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December 3, 2012

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HAND DELIVERED

Re: *Ctr. for Biological Diversity, et al. v. Minn. Dep't. of Natural Res., et al.*
Minnesota Court of Appeals File No. A12-1680

Dear Ms. Gernander:

Enclosed for filing please find the original and six copies of Respondent's Brief, Appendix, and Affidavit of Service in the above-referenced matter.

By copy of this letter service is hereby made upon opposing counsel.

Sincerely,



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No. A12-1680

STATE OF MINNESOTA

IN COURT OF APPEALS

Center for Biological Diversity, Howling for Wolves,
Petitioners,

vs.

Minnesota Department of Natural Resources, and Tom Landwehr, in his official capacity
as the Commissioner of the Minnesota Department of Natural Resources,

Respondents.

RESPONDENTS' BRIEF

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LEGAL ISSUES

- I. Was the need to adjust quota numbers, bag limits, and season structure on an annual basis a sufficient condition to support use of the expedited rulemaking procedures of Minn. Stat. § 87.027, subd. 13 (2010) by Respondents Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr, to adopt the 2012 wolf hunting and trapping season rules?

Respondents Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr, determined that the need for annual adjustments to the 2012 wolf hunting and trapping rules was a sufficient condition to warrant use of the expedited emergency rulemaking process.

Apposite Authorities

Am. Family Ins. Grp v. Schroedl, 616 N.W.2d 273 (Minn. 2000)
Hirsch v. Bartley-Lindsay Co., 537 N.W.2d 480 (Minn. 1995)
Minn.-Dakotas Retail Hardware Ass'n v. State, 279 N.W.2d 360 (Minn. 1979)
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37 SR 279-282 (Aug. 20, 2012)

- II. Does the Petitioners' challenge raise a fact issue to be reviewed on an arbitrary and capricious standard?

Respondents Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr, did not address this issue.

Apposite Authorities

Manufactured Hous. Inst. v. Pettersen, 347 N.W.2d 238 (Minn. 1984)

STATEMENT OF THE CASE

After almost 40 years of protection under the federal Endangered Species Act, the eastern timber wolf, or gray wolf, was removed from the list of threatened and endangered species by the United States Fish and Wildlife Service (“USFWS”) on January 26, 2012, once again placing management of the wolf with the State of Minnesota. As directed by the Legislature, Respondents Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr, (hereinafter referred to jointly as “DNR”) immediately took steps to develop and implement a wolf hunting and trapping season for the fall and winter of 2012-13 (hereinafter the “2012 wolf season”).

Determining that managing the wolf in a sustainable fashion would require annual adjustments to quota numbers, zones, bag limits, and general season structure, DNR utilized the expedited rulemaking process set forth in Minnesota Statutes § 84.027, subd. 13(b) (2010) to put in place the details of the 2012 wolf season. Complying with the legislative requirement that public comment first be elicited prior to the beginning of the 2012 wolf season, DNR implemented a month-long online public survey beginning May 20, 2012. Over 7,300 individuals took part in the survey and more than 4,800 specific comments were provided regarding the proposed season. In addition, hundreds of emails, telephone calls, and letters were received commenting on the proposal. DNR finalized the proposed rules based on these comments and promulgated the 2012 wolf season rules pursuant to the expedited rulemaking process, effective August 20, 2012.

Petitioners Center for Biological Diversity and Howling for Wolves (hereinafter referred to jointly as “Petitioners”) filed a Petition for Declaratory Judgment with this

Court on September 18, 2012, alleging that the rules implementing the 2012 wolf season were improperly adopted using the expedited rulemaking process, asserting that DNR should have adopted the rules using the emergency rulemaking process found in Minn. Stat. §§ 97A.0451-.0459 (2010). As conditions existed that did not allow for compliance with the emergency rulemaking process, DNR properly promulgated the 2012 wolf season rules under the expedited rulemaking process. Therefore, this Court should deny Petitioners' request to invalidate the rules.

STATEMENT OF FACTS

The wolf was first placed under the protection of the federal Endangered Species Act ("the ESA") in 1974. (*See* Respondents' Appendix ("RA") at 38; Administrative Record ("AR") at 438.) At that time, Minnesota had the only viable wolf population in the lower 48 states. 75 Fed. Reg. 55, 733 (Sept. 14, 2010); RA 38; *see* AR 444-45. Through the exceptional efforts of the State of Minnesota and the federal government, this population now far exceeds all recovery goals and has expanded into the states of Wisconsin and Michigan. 75 Fed. Reg. 55, 734 (Sept. 14, 2010); RA 15. As a leading example of the success that can be achieved in species recovery under the ESA, the federal government removed the wolf from the list of threatened and endangered species in January 2012, returning management of their respective wolf populations to the states of Minnesota, Wisconsin, and Michigan. (RA 40; 76 Fed. Reg. 81,666 (Dec. 28, 2011).) The present matter is before this Court as a challenge to the State of Minnesota's efforts to manage its wolf population in a safe, conservative, and sustaining manner. The facts

underlying the Petition do not support Petitioners' claim of improper procedure and should be rejected.

A. The ESA Listing Of The Gray Wolf.

After first being classified as endangered in Minnesota in 1974, the wolf was relisted under the ESA in 1978 as endangered in the lower 48 states, except for the Minnesota population, which was reclassified as threatened. (RA 38; AR 443.) Under the ESA, the USFWS developed the first Wolf Recovery Plan in 1978; it then revised the Plan in 1992 ("the 1992 Recovery Plan"). (RA 38; AR 443-44.) The 1992 Recovery Plan set a population goal of 1,251 to 1,400 wolves in Minnesota by the year 2000, a number that USFWS determined to be sufficient to ensure the survival of the wolf within the state, and established a goal of a combined Wisconsin—Michigan population of greater than 100 wolves for 5 consecutive years. (RA 38; AR 444.)

After the wolf was given full protection under the ESA, the federal government and DNR managed the state's wolf population with the primary objective of growing the population in Minnesota and re-establishing a viable population in a neighboring state. (AR 438; *see also* RA 38.) The wolf population in Minnesota reached the recovery goal of 1,251 to 1,400 wolves by approximately 1989, and a sustaining population was established in Wisconsin in 1994. (AR 431, 445; RA 38.) By the mid-1990s, the Minnesota wolf population had reached a number that was nearly double the 1992 Recovery Plan's objective. (RA 38; AR 445.)

B. DNR Develops A Wolf Management Plan.

In 1998, as the requirements of the 1992 Recovery Plan were being met, DNR began to develop a Minnesota wolf management plan in anticipation of management of the wolf being returned to the state through imminent ESA delisting. (RA 38-39.) As part of this development, DNR obtained extensive public input through a series of twelve public information meetings held throughout the state in January of 1998. (*Id.*; AR 438.) Later in 1998, DNR convened a wolf management “Roundtable” comprised of representatives of environmental, agricultural, hunting, trapping, and wolf-advocate organizations, as well as other government agencies and private citizens who had specific interest in wolf management. (RA 39; AR 439.) The purpose of the Roundtable was to provide guidance to DNR in its development of the wolf management plan. (*Id.*) In 2000 the Minnesota Legislature passed a wolf management bill that incorporated many of the Roundtable recommendations. (RA 39; *see also* 2000 Minn. Laws ch. 463.) The legislation included the provision that “[t]here shall be no open season for gray wolves for five years after the gray wolf is delisted under the federal Endangered Species Act of 1973.” 2000 Minn. Laws ch. 463, § 5; *see also* AR 449.

As authorized by the Legislature, DNR adopted its Minnesota Wolf Management Plan in 2001. 2000 Minn. Laws ch. 463, § 6; Minn. Stat. § 97B.646 (2010); *see also* AR 429-508. The Minnesota Wolf Management Plan states that “[t]he Minnesota Department of Natural Resources is committed to ensuring the long-term survival of the wolf in Minnesota, and also to resolve conflicts between wolves and humans.” (AR 438,

446.) With its management plan in place, DNR awaited what was then thought to be the imminent removal of the wolf from the protections of the ESA by the USFWS. (RA 41.)

C. USFWS Attempts To Delist The Gray Wolf In Minnesota.

With the wolf exceeding the recovery goals set forth in the 1992 Recovery Plan, the USFWS made its first attempt to delist the wolf in 2003. 68 Fed. Reg. 15,804-875 (April 1, 2003); RA 39-40. This effort, however, was reversed by the U.S. District Courts of Vermont and Oregon in 2005. *Defenders of Wildlife v. Secretary, U.S. Dep't of the Interior*, 354 F.Supp.2d 1156, 1174 (D. Or. 2005), and *Nat'l Wildlife Fed'n v. Norton*, 386 F.Supp.2d 553, 568 (D. Vt. 2005); RA 39-40.

The USFWS again attempted to delist the wolf in February 2007 by issuing a final rule that assigned management of the wolf back to the state of Minnesota. 72 Fed. Reg. 6,052 (Feb. 8, 2007); RA 40. DNR managed its wolf population for eighteen months until September 2008, at which time the U.S. District Court for the District of Columbia reversed the decision of the USFWS, reinstating the protections of the ESA and taking management authority from the states. *Humane Soc'y of the U.S. v. Kempthorne*, 579 F.Supp.2d 7, 21 (D. D.C. 2008); RA 40.

In April 2009, the USFWS again delisted the wolf, returning its management to the State of Minnesota. 74 Fed. Reg. 15,070 (April 2, 2009); RA 40. But in July 2009, the USFWS agreed to vacation of its decision in response to a further legal challenge, and the wolf once again was placed under the protection of the ESA. *Humane Soc'y v. Salazaar*, No. 09-cv-1092 (D. D.C., July 1, 2009) (stipulation and order); RA 40.

Recognizing that 1) the wolf population in Minnesota had exceeded its recovery goal more than two decades earlier; and 2) the state had successfully managed its wolf population twice after attempted delistings by the USFWS, DNR took the affirmative step to petition the USFWS on March 15, 2010, to delist the wolf in Minnesota. (RA 40.) The USFWS accepted DNR's petition on September 14, 2010, finding that it presented substantial information that delisting may be warranted and initiating a full status review. 75 Fed. Reg. 55,730 (Sept. 14, 2010).

In anticipation of the removal of the wolf from the protections of the ESA, and recognizing the near-ten-year delay in delisting due to frequent legal challenges, the Minnesota Legislature in 2011 amended Minn. Stat. § 97B.645, subd. 9 (2010), by removing the requirement that a wolf hunting and trapping season be delayed by five years after delisting. 2011 Minn. Laws 1st Sp. Sess. ch. 2, art. 5, § 1. On December 28, 2011, the USFWS announced its final rule removing the wolf from the list of threatened and endangered species.¹ 76 Fed. Reg. 81,666 (Dec. 28, 2011); RA 40. The delisting regulation became effective January 27, 2012, and, for the third time, the wolf came under the management of the State of Minnesota. (RA 40.)

¹ In its delisting decision, the USFWS recognized that the State of Minnesota had eliminated the five-year waiting period for implementation of a wolf hunting and trapping season and noted that this modification was not an impediment to delisting. 76 Fed. Reg. 81,703 (Dec. 28, 2011).

D. The Minnesota Legislature Directs A Wolf Hunting And Trapping Season.

In reaction to the delisting of the wolf by the USFWS, a wolf season was included within the Game and Fish Bill considered by the Minnesota Legislature during the 2012 session. (RA 28-30; AR 717-75.) The bill was ultimately passed and signed into law by Governor Dayton on May 3, 2012. (RA 29.) As noted by this Court in its Order denying Petitioners' motion for a preliminary injunction, the law specifically established a wolf hunting and trapping season and set the season opening as the first day of the firearm deer season. 2012 Minn. Laws ch. 277, art. 1, § 65. The legislation also gave DNR the authority to prescribe the details of the seasons for wolves, establish quotas, designate areas where wolves may be taken, establish possession limits, limit the number of hunters and trappers that can take wolves, and prescribe an application and fee structure for a wolf hunting and trapping season. *Id*; RA 29.

E. DNR Undertakes Rulemaking To Provide The Details Of The 2012 Wolf Season.

After the USFWS announcement of delisting, DNR informed the public in January 2012 of its intention to hold a conservative, science-based hunting and trapping

season for wolves beginning in the fall or winter of 2012.² (RA 28; *see* <http://files.dnr.state.mn.us/fish-wildlife/wildlife/wolves/wolfbrief.pdf>.) DNR also initiated contact with Indian bands within the state to open discussions regarding the proposed season. (See AR 674-75, 644-716.) As noted above, in a bill passed and signed into law during the 2011 special legislative session, the Minnesota Legislature mandated that DNR “must provide opportunity for public comment” prior to prescribing seasons and restrictions for the taking of wolves. 2011 Minn. Laws 1st Sp. Sess. ch. 2, art. 5, § 1; RA 29. Consequently, after the wolf was delisted, DNR began internal discussions regarding how to provide the public with the opportunity for input on rules implementing the state season once the Legislature had taken final action on the Game and Fish Bill. (RA 29-30.) DNR considered holding in-person public input meetings throughout the state, as well as using an online process to solicit input. (*Id.*) DNR’s experience, however, had been that the online format results in more public participation than public meetings; therefore, DNR chose to utilize an online format for public comment. (*Id.*)

Upon the Governor’s signing of the Game and Fish Bill on May 3, 2012, DNR began development of rules to implement a 2012 wolf season. (RA 8-9.) As it does for

² Petitioners assert that DNR was not required to implement a 2012 wolf season and therefore “could have proposed to start the seasons in the fall of 2013 (or later)” (Pet. Br. 10.) While DNR does retain authority to provide the details of any hunting or trapping season and close a season if conservation of a particular species requires, there was no conservation concern here and the Legislature provided strong direction to the agency to implement a wolf season in the fall of 2012. See Minn. Stat. § 84.941 (2010) (“It is the policy of the state that fish and wildlife are renewable natural resources to be conserved and enhanced through planned scientific management, protection, and utilization.”); Minn. Stat. § 84.027, subd. 2 (2010) (“The commissioner shall have charge and control of ... wild animals of the state”); RA 30.

other game and fish rules that require annual modification, DNR proceeded pursuant to the expedited rulemaking process set forth in Minn. Stat. § 84.027, subd. 13(b) (2010). (RA 2-3, 7-8, 32; AR 11, 17, 49, 54.) DNR chose to use the expedited rulemaking process authorized in Minn. Stat. § 84.027, subd. 13(b), rather than the emergency rulemaking process set forth in Minn. Stat. §§ 97A.0451-.0459 (2010) because the latter process limits the number of allowable revisions that can be made to a rule before permanent rulemaking must be used. Minn. Stat. § 97A.0458 (2010) (emergency rules may not be continued in effect after 360 days without initiating permanent rulemaking); RA 2, 32. It was determined that DNR needed the flexibility provided by the expedited rulemaking process for the wolf season in order to make anticipated annual adjustments to future season and harvest quotas to maintain populations at the desired level. (RA 32.)

On May 21, 2012, DNR issued a press release again proposing a wolf hunting and trapping season for the fall and winter of 2012, and announcing that public comments would be taken online. (AR 69-71.) DNR stated, “[w]hile the decision on whether to have a wolf season and when it should start has already been made through the lawmaking process, there remain many details to putting a season in place that the DNR would like to get public comment on.” (AR 70.) The online questionnaire consisted of ten questions, and participants were provided an opportunity to add written comments of any length at the end of the questionnaire. (AR 105-109; RA 30.) DNR did not include a proposed rule with the online questionnaire as it intended to use the public input to inform the subsequent rule. (RA 30; AR 424-27.) However, participants did view an informational presentation prior to providing written comments where they were

informed of DNR's proposed harvest quota of 400 wolves and the number of licenses to be sold. (RA 30; AR 424-27.) The comment period closed on June 20, 2012. (See AR 120, 420.) A total of 7,351 persons participated in the survey, and DNR received 4,808 written comments. (AR 105, 121-336, 343-419; RA 40.) This constitutes one of the largest responses DNR has ever received to a proposed game rule. (RA 32.) The instant Petitioners actively participated in the online survey by informing their membership of the availability of the DNR survey and encouraging their participation, with Petitioner Center for Biological Diversity informing its membership that the process for providing comment was "incredibly easy." (AR 72-74, 82-84, 428; RA 32.) DNR also accepted hundreds of emails, telephone calls, and letters from the public regarding their thoughts on the proposed hunting and trapping season. (AR 509-555; RA 31.) The online survey was never intended to be a public referendum on a wolf season; rather, it was meant to elicit input on a proposed season structure, extent, and timing. (RA 30-31.) DNR believed that the Legislature provided clear direction to the agency that a wolf season should be held in the fall of 2012.³ (RA 30; AR 70.)

³ Petitioners opine, "[t]he best option would have been for the DNR to delay wolf hunting and trapping until after expiration of the five-year moratorium proscribed by the [2001] Wolf Management Plan." (Petitioners' Brief ("Pet. Br.") at 10 n.3.) Petitioners ignore the fact that Minn. Stat. § 14.125 (2010) requires an agency to publish notice of intent to adopt rules or a notice of hearing on a proposed rule within 18 months of the effective date of the law authorizing rulemaking. As DNR's rulemaking authority now found in Minn. Stat. § 97B.657 was adopted by the Legislature in 2012, DNR's rulemaking authority would be long expired if it had taken the avenue Petitioners propose. 2012 Minn. Laws ch. 277, art. 1, §65.

The survey fulfilled its purpose: the information gathered through the public input process informed DNR's wolf rule development, resulting in a number of substantive modifications. (RA 31; AR 420 ("there are several changes to what DNR originally proposed in May as a result of input received since the proposal was announced").) Upon completion, DNR issued a press release on July 12, 2012, announcing that the agency had finalized the rules for the 2012 wolf season. (AR 420-423.) The rules were then published in the State Register on August 20, 2012. 37 SR 279-282 (Aug. 20, 2012); RA 9; AR 64-67.

It is DNR's policy to have game rules adopted and in place prior to selecting hunters for hunting seasons that have more applicants than licenses available. (RA 33.) Therefore, applications for wolf permits were made available online in early August 2012. (AR 33.) DNR received 23,433 wolf season applications by the September 6, 2012, deadline. (RA 34.) A total of 6,000 hunters and trappers were chosen, and the applicants were able to check the DNR website beginning on September 26, 2012, to determine if they had been chosen. (RA 35.) A wolf regulation booklet was mailed to the successful applicants in time for the opening of the first wolf season on November 3, 2012. (RA 35; *see also* http://files.dnr.state.mn.us/recreation/hunting/wolf/wolf_regs.pdf (2012 wolf season regulation booklet).)

F. The Status Of Minnesota's Wolf Population.

Current data available to DNR indicates that Minnesota's wolf population stands at more than double the level stated in the federal recovery goals; the data show that there are approximately 3,000 wolves in an estimated 500 packs in Minnesota. (RA 15-16,

19-20.) DNR's conservative harvest for the 2012 season is well within the bounds of sustainability. (RA 20-21.) The harvest quota of 400 wolves, along with a projected non-hunting depredation take of approximately 275 wolves, represents less than half the current estimated sustainable level of human-caused mortality. (*Id.*) Consequently, any claim that Minnesota's wolf population will be harmed by DNR's 2012 wolf season is unfounded. Likewise, this level of harvest will have little if any impact on the long-term ability of wolves to serve their many important ecological roles, nor will it hinder the opportunity for public observation or wolf-related ecotourism. (RA 19-20.)

G. DNR's Monitoring Of Wolf Population Status.

DNR has multiple annual sources of population status data for wolves within the state. (RA 16-19.) These annual sources of population status data have an established track record for collectively providing reliable data on wolf population trends. (RA 18-19.) Therefore, assessments of any effects of the 2012 wolf season on the state's wolf population will be based upon annual indexes of relative abundance currently collected or available to DNR. (*Id.*) DNR will use this data, along with other data collected from the 2012 wolf season participants, to evaluate various aspects of the 2012 wolf season in order to make necessary annual rule adjustments through expedited rulemaking to sustainably manage the state's wolf population in the coming years. (RA 6.)

SCOPE OF REVIEW

In a pre-enforcement challenge brought under Minn. Stat. § 14.44 (2010), a rule can be declared invalid if this Court finds: 1) the rule to be unconstitutional; 2) the

agency exceeded its statutory authority in promulgating the rule; or 3) the rule is adopted without compliance with statutory rulemaking procedures. Minn. Stat. § 14.45 (2010); *see Hirsch v. Bartley-Lindsay Co.*, 537 N.W.2d 480, 485 (Minn. 1995). Review under a pre-enforcement challenge to a rule has been described by the Minnesota Supreme Court to be “limited.” *Minn.-Dakotas Retail Hardware Ass’n v. State*, 279 N.W.2d 360, 363 (Minn. 1979).

Factual determinations of an agency are reviewed on an arbitrary and capricious standard. *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). In recognition of the separation of powers doctrine, a review of administrative agency decisions is narrow in scope and deferential in nature. *Excess Surplus Status of Blue Cross and Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). “If an administrative agency engages in reasoned decision making, the court will affirm, even though it may have reached a different conclusion had it been the fact finder.” *Cable Comm’ns Bd. v. Norwest Cable Comm’ns P’ship*, 356 N.W.2d 658, 668-69 (Minn. 1984) (citations omitted).

ARGUMENT

Petitioners challenge the 2012 wolf season rules as being promulgated by DNR “without compliance with statutory rulemaking procedures.” Minn. Stat. § 14.45 (2010); Pet. Br. 7. Petitioners do not assert that DNR failed to comply with any particular step in the expedited rulemaking process; rather, they contend that DNR should not have used the expedited rulemaking process at all. Rather, Petitioners’ assertion is that DNR should have chosen and followed the emergency rulemaking process. While Petitioners attempt

to characterize this challenge as a legal one, Petitioners are in fact challenging DNR's factual determination that conditions existed that did not allow compliance with the emergency rulemaking procedures for purposes of establishing the 2012 wolf season. (Pet. Br. 7.)

The emergency rulemaking process is governed by Minn. Stat. §§ 97A.0451-.0459 (2010). Pursuant to those statutes, DNR is allowed to conduct emergency rulemaking “[w]hen the commissioner is directed by statute, federal law, or court order to adopt, amend, suspend, or repeal a rule in a manner that does not allow for compliance with sections 14.14 to 14.28, or if the commissioner is expressly required or authorized by statute to adopt emergency rules” Minn. Stat. § 97A.0451, subd. 1 (2010). However, an additional statute permits DNR to conduct *expedited* rulemaking under certain circumstances:

If conditions exist that do not allow the commissioner to comply with sections 97A.0451 to 97A.0459, the commissioner may adopt a rule under this subdivision by submitting the rule to the attorney general for review under section 97A.0455, publishing a notice in the State Register and filing the rule with the secretary of state and the Legislative Coordinating Commission, and complying with section 97A.0459, and including a statement of the emergency conditions and a copy of the rule in the notice.

Minn. Stat. § 84.027, subd. 13(b) (2010); *see also id.* subd. 13(c)-(g) (further procedural requirements for expedited rulemaking).

Both of these statutory rulemaking procedures are unique to DNR, with this dual authority made exclusive to the agency by the Legislature in 1995.⁴ 1995 Minn. Laws ch. 233, art. 2, §§ 39-48. In that grant of authority, the Legislature specifically provided DNR with the discretion to determine which rulemaking process was appropriate depending upon the circumstances of the particular management activity that was proposed to be subject to rulemaking. In the instant matter, DNR determined that the expedited rulemaking process was appropriate. As Petitioners note, DNR cited the following as the emergency conditions necessitating expedited rulemaking, rather than the emergency rulemaking, for the 2012 wolf season:

The emergency conditions that do not allow compliance with Minnesota Statutes, sections 97A.0451 to 97A.0459, are that quota numbers, bag limits, and season structure are developed on an annual basis so that the harvest and populations can be managed sustainably.

(Pet. Br. 8 (hereinafter “Expediting Conditions”); AR 64; 37 SR 279 (Aug. 20, 2012).)

Petitioners dispute these conditions are sufficient to warrant DNR’s use of the expedited rulemaking process.

I. CONDITIONS EXIST THAT DO NOT ALLOW DNR TO CONDUCT EMERGENCY RULEMAKING.

The Expediting Conditions explicitly reference DNR’s need to study populations and adjust such matters as “quota numbers, bag limits, and season structure” on an annual

⁴ Both the emergency and expedited rulemaking provisions were moved from chapter 14 to DNR’s controlling chapters in 1995. 1995 Minn. Laws ch. 233, art. 2, § 57 (repealer). DNR was originally given expedited rulemaking authority in chapter 14 in 1991. 1991 Minn. Laws ch. 259, § 5; Minn. Stat. § 14.29, subd. 4 (1992). With its transfer to chapter 97A in 1995, emergency rulemaking was limited to DNR. *Compare* Minn. Stat. § 14.29, subd. 1 (1992) and Minn. Stat. § 97A.0451, subd. 1 (1996).

basis.⁵ (See Expediting Conditions.) This need implicates, and directly conflicts with, the emergency rulemaking process—specifically, with Minn. Stat. § 97A.0458 (2010):

Emergency rules adopted under sections 97A.0451 to 97A.0459 shall be effective for the period stated in the notice of intent to adopt emergency rules *which may not be longer than 180 days*. The emergency rules *may* be continued in effect for *an additional period of up to 180 days* if the commissioner gives notice of continuation by publishing notice in the State Register and mailing the same notice to all persons registered with the commissioner to receive notice of any rulemaking proceedings. The continuation is not effective until these notices have been mailed. No emergency rule may remain in effect on a date 361 days after its original effective date. *The emergency rules may not be continued in effect after 360 days without following the procedure of sections 14.14 to 14.28.*

Minn. Stat. § 97A.0458 (2010) (emphasis added). Sections 14.14 to 14.28, of course, describe the permanent rulemaking process of the Administrative Procedures Act (“APA”), which includes, among other requirements, the preparation of a statement of need and reasonableness for the proposed rule (Minn. Stat. § 14.131), the publication of a 30-day notice of any public hearing to be held with a copy of the proposed rule (Minn. Stat. § 14.14, subd. 1a), and the convening of a public hearing, if required (Minn. Stat. § 14.14), all of which ends in the review of the rule by an administrative law judge who then issues a report addressing the legal sufficiency of the proposed rules (Minn. Stat. § 14.15). Pursuant to the unequivocal language of section 97A.0458, emergency rulemaking is a one-time approach that can only be continued in effect for a single year; after that, an agency is limited to the use of the detailed APA rulemaking procedures of

⁵ Petitioners apparently do not dispute DNR’s factual determination that it will need to modify quota numbers, bag limits, and season structure based upon data collected during the preceding season on an annual basis.

chapter 14, a process that can take up to 12 to 18 months to adopt a final permanent rule. Minn. Stat. § 97A.0458 (2010); *see also* RA 2, 7-8. There is no dispute that the emergency rulemaking statute is clear and unambiguous in its requirement that the process may only be used one time, followed by permanent rulemaking. *See Am. Family Ins. Grp v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000) (“When interpreting a statute, we first [determine] whether the statute’s language, on its face, is clear and unambiguous”).

As DNR’s emergency-conditions statement explains, under ordinary conditions, this makes emergency rulemaking fundamentally incompatible with the agency’s needs when it is setting hunting seasons. (AR 64; RA 2-3.) To achieve appropriate and effective continuing management of wildlife populations, DNR must gather and evaluate data and potentially change quota numbers, bag limits, and season structure every year—a process that is simply impossible within the timeline required for standard APA rulemaking processes.⁶ (RA 2-3, 6-8, 32.) Emergency rulemaking can, by design, offer only a one-year reprieve from this timeline (*see* Minn. Stat. § 97A.0458); as a result, hunting seasons for many species that DNR manages invariably create a “condition ... that do[es] not allow the commissioner to comply with sections 97A.0451

⁶ If Petitioners’ argument was correct, this would leave DNR in an impossible situation: 1) establishing annual hunting seasons via emergency rulemaking violates Minn. Stat. § 97A.0458; 2) establishing them via standard APA rulemaking forces DNR to set bag limits and other elements of the rule so many months before the opening of the season without the benefit of up-to-date data that the settings for those elements could only be arbitrary and capricious; and 3) establishing the seasons via expedited rulemaking gives rise to Petitioners’ claim that there are no “conditions” justifying expedited processes. This is the basic reason expedited rulemaking was created in the first place.

to 97A.0459.” Minn. Stat. § 84.027, subd. 13(b) (2010). This is why DNR’s rules governing many (but not all) hunting seasons—seasons for deer, for elk, for bear, and other select species—for the past seventeen years have been adopted, by necessity, under expedited processes. (RA 11, 32.)

Petitioners respond to this point by declaring that DNR should, indeed must, read the emergency-rulemaking statutes in a manner that simply ignores section 97A.0458’s 360-day limit. (*See* Pet. Br. 11.) They suggest that, in flagrant disregard of the statute’s command that “emergency rules may not be continued in effect after 360 days without following” standard APA rulemaking procedure, DNR should continue their hunting-season rules in permanent effect by adopting them via emergency rulemaking year after year after year. (Pet. Br. 11) That would include the not uncommon occurrence of rules that DNR determines, after gathering and studying the annual data, do not need to be changed the following year. *Compare, e.g.*, 37 SR 256 (Aug. 13, 2012) and 36 SR 117 (Aug. 15, 2011) (expedited rule part 6232.0350 setting special restrictions for taking deer in certain permit areas remained unchanged from 2011 to 2012). That approach is *precisely* what the 360-day limit in section 97A.0458 bars: under that statute, “emergency rules *may not be continued in effect*” after 360 days have elapsed without the use of APA permanent rulemaking procedures. Using emergency rulemaking to create a wolf season (or any other hunting season) over and over again *is* “continu[ing]” “emergency rules ... in effect” after the first 360 days, a practice that the statute

specifically bans.⁷ The very purpose of section 97A.0458 is to ensure that the emergency rulemaking process is a “stop gap” one-year-only remedy for true emergencies, one to be followed *only* by standard APA rulemaking.⁸ The solution Petitioners offer to the problem identified in the Expedited Condition pretends that this explicit command does not exist, thus deleting the core requirement of section 97A.0458. The requirements of a statute must be considered within the context of the entire act or provision and considered with sections of a statute that relate to the same subject matter. *A.A.A. v. Minn. Dep’t of Human Serv.*, 818 N.W.2d 552, 556 (Minn. Ct App. 2012). There is no basis in law for the approach offered by Petitioners which ignores the limitations found in the very rulemaking process they suggest is applicable.

⁷ DNR notes that such a practice would all but certainly result in a lawsuit against the agency for violating section 97A.0458. Again, Petitioners’ legal theory places DNR in an impossible position in which it is not legally permitted to engage in hunting-season rulemaking by any means at all.

⁸ Petitioners question why the Legislature would give DNR emergency rulemaking authority for hunting rules if DNR is otherwise barred from using the process due to its need for annual modification. (Pet. Br. 12.) The answer to Petitioner’s question is clear. First, the emergency rulemaking process is not limited to hunting but is available for any resource whose management is governed by Minn. Stat. chs. 97A, 97B, and 97C. Minn. Stat. § 87.027, subd. 13(1)(1) (2010). Second, while infrequent, DNR has had the need to adopt emergency rules. An example of DNR’s use of the emergency rulemaking process as a “stop gap” measure, followed by permanent rulemaking, was the promulgation of emergency rules in June 1999 to close Crawford Lake in Wright County and Mountain Lake in Cottonwood County to possession of fish to address harmful exotic species infestations. *See* 23 SR 1865-66 (March 22, 1999) (emergency rules adopted). These emergency rules were then proposed as and made permanent under Minn. Stat. ch. 14. 24 SR 1308-10 (March 20, 2000) (proposed permanent rules); 24 SR 1849 (June 19, 2000) (permanent rules adopted). *See also* 28 SR 1454-60 (May 17, 2004) (proposed emergency rules identifying prohibited exotic species and designated infested waters); 29 SR 135 (Aug. 2, 2004)(adopting those emergency rules).

At the same time that Petitioners pretend that the 360-day limit in section 97A.0458 is meaningless verbiage that can be evaded simply by calling the continuation of a year-old emergency rule “a new emergency rule,” they also attempt to insert new provisions of Petitioners’ own creation into the statute governing expedited rulemaking. According to Petitioners, it is, for some reason, “[un]lawful for the DNR to routinely use the expedited emergency process.” (Pet. Br. 11 (emphasis in original).) They cite no legal authority for this surprising contention. There is nothing in Minnesota law that so much as hints that DNR is barred from utilizing the expedited procedures provided in Minn. Stat. § 84.027, subd. 13 (2010) “routinely.” State law contains no limitation whatsoever on repeated use of those procedures; to the contrary, they are available at any and every point at which “conditions exist that do not allow the commissioner to comply with” the stringent restrictions state law places on DNR’s emergency rulemaking ability. Minn. Stat. § 84.027, subd. 13(b) (2010). If the “conditions” in question *routinely* arise—and, according to DNR’s findings of fact, in the current context of hunting-season regulation *they do*—then section 84.027 demonstrably does license routine use of expedited rulemaking. Petitioners appear to be troubled by the terms of Minnesota law on this point, but they have cited, and can cite, no legal authority that calls those terms into question.

State law bars the “routine” and repeated use of *emergency* rulemaking, *not* expedited rulemaking. Petitioners’ legal theory requires them to deny the plain meaning of state law on *both* emergency and expedited rules by deleting a key provision from

section 97A.0458 at the same time they insert a new one into section 84.027. Consequently, on this basis alone their Petition should be denied.⁹

Petitioners attempt to avoid the flaw in their reading of the applicable statutes by arguing that this Court should be swayed to grant their Petition because there is no formal notice and comment period provided in the expedited rulemaking process. (Pet. Br. 7-9, 14-18.) Petitioners' argument fails at the outset because whether or not a formal notice and comment period in the manner set forth for emergency rulemaking is preferable does not control which rulemaking process is applicable here. *See* Minn. Stat. § 645.16 (2010) (when the words of a statute are clear, "the letter of the law shall not be disregarded under the pretext of pursuing the spirit"); *see also Anoka-Hennepin Edu. Ass'n v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 305 N.W.2d 326, 329 (Minn. 1981) ("[N]o room for judicial construction exists when the statute speaks for itself"). As DNR has

⁹ Petitioners assert that DNR could have undertaken and completed the emergency rulemaking process before the beginning of the 2012 wolf season. (Pet. Br. 9-10.) DNR has never taken the position that it undertook expedited rulemaking for the 2012 wolf season because of a lack of time to comply with emergency rulemaking requirements. Nevertheless, Petitioners' claim that "DNR had time to comply" with emergency rulemaking is pure speculation. (Pet. Br. 9.) To support this claim, Petitioners merely add the statutorily-specified time periods (25-day comment period, 10-day attorney general review, 5-day wait after publication) without considering other factors inherent in emergency rulemaking. (Pet. Br. 10.) These include the requirement to have the rule draft completed for publication *before* soliciting public comment (here, the draft rule was completed in July 2012 (RA 9)), the time needed to give serious consideration to comments received, and publication of the final rule in time to implement the license lottery and prepare and publish the wolf season handbook. Minn. Stat. § 97A.0452 (2010); Minn. Stat. § 97A.051 (2010) (DNR required to publish summary of hunting laws and rules); RA 33. Even using the expedited rulemaking process, DNR considered it a "significant challenge ... to have everything needed in place and fully functional" before the beginning of the 2012 wolf season. (RA 33.)

demonstrated above, the expedited rulemaking process is applicable due to the need for annual rule modification based upon data collected during the preceding harvest season or seasons.

Notwithstanding this undeniable conclusion, DNR notes that the Legislature recognized that public comment would be desirable for purposes of developing the wolf season rules and expressly stated in 2011 that DNR solicit public comment prior to implementing such a season.¹⁰ Minn. Stat. § 97B.645, subd. 9 (2011 Supp. & 2010); 2011 Minn. Laws 1st Sp. Sess. ch. 2, art. 5, § 1. And DNR did just that by implementing its online survey that provided the public with a forum to provide whatever comments they desired. (RA 30.) While Petitioners lament a lack of a “meaningful opportunity” for public comment, there were over 7,300 participants in DNR’s online survey, of which 4,808 provided written comment, one of the largest responses DNR has seen to a proposal from the DNR Section of Wildlife Management. (RA 31; *see* AR 121-336, 343-419.) Petitioners took full advantage of this comment period, encouraging their membership to provide comment, noting, “[p]articipating is incredibly easy.” (AR 72-74, 83-84, 428.) DNR also received and accepted hundreds of emails, telephone calls, and letters from the public and public organizations regarding their thoughts on the proposed 2012 wolf season. (RA 31; AR 509-555, 776-830.) The comments received by DNR led to several changes to the rules as they were developed. (AR 420, RA 31.)

¹⁰ This statutory language would be superfluous if permanent or emergency rulemaking was presumed by the Legislature to be the proper procedure to implement the 2012 wolf season as the public comment period is inherent in those two processes.

DNR agrees that its public comment does not somehow transform the expedited rulemaking process into a legal substitute for the emergency rulemaking process. It was never intended to do so. Rather, DNR solicited public comment prior to implementation of the 2012 wolf season to comply with the specific direction of the Legislature. The process DNR did use provided the public with an opportunity to comment; the public took advantage of the opportunity; and DNR received significant input in its rulemaking due to this public opportunity. Consequently, Petitioners' inference that there was a lack of public participation in the 2012 wolf season rulemaking process is without merit.¹¹

II. THE EXISTENCE OF CONDITIONS IS A FACT ISSUE.

DNR's finding regarding the "exist[ence]" of "conditions ... that do not allow the commissioner to comply with sections 97A.0451 to 97A.0459" is entirely concerned with the facts inherent in the practice of regulating hunting seasons. This Court reviews

¹¹ To the extent this Court believes the statutory provisions governing the expedited and the emergency rulemaking processes, and their interrelationship, are ambiguous, Minnesota caselaw has recognized that an agency's interpretation of an ambiguous statute may be upheld where 1) the statutory language is technical in nature; and 2) the agency's interpretation is one of longstanding application. *In the Matter of a Petition by Excelsior Energy, Inc.*, 782 N.W.2d 282, 289 (Minn. Ct. App. 2010). In the instant matter, the emergency and expedited rulemaking processes are unique to DNR and the determination as to which process is applicable is based upon DNR's technical determination whether annual adjustments will be necessary. In addition, it is undisputed that DNR has been interpreting and implementing its rulemaking authority in the present manner since the expedited and emergency rulemaking processes were first given to the agency in 1995. (RA 8 ("DNR has used the expedited rulemaking process since 1995 for the topics listed in Minnesota Statutes, section 84.027, subdivision 13, for species of animals that require annual modification to the existing rules").) Therefore, if found ambiguous, this Court should give deference to DNR's interpretation. *See also Work Connection, Inc. v. Q. Bui*, 749 N.W.2d 63, 69-70 (Minn. Ct. App. 2009); *In re Kleven*, 736 N.W.2d 707, 709 (Minn. Ct. App. 2007).

agencies' factual findings within rulemaking proceedings on an arbitrary-and-capricious standard. *Manufactured Housing*, 347 N.W.2d at 244. The finding at issue here states:

The emergency conditions that do not allow compliance with *Minnesota Statutes*, sections 97A.0451 to 97A.0459, are that quota numbers, bag limits, and season structure are developed on an annual basis so that the harvest and populations can be managed sustainably.

(Expediting Conditions.) The only specifically *legal* element of this explanation is the premise that Minn. Stat. § 97A.0458 does not allow an agency to use emergency rulemaking to continue rules in effect year after year after year—but that premise is indisputable, despite Petitioners' statute-revising insistence to the contrary. The actual substance of DNR's Expediting Condition finding is that responsible management of a wolf hunting and trapping season requires the regulatory agency to be able to review and potentially change quota numbers, bag limits, and season structure every year. (*See Expediting Conditions.*) Petitioners apparently do not dispute that finding. And that conclusion is a finding of *fact*, not law, which is not arbitrary and capricious. As a result, this Court should hold that conditions rendering emergency rulemaking inapposite are factually sufficient.

CONCLUSION

Based upon the foregoing, DNR asks this Court to deny the Petition for Declaratory Judgment and affirm the 2012 wolf season rules.

Dated: December 3, 2012

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. Iverson', written over a horizontal line.

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