circumstances.” *Motley-Motley, Inc.*, 127 Wn. App. at 76. Those circumstances are outlined in RCW 34.05.562(1). In ruling on the motion to supplement, the superior court considered the requirements of RCW 34.05.562, reviewed the proposed supplemental documents, and held that the documents were not necessary to resolve disputed issues. CP3747-48; *see also* CP3699-706. The court also ruled that the motion to supplement was untimely. *Id.*

A. Standard Applicable to This Court’s Review of the Order Denying the Motion to Supplement.

Washington law requires the Court to apply the “manifest abuse of discretion” standard in reviewing the superior court’s denial of CBD’s motion to supplement. *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 65, 202 P.3d 334, 350 (2009); *Okamoto*, 107 Wn. App. at 495; *Lund v. State Dep’t of Ecology*, 93 Wn. App. 329, 334, 969 P.2d 1072, 1075 (1998); *Washington Indep. Tel. Ass’n v. Washington Utilities & Transp. Comm’n*, 110 Wn. App. 498, 518, 41 P.3d 1212, 1222 (2002), *aff’d*, 149 Wn.2d 17, 65 P.3d 319 (2003). The abuse of discretion standard is also applied when reviewing the granting of a motion to supplement. *Motley-Motley, Inc.*, 127 Wn. App. at 77.

“A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Okamoto*, 107 Wn. App. at 49 (citing *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692, 698 (1984)).

B. Standard Applicable to the Trial Court’s Consideration of a Motion to Supplement Under RCW 34.05.562(1).

In addition to the manifest abuse of discretion standard that applies to this Court’s review of the trial court’s finding, RCW 34.05.562 independently sets a very high standard for supplementing the record. *Motley-Motley, Inc.*, 127 Wn. App. at 77. APA challenges are limited to consideration of the relevant administrative record, and supplemental evidence is allowed “only under highly limited circumstances.” *Id.* at 76. *See also Yow v. Dep’t of Health Unlicensed Practice Program*, 147 Wn. App. 807, 828, 199 P.3d 417, 429 (2008) (stating that supplementation under RCW 34.05.562 is permissible “only in very limited circumstances”). Such circumstances arise only when additional information is “needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.”

RCW 34.05.562(1).

Issue 9: Review of the Documents Presented by CBD Shows that They Do Not Satisfy the Requirements of RCW 34.05.562(1)(c).

CBD argues supplementation was appropriate (and is appropriate) under RCW 34.05.562(1)(c) because the documents are necessary to resolve disputed issues related to “material facts.” OB at 45-46. A review of the 28 documents offered by CBD demonstrates they do not satisfy the requirements of RCW 34.05.562(1), and that the superior court did not err in denying the motion to supplement. Each of the documents proffered by CBD is discussed below.

Document 1 is a December 1995 news bulletin published by the “Progressive Animal Welfare Society.” It is a policy advocacy document published by an organization that is morally opposed to the hunting of bears. This document was not provided to WDFW during the rulemaking process. It also does not establish any material fact necessary to this Court’s consideration of whether the 2016 Rules are valid.

Document 2 is a two-page 2017 WDFW guidance document related to the administration of the depredation hunts. It post-dates the challenged rulemaking, and thus could not have been considered by WDFW during the rulemaking. Supplementing the record with documents generated after an agency has acted is improper. RCW 34.05.562(1) (supplemental evidence is admissible “only if it relates to the validity of the agency action at the time it was taken”); *see also Washington Indep. Tel. Ass’n*, 148 Wn.2d at 906 (finding “materials may be presented on

review only insofar as relevant to explain the agency’s decision at the time it was made”).

Document 3 is WDFW’s “Game Management Plan, July 2015 – June 2021.” The relevant information from this document is in the administrative record. *Compare* CP1416-21, *with* AR4082-92. The data in the administrative record has been updated with additional years and is thus more accurate. Furthermore, the Game Management Plan is identified as the source of the information in the corresponding administrative record materials. *See* AR4092. Because this information is largely in the record, it is not necessary to resolve disputed issues.

Document 4 is an undated PowerPoint presentation related to spring bear hunting. As a PowerPoint it contains very little useable information. It largely confirms that bear peeling is a problem. CBD uses information on a single slide related to a public opinion poll to suggest that the public does not approve of bear hunting. OB at 36 (*citing* CP2395). It is unclear where this poll came from, when it was taken, or whether it is accurate. The question of whether the public approves or disapproves of bear hunting is not relevant to this case, and thus is not a disputed fact that needs resolution.

Document 5 contains two short letters from WDFW responding to concerns raised by the Humane Society. These communications post-date the rulemaking, and therefore are irrelevant to the decision that was made. RCW 34.05.562(1) (supplemental evidence is admissible “only if it relates to the validity of the agency action at the time it was taken”). Neither letter

assists in the resolution of any factual issues that are relevant to the 2016 rulemaking.

Documents 6-10, 17-18, 21, and 28 are emails that are unrelated to the rulemaking process. The emails both pre-date and post-date the rulemaking. Under RCW 34.05.370(3), internal agency documents are generally not included in the administrative record. CBD cites to these emails to support assertions such as “the Program implicated other ethical issues about which WDFW refused to be transparent.” OB at 35 (citing CP1765). These emails do not establish what WDFW did or did not consider during rulemaking, nor do they establish any disputed facts or demonstrate arbitrary decision-making.

Documents 11-16 are meeting minutes from a stakeholder-WDFW committee that worked to address the logistics of dealing with bear conflicts. *See* CP2041. This committee was not tasked with development of the 2016 Rules or making the law. As the rulemaking file makes clear, this committee was given the separate task of addressing logistical on-the-ground issues. AR4361. The committee considered basic questions such as changing the permit seals to the color pink. CP2050. It also assisted in communicating to stakeholders the basic requirements of the depredation program, such as ensuring all hunters had hunting licenses and general bear tags in addition to a depredation permit. CP2049. To argue the committee was involved in the rulemaking or had any bearing on the rulemaking is incorrect—it was simply a body to assist in the administration of the hunting seasons. Additionally, the committee’s

logistical recommendations were not completed at the time of the 2015 rulemaking decision and therefore do not meet the requirements of RCW 34.05.562(1). *See Low Income Hous. Inst. v. City of Lakewood*, 119 Wn. App. 110, 121, 77 P.3d 653, 658 (2003) (upholding denial of motion to supplement because the agency analysis sought to be admitted was not completed at the time the decision was made).

Document 19 is a public opinion poll related to bear and wolf management. Public opinion related to bear management is not a disputed fact that needs resolution in this case.

Document 20 is a compilation of tables showing black bear harvest and hunting levels in Washington from 2007-2016. This data was summarized in reports that are in the administrative record. *See* AR4082-92. The administrative record contains data showing that there was a robust recreational hunting season, that depredation hunting was declining, that conflicts requiring the killing of bears existed, and that the depredation program had inconsequential impacts on the bear population. AR4082-92. This information is largely in the record, and there is no need for this Court to consider this data to resolve a disputed issue of fact.

Documents 22-27 are scientific articles that CBD presents to support its belief that the depredation program is bad policy. It includes articles such as *Sociological and Ethical Considerations of Black Bear Hunting*. None of this information was considered by WDFW in promulgating the 2016 Rules, and CBD did not provide it to WDFW

during rulemaking. These studies do not resolve any disputed issues of fact before the court, but instead simply present CBD's policy preferences.

Based on the above it is apparent that none of the documents presented by CBD satisfy the requirements of RCW 34.05.562(1).

Issue 10: The Trial Court had Discretion to Consider the Untimeliness of CBD's Motion to Supplement.

CBD argues that the superior court abused its discretion "by failing to give genuine consideration to the merits" of the motion to supplement. OB at 47. This assertion is simply incorrect. The superior court's order specifically reads:

"The Court has reviewed the briefing, including the citations to the agency record and the citations to the proposed supplemental record, and the case law and statutory authority cited in the parties' briefs. The Court may supplement an agency record when it finds that the agency record is inadequate for certain statutory reasons, and the burden is on the party requesting supplementation to show that one of the statutory criteria has been met. Based upon the briefing of the parties, and specifically relying on each and every one of Washington Department of Fish and Wildlife's arguments, the Court denies the motion to supplement."

CP3746. The order is clear that the court gave "genuine consideration to the merits."

CBD is correct that the superior court voiced frustration with how CBD prosecuted its case and cited the untimeliness of CBD's motion to

supplement as one reason for denial of the motion. CP3747. Specifically, the court found it improper for CBD to brief the case based on its policy critique, but not actually seek to admit that critique until the morning of the merits hearing. The court found that CBD should have (and certainly could have) resolved its evidentiary issues well in advance of the merits hearing. CP3748. Intervenors provided a detailed timeline to illustrate this point in their Response to CBD's standalone Motion to Supplement.

By moving to supplement in an untimely fashion, CBD tied the hands of WDFW, Intervenors, and the court by forcing them to respond and consider a brief that was based almost entirely on unadmitted materials. Operating in such a fashion is clearly improper in an APA proceeding, and superior courts have inherent equitable powers to manage their own proceedings to ensure efficiency and fairness. *State v. Gassman*, 175 Wn.2d 208, 211, 283 P.3d 1113, 1114 (2012). By issuing the alternative ruling on timeliness that it did, the superior court exercised this inherent power to ensure future litigants do not attempt the same gamesmanship.

Regardless, the court did evaluate the merits of the motion, and squarely ruled on the merits of the motion.

VI. CONCLUSION

Because WDFW adopted the 2016 Rules only after giving due consideration to the relevant facts and circumstances, and because neither of the rules exceed WDFW's statutory authority, the Court should find the challenged rules to be valid. Additionally, the Court should uphold the

superior court's Motion to Supplement decision and deny admission of CBD's policy critique as supplemental evidence. Finally, the Court should uphold the superior court's standing decision related to the 2018 Guidance.

RESPECTFULLY SUBMITTED this 7th day of February, 2020.

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DECLARATION OF SERVICE

I declare that I caused the foregoing to be served to each of the following via email and electronic notification via the electronic court filing system:

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I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct to the best of my knowledge.

DATED 7th day of February, 2020, in Seattle, Washington.

s/Eliza Hinkes
Eliza Hinkes, Paralegal

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