IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DELAWARE STATE SPORTSMEN'S ASSOCIATION; BRIDGEVILLE RIFLE & PISTOL CLUB, LTD.; WILLIAM BELL; and CECIL CLEMENTS,	:	C.A. No. K19C-11-001 NEP In and for Kent County
Plaintiffs,	:	
v.	:	
SHAWN M. GARVIN, in his official capacity as Secretary of the Delaware Department of Natural Resources and Environmental Control; and DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	:	
Defendants.	:	

Submitted: September 9, 2020
Decided: November 18, 2020

MEMORANDUM OPINION AND ORDER

Upon Plaintiffs' Motion for Summary Judgment
GRANTED in part and DENIED in part

Upon Defendants' Motion for Summary Judgment
DENIED

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Primos, J.

Before the Court are cross-motions for summary judgment of Plaintiffs Delaware State Sportsmen's Association ("DSSA"), Bridgeville Rifle & Pistol Club, Ltd. ("BRPC"), William Bell ("Bell"), and Cecil Clements ("Clements" and, together with DSSA, BRPC, and Bell collectively, "Plaintiffs"), and of Defendants Shawn M. Garvin ("Garvin") and the State of Delaware Department of Natural Resources and Environmental Control ("DNREC" and, together with Garvin, "Defendants"). For the reasons set forth in this opinion, Plaintiffs' motion is ***GRANTED* in part and *DENIED* in part**, and Defendants' motion is ***DENIED***.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties

DSSA is a private organization affiliated with the National Rifle Association of America. BRPC is a private organization based in Bridgeville, Delaware, and a constituent "Club Member" of DSSA. Bell and Clements are Delaware residents and members of DSSA, and Bell is also a member of BRPC. DNREC is an agency of the State of Delaware, and Garvin serves as its Cabinet Secretary.[1]

B. Procedural History

Plaintiffs initiated this action on November 1, 2019, by filing a complaint requesting a declaratory judgment from this Court. The complaint asserts that Defendants have unlawfully restricted deer hunters from using certain firearms otherwise permitted under Delaware law. Specifically, Plaintiffs contend that Defendants, by publishing DNREC's annual hunting and trapping guide, restricted the types of rifles hunters are permitted to use in ways that the applicable statute does not, and thereby violated Article II, Section 1 of the

[1] DNREC was established pursuant to 29 *Del. C.* § 8001 and it derives its authority from, *inter alia*, Title 7, Chapter 60 of the Delaware Code.

Delaware Constitution (the "Constitution"),[2] exceeded their authority under 29 *Del. C.* § 8003(7),[3] and created a *de facto* regulation that should have been subject to the Delaware Administrative Procedures Act (the "APA").[4]

On December 2, 2019, Defendants filed a motion to dismiss contending that Plaintiffs did not have standing.[5] The Court denied that motion. The parties then agreed to submit a joint stipulation of facts and to file cross-motions for judgment on the pleadings or for summary judgment. Subsequently, Plaintiffs filed a motion for summary judgment, and Defendants filed a motion for judgment on the pleadings.

On September 9, 2020, the Court heard oral argument on the parties' motions. At oral argument, the parties agreed that Defendants' motion should be deemed a motion for summary judgment, as it relies upon facts outside the record (*i.e.*, the joint stipulation of facts), and the parties further agreed that because they had not argued that there was an issue of fact material to the disposition of either motion, the motions would be deemed the equivalent of a stipulation for decision on the merits pursuant to Superior Court Civil Rule 56(h).

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[2] Article II, Section I states that "[t]he legislative power of this State [Delaware] shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives."

[3] 29 *Del. C.* § 8003(7) provides that the Secretary of DNREC may not promulgate rules or regulations "inconsistent with the laws of [Delaware]."

[4] The APA "standardize[s] the procedures and methods whereby certain state agencies exercise their statutory powers [including the power to promulgate regulations] and [it] specif[ies] the manner and extent to which their actions may be subject to public comment and judicial review." 29 *Del. C.* § 10101.

[5] Standing refers to a party's right "to invoke the jurisdiction of a court to enforce a claim or redress a grievance. It is concerned only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy." *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994) (quoting *Stuart Kingston, Inc. v. Robinson,* 596 A.2d 1378, 1382 (Del. 1991)).

C. Stipulated Facts

Prior to 2018, 7 *Del. C.* § 704(g) allowed the use of handguns, but not rifles, in hunting.[6] In 2018, 7 *Del. C.* § 704(g) was amended to allow pistol-caliber rifles to be used for deer hunting as well with limitations on the types of sights, ammunition, and the number of cartridges allowed to be used therewith.[7] The amendment also updated requirements for handguns used for deer hunting and clarified that a handgun or rifle could be used during shotgun deer season.[8]

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[6] Prior to 2018, a separate statutory provision did allow the use of muzzle-loading rifles for hunting during the primitive weapon season. 7 *Del. C.* § 704(f).

[7] An Act to Amend Title 7 of the Delaware Code Relating to Conservation, Original Synopsis, (2018).

[8] *Id.* The text of 7 *Del. C.* § 704(g) as amended, with deletions indicated by strike-throughs and additions by underlining, is as follows:

> (g) Except as set forth herein, no person may use a handgun or rifle in the pursuit, taking or attempted taking (hunting) of protected wildlife. A handgun or rifle as described herein may be used for the pursuit, taking and attempted taking (hunting) of deer on privately owned lands situated south of the Chesapeake and Delaware Canal and those lands within the State owned by the State of Delaware so designated for this purpose by the Department of Natural Resources and Environmental Control, and farms permitted by the Department through its deer depredation programs, at its discretion, under the following conditions:
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> (1) The handgun shall be limited to revolvers and single shot pistols with a minimum barrel length of 5.75 inches and not exceeding 12.5 inches and chambered for and using straight-wall handgun ammunition in ~~.357 magnum, .41 caliber, .41 magnum, .44 caliber, 44 magnum, .45 caliber, .454 caliber, .480 caliber or .50 caliber and using open sights, metallic/mechanical, optical or telescopic sights~~ .357 to .38 caliber with a cartridge case length of no less than 1.25 inches and a maximum case length of 1.82 inches, or in .41 caliber to a maximum of .50 caliber and a maximum case length of 1.82 inches;
>
> (2) The handgun must be carried openly on a sling or in a holster and not concealed;
>
> (3) The rifle shall be limited to rifles:
>
> a. Using open, metallic/mechanical, optical, or telescopic sights;
>
> b. Chambered for and using straight-walled ammunition as defined in (g)(1) above; and
>
> c. Loaded with no more than 3 cartridges in the chamber and magazine combined.

The parties agree that DNREC has the ability to "[e]stablish and promulgate such rules and regulations governing the administration and operation of [DNREC] as may be deemed necessary by the Secretary and which are not inconsistent with the laws of [Delaware]."[9] In July 2019, DNREC's Division of Fish & Wildlife made available for distribution its 2019/2020 Delaware Hunting & Trapping Guide (the "Hunting Guide"). The Hunting Guide is a "summary for the convenience of hunters and trappers and is not intended to cover all hunting laws and regulations."[10] Under the heading "Method of Take" in the Deer Hunting Section, the Hunting Guide states that "[r]ifles chambered for straight-wall ammunition legal for deer hunting must be manually operated, consisting of: lever action, bolt action, pump action, single shot, and revolver rifles."[11] The Hunting Guide further provides that "if there is not a commercially produced handgun available that is chambered for ammunition that meets the caliber and cartridge case length criteria[,] than [sic] a rifle chambered for that same ammunition is not permissible for use."[12] The foregoing provisions in the Hunting Guide are at issue in this litigation.

D. The Parties' Contentions

Plaintiffs argue that Defendants, by publishing the foregoing language in the Hunting Guide, (1) violated Article II, Section 1 of the Delaware Constitution, (2) exceeded their

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~~(3)~~(4) To be used as follows:

a. ~~During~~ A handgun or rifle may be used during a separate 7-day season to begin on the first Saturday in January through the second Saturday in January; and

b. ~~In~~ A handgun or rifle may be used in place of a shotgun during the shotgun deer season(s); and

c. When harvesting deer under a Department deer depredation program.

[9] 29 *Del. C.* § 8003(7).
[10] DNREC, *2019/2020 Delaware Hunting & Trapping Guide* 3 (2019).
[11] *Id.* at 19.
[12] *Id.*

authority under 29 *Del. C.* § 8003(7), and (3) created a *de facto* regulation that should have been subject to the APA.

For their part, Defendants contend that Plaintiffs do not have standing. Moreover, Defendants argue that (1) DNREC did not violate the Constitution because it is permitted as an agency to interpret the statutes it administers, (2) DNREC did not exceed its statutory powers because it has broad authority to protect, manage, and conserve Delaware's protected wildlife, including deer, and (3) the language in the Hunting Guide is not a regulation subject to the APA because it was created pursuant to a statutory directive.

II. STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[13] When the parties have filed cross-motions for summary judgment and have not argued that there is any issue of material fact, this Court "shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions."[14] In that instance, the parties concede the absence of any material factual issues and acknowledge that the factual record before the Court is sufficient to support their respective motions.[15]

Here, the parties submitted a joint stipulation of facts and agreed at oral argument to have their motions treated as cross-motions for summary judgment, and the matter is ripe for a decision on the merits based upon the record before this Court.

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[13] Super. Ct. Civ. R. 56(c).
[14] Super. Ct. Civ. R. 56(h).
[15] *Browning-Ferris, Inc. v. Rockford Enters. Inc.*, 642 A.2d 820, 823 (Del. Super. 1993).

III. DISCUSSION

A. Plaintiffs have standing to pursue their claims.

This Court previously addressed the issue of standing in deciding Defendants' motion to dismiss. When reviewing a motion to dismiss, the Court accepts all well-pled factual allegations as true, accepts even vague allegations as well-pled if they give the opposing party notice of the claim, draws all reasonable inferences in favor of the non-moving party, and does not affirm a dismissal unless the plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances.[16] Applying that standard, the Court denied Defendants' motion to dismiss.

Where the Court makes a decision regarding a legal issue, so long as there is no change in fact or law and no manifest injustice would occur, the Court will not revisit the issue.[17] The Court's prior decision becomes the law of the case.[18] The legal underpinning of the Court's decision on Defendants' motion to dismiss (*i.e.*, that the allegations in the complaint established standing if accepted as true) became the law of the case at the time of the Court's decision and—provided that the facts regarding standing have remained constant—cannot now be re-litigated on summary judgment.[19]

Despite this, Defendants now attempt to reargue the legal issue of standing without any change in the facts relating to that issue. When deciding Defendants' motion to dismiss, the Court was not making its final decision as to whether Plaintiffs had standing, but was willing to consider any additional or contrary facts regarding that issue at a later stage of the proceedings. However, Defendants have failed to provide any additional facts to persuade

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[16] *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC*, 27 A.3d 531, 535 (Del. 2011).
[17] *Fanean v. Rite Aid Corp. of Delaware*, 984 A.2d 812, 818 (Del. Super. 2009).
[18] *See Kenton v. Kenton*, 571 A.2d. 778, 784 (Del. 1990) ("The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout the subsequent course of the same litigation.").
[19] *Id.*

the Court to change its decision. Indeed, Defendants conceded at oral argument that no additional facts regarded standing had been included in the joint stipulation of facts or otherwise presented to the Court after its decision on the motion to dismiss. Therefore, the Court confirms Plaintiffs' standing to pursue their claims for the reasons set forth below.[20]

Standing "'is concerned only with the question of who is entitled to mount a legal challenge and not with the merits of the subject matter of the controversy.'"[21] For a party to have standing, (1) there must be a claim of injury in fact, and (2) the interest sought to be protected must be arguably within the zone of interest to be protected or regulated by the legal guarantee in question.[22]

Here, Bell and Clements have standing as individual plaintiffs. Plaintiffs' complaint asserts that Bell and Clements would be injured if they did not seek declaratory relief because they would be prohibited from using firearms that are otherwise lawfully permitted under Delaware law.[23] Furthermore, the complaint alleges that Bell and Clements could be subject to criminal penalties and/or civil sanctions because the firearms they seek to use for hunting deer do not comply with the language in the Hunting Guide.[24] The claim of injury in fact that Bell and Clements would be unable to use their firearms that allegedly are otherwise permitted satisfies the first prong for standing. Bell and Clements also meet the second prong: 7 *Del. C.* § 704(g) protects hunters' rights to use certain firearms for hunting, and Bell and Clements's claimed right to use their firearms arguably falls within that zone of interest.

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[20] The Court rendered its decision on the motion to dismiss from the bench and at that time provided a comparatively brief explanation of the legal underpinnings of its decision. With the allegations regarding standing now settled, the Court takes this opportunity to provide a more detailed analysis of the issue.
[21] *Oceanport Indus.*, 636 A.2d at 900 (quoting *Kingston,* 596 A.2d at 1382).
[22] *Gannett Co. v. State*, 565 A.2d 895, 897 (Del. 1989).
[23] Compl. ¶ 35.
[24] *Id.* ¶ 37.

Regarding organizational plaintiffs DSSA and BRPC, the Court finds that they too have standing. An organization may sue on behalf of its members if "1) the interests to be protected by the suit are germane to the organization's purpose; 2) neither the claim asserted nor the relief requested requires the participation of individual members; and 3) the organization's members would otherwise have standing."[25]

The complaint asserts that DSSA's purpose is to protect the interests of owners of firearms in Delaware, and that many of its members hold hunting licenses.[26] BRPC owns land in Delaware and allows members to hunt on its property to control the deer population.[27] Regarding the first, or germaneness, prong, the interests DSSA and BRPC seek to protect through litigation (*i.e.*, allowing their members to use certain firearms to hunt deer) are closely related to the organizations' purposes of protecting the rights of firearm owners and facilitating hunting activities.[28] Both organizations satisfy the second prong because neither the claim asserted nor the relief requested requires the participation of their individual members: while Bell and Clements are also plaintiffs, their presence is not required for the Court to rule on the legal issues or to award the declaratory relief requested. Finally, DSSA and BRPC meet the third prong because they have members who would use firearms that are otherwise prohibited by the Hunting Guide, and thus those members (like Bell and Clements) would have standing as individuals. Consequently, DSSA and BRPC meet the standing requirements for organizational plaintiffs.

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[25] *Delaware State Sportsmen's Ass'n v. Garvin,* 196 A.3d 1254, 1264 (Del. Super. 2018) (hereinafter *Garvin I*) (citing *Oceanport Indus.*, 636 A.2d at 902).
[26] Compl. ¶ 7.
[27] *Id.* ¶ 8.
[28] *See Garvin I* (the "germaneness" prong bars only those "whose litigation goals and organization's purpose *are totally unrelated*" (citing *Oceanport Indus.*, 636 A.2d at 902)).

This Court has previously held that there is a preference for pre-enforcement review when there is a challenge to a regulation.[29] Pre-enforcement review ensures that plaintiffs are not faced with a "Hobson's choice" between complying with regulations they believe to be invalid or risking possible sanctions.[30] An agency that issues regulations "may also benefit from pre-enforcement review because, if a regulation is found invalid during pre-enforcement review, it may still be revised instead of simply being declared void."[31] Furthermore, such review "helps minimize costly and burdensome litigation by not forcing agencies to defend the legality of their regulations piecemeal across many separate enforcement actions."[32]

B. Delaware law does not prohibit the use of semi-automatic weapons in hunting.

Defendants contend that one of the restrictions at issue in the Hunting Guide—that pistol-caliber rifles must be "manually operated, consisting of: lever action, bolt action, pump action, single shot, and revolver rifles"—is valid because Delaware law prohibits the use of both automatic and semi-automatic weapons in hunting. Defendants' assertion, however, is based both upon an inappropriate conflation of the terms "automatic" and "semi-automatic" and upon a fundamental misunderstanding of the statutory framework.

The terms "automatic" and "semi-automatic," when used in conjunction with each other, are properly references to the actions of firearms. According to Defendants, the term "automatic," in the context of a firearm's action, includes semi-automatic weapons.[33] While

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[29] *Id.* at 1263 ("The very 'existence of a statute [or regulation] implies a threat to prosecute, so pre-enforcement challenges are proper, because a probability of future injury counts as 'injury' for the purpose of standing.'" (quoting *Ezell v. City of Chicago,* 651 F.3d 684, 695-96 (7th Cir. 2011))).
[30] *Id.* at 1262.
[31] *Id.*
[32] *Id.*
[33] Defendants' Op. Br. at 2 n.1.

Delaware law does not specifically define "automatic" and "semi-automatic" weapons, federal law contains definitions of those terms that are helpful in this analysis.

An "automatic" firearm, commonly referred to as a machine gun, is defined under federal law as a firearm that "shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger."[34] On the other hand, federal law defines a semi-automatic rifle as "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which requires a separate pull of the trigger to fire each cartridge."[35] Thus, the primary difference between an automatic and a semi-automatic firearm is that unlike an automatic firearm where a single pull of the trigger can fire more than one shot, a semi-automatic firearm requires the operator to pull the trigger each time he or she wishes to fire a cartridge. Therefore, a semi-automatic firearm is not an automatic firearm, as Defendants contend.

Under the National Firearms Act,[36] the possession of machine guns (*i.e.*, automatic guns) is strictly regulated, and those firearms are not readily available to purchasers.[37] This is true under Delaware law as well: the Delaware Code prohibits persons from possessing

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[34] 26 U.S.C.A. § 5845(b) (West).
[35] 18 U.S.C.A. § 921(a)(28) (West).
[36] 26 U.S.C.A. §§ 5801-5872 (West).
[37] 26 U.S.C.A. § 5811 (requiring transferors to pay a transfer tax); 26 U.S.C.A. § 5841 (requiring all firearms be listed in the National Firearms Registration and Transfer Record, "a central registry of all firearms in the United States [that] are not in the possession or under the control of the United States."); 18 U.S.C.A. § 922(o) (West) (providing that automatic weapons produced on or after May 19, 1986, can be acquired only by the military or law enforcement agencies); 27 C.F.R. §§ 479.85 (requiring transferee of machine gun to submit fingerprints), 478.98 (requiring the licensee submit a sworn statement stating the reason why there is a "reasonable necessity" to acquire a machine gun and why the person's receipt of the machine gun "would be consistent with public safety").

machine guns or any other type of firearm or weapon that is adaptable for use as a machine gun, with very limited exceptions.[38]

Defendants also argue that both automatic and semi-automatic rifles are prohibited for deer hunting pursuant to 7 *Del. C.* § 711. That provision states that "[n]o person shall hunt for . . . game animals . . . with or by means of any automatic-loading or hand-operated repeating *shotgun* . . . ."[39] It is clear from the statute that 7 *Del. C.* § 711 applies only to shotguns, not to rifles.[40]

Moreover, Defendants' contention that hunters are prohibited from using *all* semi-automatic firearms is inaccurate and contrary to its own regulations. Under the Delaware Administrative Code, hunters may use semi-automatic firearms for hunting gray squirrels and red foxes.[41] The fact that DNREC's own regulations permit the use of semi-automatic firearms for hunting some animals undercuts Defendants' argument that 7 *Del. C.* § 711 prohibits the use of all "automatic-loading guns," whether shotguns or other types of firearms.

The statute in question, 7 *Del. C.* § 704(g), does not address the form of action—*i.e.*, automatic, semi-automatic, or manual—hunters' rifles must have for use in deer hunting. The statute simply states that a hunter may use a "rifle."[42] Technically speaking, the statute does not prohibit the use of automatic rifles to hunt deer; however, as mentioned *supra*,

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[38] 11 *Del. C.* § 1444(a)(5).
[39] 7 *Del. C.* § 711(a) (emphasis added).
[40] Furthermore, 7 *Del. C.* § 711 only restricts the use of automatic-loading or hand-operated repeating shotguns that, *inter alia*, hold "more than 3 shells at 1 time in the magazine and chamber combined." It does not prohibit *all* automatic-loading or hand-operated repeating shotguns.
[41] *See* 7 *Del. Admin. C.* § 3900-2.5 (stating that hunters may use "a .17 through .22 caliber rimfire or pellet firearm with a rifled barrel" to hunt gray squirrels); 7 *Del. Admin. C.* § 3900-2.8.1 (permitting the use of, *inter alia*, a "rimfire rifle or centerfire rifle up to .25 caliber" to hunt red foxes).
[42] 7 *Del. C.* § 704(g).

automatic firearms are strictly regulated, and Plaintiffs are not advocating for their use in deer hunting.

On the other hand, Plaintiffs do contend that hunters may use semi-automatic rifles for deer hunting pursuant to 7 *Del. C.* 704(g), so long as they follow the statutory restrictions regarding the types of sights, ammunition, and the maximum number of cartridges allowed to be used in the semi-automatic firearm. The Court agrees.

C. The Court will not address Plaintiffs' constitutional challenge to Defendants' publication of the disputed language in the Hunting Guide.

Plaintiffs argue that Defendants created extra-statutory language in the Hunting Guide in violation of the separation of powers doctrine rooted in Article II, Section I of the Delaware Constitution. That doctrine provides that "generally speaking, one department [*i.e.*, legislative, executive, or judicial] may not encroach on the field of either of the others."[43]

The Delaware Supreme Court has repeatedly held that courts should address statutory violations prior to reaching constitutional questions. In *Culver v. State*, the Court did not reach any constitutional questions because it found that probation officers had violated a statutory mandate.[44] Similarly, in *Keeler v. Metal Masters Foodservice Equipment Co., Inc.*, the Court found that, because the claimant had not met his burden of proof under the displaced worker doctrine, the Court need not reach the constitutional issue of whether the doctrine violated the claimant's substantive due process rights.[45] As the Court explained, it "will refrain from deciding constitutional questions unless a decision can be reached on no other grounds."[46] The Court quoted *Wheatley v. State*, which stated the cardinal rule:

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[43] *Evans v. State*, 872 A.2d 539, 548 (Del. 2005).
[44] *Culver v. State*, 956 A.2d 5, 7 n.1 (Del. 2008) (citing *Downs v. Jacobs*, 272 A.2d 706, 707 (Del. 1970)).
[45] *Keeler v. Metal Masters Foodservice Equip. Co., Inc.*, 712 A.2d 1004, 1005-06 (Del. 1998).
[46] *Id.* at 1006.

"constitutional questions will not be decided unless essential to the disposition of the case."[47] Keeping with that cardinal principle, this Court renders its decision on the non-constitutional grounds discussed below.

D. DNREC exceeded its authority by publishing language in the Hunting Guide that is inconsistent with lawfully-enacted legislation, and the challenged restrictions in the Hunting Guide are for that reason invalid.

Pursuant to 29 *Del. C.* § 8003(7), the Secretary of DNREC has the authority to "[e]stablish and promulgate such rules and regulations governing the administration and operation of [DNREC] as may be deemed necessary by the Secretary and which are not inconsistent with the laws of [Delaware] . . . ."[48] Delaware courts have consistently held that an agency exceeds its authority, and a regulation is invalid, when the regulation is inconsistent with the laws of Delaware.[49]

1. 7 *Del. C.* § 704(g) does not limit the types of rifles deer hunters may use.

As previously explained, 7 *Del. C.* § 704(g) does not limit by action the types of rifles hunters may use to hunt deer; rather, it limits the types of sights and ammunition used with a rifle, and the number of cartridges permitted to be loaded into a rifle.[50] This Court must assume that the legislature deliberately omitted from the statute any additional limitation of the types of rifles deer hunters are permitted to use because a court "may not assume that the omission [of certain provisions from a statute] was the result of an oversight on the part of the General Assembly."[51] Rather, the General Assembly "is presumed to have inserted

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[47] *Wheatley v. State*, 465 A.2d 1110, 1111 (Del. 1983).
[48] 29 *Del. C.* § 8003(7).
[49] *See, e.g., Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 661 (Del. 2017) (explaining that agencies may not make regulations that are inconsistent with the laws of Delaware); *Garvin I,* 196 A.3d at 1267 (stating that where a statute and a regulation conflict, the statute will always prevail (*citing Cantinca v. Fontana*, 884 A.2d 468, 473 (Del. 2005))).
[50] 7 *Del. C.* § 704(g).
[51] *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del. 1982).

every provision for some useful purpose and construction, and when different terms are used in various parts of a statute it is reasonable to assume that a distinction between the terms was intended."[52]

The General Assembly provided in 7 *Del. C.* § 704(g) that "rifles" may be used for deer hunting; however, when the statute discusses handguns, it specifically limits the types of handguns hunters are permitted to use to "revolvers" and "single shot pistols."[53] Because the legislature defined the types of handguns hunters may use but omitted specifying the types of rifles allowed, the Court will not assume that the use of the single word "rifle" was an oversight on the part of the General Assembly.[54]

a. 7 *Del. C.* § 704(g) is not ambiguous.

Defendants contend, relying on 7 *Del. C.* § 711, that the language in 7 *Del. C.* § 704(g) is ambiguous because it does not describe the types of rifles that can be used for deer hunting, as does 7 *Del. C.* § 711 for shotguns. However, as mentioned *supra*, 7 *Del. C.* § 711 does not apply to 7 *Del. C.* § 704(g) and cannot be read in conjunction with that section.

The rules of statutory construction are well established.[55] If a statute is reasonably susceptible to more than one interpretation, it is ambiguous.[56] If it is unambiguous, the Court gives the language in the statute its plain meaning.[57]

The legislature sometimes specifies the types of firearms hunters may not use, as in 7 *Del. C.* § 711(a), which prohibits the use of "automatic-loading or hand-operated repeating" shotguns unless they meet certain specifications.[58] By contrast, in 7 *Del. C.* § 717

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[52] *Id.* (citing *C & T Assocs. v. Gov't of New Castle*, 408 A.2d 27, 29 (Del.Ch. 1979)).
[53] 7 *Del. C.* § 704(g).
[54] *Giuricich*, 449 A.2d at 238.
[55] *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011).
[56] *Id.*
[57] *Id.*
[58] 7 *Del. C.* § 711(a).

(prohibiting the use of "a rifle, shotgun or any other weapon" for frightening or harassing migratory birds), the legislature merely used the unmodified term "shotgun," *i.e.*, referring to any type of shotgun.[59]

Just as the legislature referred to "shotguns" generally in 7 *Del. C.* § 717, the Court finds that the term "rifle" in 7 *Del. C.* § 704(g) is unambiguous and refers to rifles generally. If the legislature intended for the term "rifle" to be limited to specific types of rifles, it would have defined the types of rifles, just as it did for handguns in 7 *Del. C.* § 704(g) and as it did for shotguns in 7 *Del. C.* § 711. It did not. Furthermore, the fact that the term "rifle" is used without a narrower definition throughout Delaware law supports the Court's conclusion that the term "rifle" is unambiguous and refers to all types of rifles; the Court need not further define the term.

b. The use of automatic rifles (*i.e.*, machine guns) for deer hunting is strictly regulated, *i.e.*, effectively prohibited.

Despite the omission of limitations on the type of rifles hunters may use for hunting deer, the omission does not open up hunting to the use of automatic weapons, as Defendants claim. As mentioned *supra*, automatic rifles (*i.e.*, machine guns) are already strictly regulated and essentially prohibited for hunting deer.[60] Furthermore, Defendants' contention that deer hunters may not use semi-automatic rifles to hunt is misplaced, since DNREC's own regulations permit the use of semi-automatic weapons in hunting, as noted *supra*.[61]

In short, because Defendants limited the types of rifles hunters must use to those that are "manually operated, consisting of: lever action, bolt action, pump action, single shot,

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[59] 7 *Del. C.* § 717 (pertaining to the use of weapons to frighten or harass migratory birds while at rest on the property of another).
[60] *See supra* text accompanying notes 36-37.
[61] *See supra* note 41 and accompanying text.

and revolver rifles,"[62] and because the statutory scheme does not authorize such a limitation, Defendants unlawfully exceeded their authority.

2. 7 *Del. C.* § 704(g) does not limit rifles based on the commercial production of handguns that use the same ammunition.

Defendants argue that the pronouncement in the Hunting Guide that "if there is not a commercially produced handgun available that is chambered for ammunition that meets the caliber and cartridge case length criteria[,] than [sic] a rifle chambered for that same ammunition is not permissible for use" properly interprets the language of 7 *Del. C.* § 704(g). The Court disagrees.

First, nowhere in 7 *Del. C.* § 704(g) does the term "commercially produced" appear when the statute discusses handguns. DNREC added the words "commercially produced" to the Hunting Guide, thereby creating a limiting qualification inconsistent with the laws of Delaware. In other words, the Hunting Guide seeks to prohibit the use of rifles, even if they are chambered for ammunition meeting the cartridge and case length criteria set forth in the statute, unless there is a commercially produced handgun using that same ammunition.

Second, 7 *Del. C.* § 704(g)(3), which refers to the limitations placed on rifles, omits the word "handgun" when referring to the type of ammunition permitted to be used in a rifle.[63] Thus, the statute clearly envisions the use of rifles compatible with ammunition of a certain caliber and cartridge case length, regardless of whether a "commercially produced" handgun using that same ammunition exists. Therefore, because the Hunting Guide limits hunters' use of certain rifles otherwise permitted by 7 *Del. C.* § 704(g), Defendants exceeded their authority, and the disputed language is therefore improper.

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[62] DNREC, *2019/2020 Delaware Hunting & Trapping Guide* 19 (2019).

[63] 7 *Del. C.* § 704(g)(3)b. limits allowed rifles to those "[c]hambered for and using straight-walled ammunition"—not "chambered for and using straight-wall[ed] *handgun* ammunition," which is the language found in 7 *Del. C.* § 704(g)(1).

E. Even if Defendants did not exceed their authority by including the challenged language in the Hunting Guide, those restrictions are void because DNREC failed to follow the APA.

DNREC has the power and authority to "protect, manage and conserve all forms of protected wildlife of this State, and enforce by proper actions and proceedings the law relating thereto."[64] However, its power and authority is not absolute. DNREC is an agency subject to the APA.[65] "If DNREC promulgates regulations, those regulations must comply with the APA."[66]

1. The disputed language in the Hunting Guide represents a *de facto* regulation.

A regulation is "any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court."[67] The Hunting Guide's language restricting the type of rifles and ammunition hunters are permitted to use for deer hunting is not only a statement of "policy" but also one of "requirement": the Hunting Guide uses words such as "must be" and "is not permissible" when describing the types of rifles hunters are and are not permitted to use.[68] Therefore, the disputed language meets the statutory definition of regulation, and the Court finds that the disputed language constitutes a *de facto* regulation.

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[64] 7 *Del. C.* § 102(a).
[65] *Baker v. Delaware Dep't of Nat. Res. & Envtl. Control*, 2015 WL 5971784, at *12 (Del. Super. Oct. 7, 2015), *aff'd*, 137 A.3d 122 (Del. 2016).
[66] *Id.*
[67] 29 *Del. C.* § 10102(7).
[68] DNREC, *2019/2020 Delaware Hunting & Trapping Guide* 19 (2019).

2. The requirements set forth in the disputed language do not constitute the implementation of a specific and detailed statutory directive.

Minus a few exceptions, regulations promulgated by DNREC must follow the APA.[69] However, in *Free-Flow Packaging International, Inc. v. Secretary of Department of Natural Resources and Environmental Control of Delaware*, the Delaware Supreme Court held that when an agency such as DNREC "implements a specific and detailed statutory directive, it may operate outside the scope of the APA."[70]

Relying on *Free-Flow*, Defendants contend that the disputed language in the Hunting Guide is not a regulation subject to the APA, but rather the implementation of a specific and detailed directive that is not subject to the same formal comment and review requirements. Specifically, Defendants argue that 7 *Del. C.* §§ 704(g) and 711 authorized DNREC to publish the Hunting Guide's language without following the formal APA requirements. The Court finds otherwise.

In *Free-Flow*, the Supreme Court found that DNREC had lawfully determined, without implementing a regulation, the base fees to be paid by companies that emit air contaminants.[71] In that case, DNREC placed each company that was the subject source of

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[69] The following types of regulations are exempt from the procedural requirements of the APA:

> (1) Descriptions of agency organization, operations and procedures for obtaining information; (2) Rules of practice and procedure used by the agency; (3) Delegations of authority to subordinates; (4) Nonsubstantive changes in existing regulations to alter style or form or to correct technical errors; (5) Amendments to existing regulations to make them consistent with changes in basic law but which do not otherwise alter the substance of the regulations; and (6) Codifications of existing agency or judicial principles of decision derived from previous decisions and rulings.

29 *Del. C.* § 10113(b); *Baker,* 2015 WL 5971784, at *12 (explaining that regulations promulgated by DNREC are subject to the APA).

[70] *Free-Flow Packaging Int'l, Inc. v. Sec'y of Dep't of Nat. Res. and Env't Control of Delaware*, 861 A.2d 1233, 1236 (Del. 2004).

[71] *Id.*

emissions into a category, and the company was then charged a fee based on that category as prescribed by statute.[72] The General Assembly had given DNREC the following statutory directive:

> *The Department will place* each subject source into 1 of the following 4 categories, either as a voluntarily requested synthetic minor or as determined from estimated hours spent performing services: (1) Synthetic minor: $3,000; (2) Routine, up to 400 hours spent: $7,500; (3) Complex, from 401 to 625 hours spent: $18,000; and (4) Very complex, over 625 hours spent; [sic] $39,500.[73]

The plaintiff company contended, *inter alia*, that DNREC could not lawfully determine into what category a company fell without creating a regulation subject to the APA.[74] The Supreme Court rejected that argument, finding that DNREC was authorized to place companies into categories without passing a regulation because DNREC was required to follow the specific directives provided by statute, and companies could simply read the statute to ascertain how they were to be categorized.[75] The Court was satisfied with the process, and specifically the detailed information provided to the General Assembly prior to its enactment of the statute giving DNREC the specific statutory directive regarding how to categorize companies.[76] The Court further found that the fact that the statute had to be reviewed and renewed every three years supported its decision that DNREC was not required to create a regulation subject to the APA.[77]

Unlike in *Free-Flow*, where there was a specific statutory directive (*i.e.*, "The Department will place . . . ."), here 7 *Del. C.* § 704(g) does not direct DNREC to determine

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[72] *Id.* at 1235.
[73] *Id.* (emphasis supplied).
[74] *Id.*
[75] *Id.* at 1236.
[76] *Id.* at 1237.
[77] *Id.*

the types of rifles hunters may use. In addition, 7 *Del. C.* § 711 provides no such directive, and regardless, as mentioned *supra*, that provision applies only to shotguns.[78]

Certainly, the General Assembly has given DNREC the authority to "protect, manage, and conserve all forms of protected wildlife," which includes deer, in Delaware.[79] However, that does not mean that DNREC may implement additional policies and requirements, including the disputed language in the Hunting Guide, without observing the comment and review process of the APA.[80]

3. Plaintiffs' claims are not time-barred.

Pursuant to 29 *Del. C.* § 10141, "no judicial review of a regulation is available unless a complaint therefor is filed in the Court within 30 days of the day the agency order with respect to the regulation was published in the Register of Regulations."[81] Here, it is undisputed that Plaintiffs did not file this action within 30 days of the publication of the Hunting Guide.

However, because Defendants ignored the APA and never followed its requirements with regard to the *de facto* regulation that appears in the Hunting Guide, the 30-day clock never began to run. Therefore, Plaintiffs were permitted to challenge the *de facto* regulation, *i.e.*, the statement of policy and requirement, published by DNREC in the Hunting Guide.

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[78] *See supra* text accompanying notes 39-40.
[79] 7 *Del. C.* § 102(a); *see also* 7 *Del. C.* § 704(g).
[80] *See* 29 *Del. C.* § 10102(7) (stating that requirements and guides are regulations subject to the APA); *see also Baker*, 2015 WL 5971784, at *13 (finding that where no "specific detailed statutory directive" existed, DNREC could not rely on *Free-Flow* to argue that its creation of technical documents did not have to be subject to scrutiny under the APA).
[81] 29 *Del. C.* § 10141(d).

IV. CONCLUSION

For the reasons set forth in this opinion, Plaintiffs' motion for summary judgment will be granted in part and denied in part. The language in the 2019/2020 Hunting Guide limiting pistol-caliber rifles used in deer hunting to those that are "manually operated, consisting of: lever action, bolt action, pump action, single shot, and revolver rifles," and to those chambered for ammunition for which there is "a commercially produced handgun available . . . chambered for [the same] ammunition," exceeded DNREC's statutory authority and also constituted a *de facto* regulation requiring enactment through the APA—a procedure that did not occur here. The Court does not reach the question of whether the disputed language violates Article II, Section 1 of the Delaware Constitution, and to that extent Plaintiffs' motion is denied.[82] Correspondingly, Defendants' motion is denied in its entirety. Defendants are expected to remove the offending language from the 2019/2020 edition, and any subsequent editions, of the Hunting Guide.

WHEREFORE, for the foregoing reasons, Plaintiffs' motion for summary judgment is ***GRANTED in part and DENIED in part***, and Defendants' cross-motion for summary judgment is ***DENIED***.

IT IS SO ORDERED.

/s/ Noel Eason Primos
Judge

NEP/wjs
Via File & ServeXpress
oc: Prothonotary
Counsel of Record

[82] To clarify, although the Court is denying Plaintiffs' motion in part, this order constitutes a final order for purposes of appeal.