STATE OF MINNESOTA

IN COURT OF APPEALS

Court File No. A12-1680

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' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

Petitioners make the extraordinary and unprecedented request that the Minnesota Court of Appeals issue a preliminary injunction in the instant case. Because no law empowers this Court to issue an injunction or to give Petitioners any similar preliminary relief in this case, in which Petitioners are unlikely to prevail on the merits in any event, the motion should be denied.

FACTS

The eastern timber wolf, or gray wolf, was first placed under federal protection by the Endangered Species Act ("ESA") in 1974. (Affidavit of Daniel W. Stark ("Stark Aff.") at ¶ 3.) At that time, Minnesota had the only viable wolf population in the lower 48 states. (*Id.*) In 1978, the wolf was relisted under the ESA as endangered in the lower 48 states, except for the Minnesota population, which was reclassified as threatened.

(*Id.*) Under the ESA, the U.S. Fish and Wildlife Service ("USFWS") developed the Wolf Recovery Plan in 1978, and revised the Plan in 1992 ("1992 Recovery Plan"). (*Id.* at ¶ 4.) The 1992 Recovery Plan set the population goal of 1,251 to 1,400 wolves in Minnesota to ensure the survival of the wolf within the state. (*Id.*)

After the wolf was given full protection under the ESA, the federal government and the State of Minnesota, Department of Natural Resources ("DNR"), managed the state's wolf population with the primary objective of enhancing the populations in Minnesota and re-establishing a viable population in both Wisconsin and Michigan. (*See* 2001 Minnesota Wolf Management Plan, attached to Petitioners' Declaration of Collette L. Adkins Giese ("Giese Decl.") at Ex. A-10.) The wolf population in Minnesota reached the recovery goal of 1,251 to 1,400 wolves by approximately 1989, and in Wisconsin and Michigan shortly thereafter. (Giese Decl. Ex. A-3; Stark Aff. ¶ 5.) By the mid-1990s, the Minnesota wolf population had reached a number that was nearly double the 1992 Recovery Plan's objective of 1,251 to 1,400 wolves. (Stark Aff. ¶ 5.)

As the requirements of the Recovery Plan were being, DNR began to develop a Minnesota wolf management plan in 1998. (*Id.* at ¶ 6.) DNR obtained extensive public input through public information meetings and wolf management "Roundtables" comprised of representatives of many interested groups. (*Id.*) In 2000, the Minnesota Legislature passed a wolf management bill that incorporated many of the Roundtable recommendations. 2000 Minn. Laws ch. 463; Stark Aff. ¶ 6. As authorized by the Legislature, DNR adopted the Minnesota Wolf Management Plan in 2001. (*See* Giese Decl. Ex. A.) 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." (Giese Decl. Ex. A-10.)

Because the wolf had met and exceeded the recovery goals set forth in the 1992 Recovery Plan, the USFWS made attempts to delist the wolf in 2003, 2007, and 2009. (Stark Aff. at ¶ 8; Affidavit of John D. Erb ("Erb Aff.") at ¶ 4.) However, each attempt to delist the wolf was vacated as a result of legal action taken against the USFWS. (*Id.*) Consequently, on March 15, 2010, the Minnesota DNR petitioned the USFWS to delist the wolf in Minnesota. (Stark Aff. ¶ 11.) The USFWS accepted DNR's petition on September 14, 2010, and removed the wolf from the list of threatened and endangered species on December 28, 2011. 76 Fed. Reg. 81666 (Dec. 28, 2011); Stark Aff. ¶¶ 11-12. The delisting regulation became effective January 27, 2012, at which time the wolf came under the management of the State of Minnesota. (*Id.* at ¶ 12.)

DNR first 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. (Affidavit of Steve Merchant ("Merchant Aff.") at ¶ 2.) In the 2011 legislative session, the Minnesota Legislature provided DNR with the authority to prescribe open seasons and restrictions for the taking of gray wolves, but mandated that DNR "must provide opportunity for public comment." Minn. Stat. § 97B.645, subd. 9 (2010); Merchant Aff. at ¶ 5. Consequently, after the wolf was delisted, DNR began discussions regarding how to provide the public the opportunity for input on rules regarding the state hunt. (Merchant Aff. ¶ 6.) 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 input than public meetings; therefore, DNR chose to utilize an online format for public comment. (*Id.*)

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 in the 2012 session. (*Id.* at ¶ 3.) The bill was ultimately passed and signed into law by Governor Dayton on May 3, 2012. (*Id.* at ¶ 4.) The law established the opening day for the wolf season as the first day of the firearm deer season, gave DNR the authority to prescribe open seasons for wolves, established quotas, designated areas where wolves may be taken, established possession limits, limited the number of hunters and trappers that can take wolves, and prescribed an application and fee structure for a wolf hunting and trapping season. (*Id*. at ¶ 4.)

Upon enactment of the statute, DNR began development of a rule to implement a 2012 wolf season. (Affidavit of Elizabeth P. Carlson ("Carlson Aff.") at ¶ 12.) As it does for 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 (2010). (Carlson Aff. ¶¶ 9-11; Merchant Aff. ¶ 13; Abraham Aff. ¶¶ 3-6.) On May 21, 2012, DNR issued a press release proposing a wolf season for the fall of 2012, and announcing that public comments would be taken online. (*See* Giese Decl. Ex. C-1.) The online questionnaire consisted of ten questions, and participants were provided an opportunity to add comments at the end of the questionnaire. (Merchant Aff. ¶ 8.) The comment period closed on June 20, 2012. (*See* Giese Decl. Ex. F-1.) A total of 7,351 persons participated in the survey, and DNR received 4,808 written comments. (*Id.*) This was one of the largest responses DNR had ever received to a proposed game rule. (*Id*. at ¶ 9.) The information gathered through the public input process informed DNR's wolf rule development, resulting in a number of substantive changes. (*Id.* at ¶ 10.) DNR issued a press release on July 12, 2012, announcing that the agency had finalized the rules for the 2012 wolf season. (*See* Giese Decl. Ex. F.) The rule was then published in the State Register on August 20, 2012. 37 SR 279-282 (August 20, 2012); Carlson Aff. ¶ 13.

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. (*Id.* at ¶ 14.) Therefore, applications for wolf permits were made available online upon the effective date of the rule. DNR received 23,433 wolf season applications by the September 6, 2012, deadline. (*Id.* at ¶ 17.) A total of 6,000 hunters and trappers were chosen, and the applicants were able to check the DNR website beginning September 26, 2012, to determine if they were successful. (*Id.* at ¶ 21.) A wolf regulation booklet has been sent to the printer by DNR and will be mailed to the successful applicants by the opening of the first wolf season on November 3, 2012. (*Id.* at ¶ 22.)

Current data available to DNR indicates that Minnesota's wolf population is more than double the federal recovery goals and estimated to be approximately 3,000 wolves in an estimated 500 packs. (Erb. Aff. ¶¶ 5, 15.) DNR's proposed conservative harvest for the 2012 season is considered to be well within the bounds of sustainability. (*Id.* at ¶ 16.)

DNR's proposed harvest quota of 400 wolves, along with a projected 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 proposed 2012 harvest season is unfounded.

Contrary to Petitioners' assertions that DNR will be unable to measure the effects of the 2012 hunting and trapping season on the state's wolf population, DNR has multiple annual sources of population status data for wolves within the state. (Erb Aff. ¶¶ 6-12.) These annual sources of population status data have an established track record for collectively providing reliable data on wolf population trends. (*Id.* at ¶ 12.) Therefore, assessments of any effects of the 2012 hunting and trapping 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 to evaluate various aspects of the 2012 wolf season in order to make those rule changes necessary to sustainably manage the state's wolf population in the coming years. (Abraham Aff. ¶ 6.)

ARGUMENT

Petitioners' challenge to the wolf-hunt rule is without merit: DNR adopted that rule in a manner entirely consistent with existing statutory authority, after seeking extensive public comment. Implementation of the rule will maintain a sustainable population of gray wolves in Minnesota.

Petitioners here request "that the Court grant an injunction to preserve the status quo." (Petitioners' Motion (hereinafter "P.M.") 1.) They cite no law authorizing this Court to grant (1) an injunction in *any* case or (2) analogous preliminary relief in the instant case. As a result, Petitioners' motion should be denied as beyond the powers state law grants to this Court.

Moreover, even if this Court did have the power to stay enforcement of the DNR rule pending Petitioner's appeal on the merits, Petitioners have not met the general standards this Court applies for such stays; indeed, granting a stay at this point would be tantamount to invalidating the challenged rule, despite the fact that Petitioners are unlikely to prevail on the merits.

I. RESPONDENTS ARE LIKELY TO PREVAIL ON THE MERITS.

Petitioners assert that their likelihood of victory on the merits of this case is relevant to this motion. This notion is heavily dubious, in light of the irrelevance of preliminary injunctions and the related *Dahlberg Bros.* test to appellate proceedings, *see* Part II, *infra*—but regardless, if Petitioners are required to show a likelihood of success on the merits, they cannot succeed. The rulemaking process DNR followed in the case at bar was entirely legal, and the Court is unlikely to find otherwise.

As an initial matter, the notions presented in Petitioners' declarations regarding the danger the upcoming hunt poses to Minnesota's wolf population are unfounded. There are currently approximately 3,000 wolves in 500 packs in the state—more than twice as many as the federal Fish and Wildlife Service determined were necessary to sustain Minnesota's wolf population. (Erb Aff. at ¶¶ 5 and 15.) The hunt will take less than 30% of the number of wolves the state population could withstand losing to human-caused mortality. (*Id.* at ¶ 16.)

On the merits of their motion, Petitioners note that emergency rulemaking processes are governed by Minn. Stat. §§ 97A.0451 - .0459. Pursuant to those statutes, administrative agencies are 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).[1]

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).

[1] Petitioners assert that Minn. Stat. § 84.027, subd. 13(a), provides DNR with such an authorization. (P.M. 8.) As an initial matter, however, it is not clear that that statute constitutes an "*express*[ ]" authorization "to adopt emergency rules," as § 97A.0451, subd. 1, requires—rather than a mere statement of *subject matters* (*see* Minn. Stat. § 84.027, subd. 13(a)(1)) that can be subject to emergency DNR rulemaking when that rulemaking is expressly authorized elsewhere. It is hard to understand how a statute that never uses the word "authorize" or the phrase "emergency rules" could possibly "*expressly* require[ ] or authorize[ ] . . . emergency rules."

As Petitioners note, in the instant matter DNR cited the following as the emergency conditions necessitating expedited rulemaking:

> 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.

(P.M. 10 (quoting Giese Dec. Exh. G-5 (hereinafter "Expediting Conditions")).) In response to this, the DNR factual finding below that is at the center of the instant petition, Petitioners now conclusorily declare that (1) DNR's finding is simply false, and "[n]o such conditions existed" (P.M. 9); (2) the finding is a conclusion of *law* that the Court should review *de novo* (*id.* at 10); and (3) the finding is contradicted by the fact that "DNR had time to comply with" emergency rulemaking proceedings (*id.*). All of these assertions are false; they all simply ignore the nature, content, and statutory context of the above-quoted finding.

A. Conditions Exist That Do Not Allow DNR To Conduct Emergency Rulemaking.

First, there is nothing in the Expediting Conditions that has anything to do with how much "time" "DNR had" to conduct rulemaking. The condition described explicitly references DNR's need to study populations and tweak such matters as "quota numbers, bag limits, and season structure" *on an annual basis*. (*See* Expediting Conditions.) Petitioners have simply missed the fact that this need implicates, and directly conflicts with, the emergency rulemaking process—specifically, with Minn. Stat. § 97A.0458:

> 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). In other words, emergency rulemaking is a one-time approach that can only be continued on a given subject matter for a single year; after that, an agency is limited to the use of the standard Administrative Procedure Act ("APA") rulemaking procedures in Chapter 14. *Id.*

As DNR's emergency-conditions statement explains, this makes emergency rulemaking fundamentally incompatible with the agency's needs when it is setting hunting seasons. To achieve appropriate and effective management of wildlife populations, DNR is forced to evaluate 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 processes. (Abraham Aff. ¶¶ 4-6; Merchant Aff. ¶ 13; Carlson Aff. ¶¶ 8-11.)[2] Emergency rulemaking can, by design, only offer a one-year reprieve

[2] If Petitioners' argument is accepted, this leaves DNR in an impossible situation: (1) establishing 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 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 sufficient "conditions" justifying expedited processes. The potential for such vicious cycles is one of the basic reasons expedited rulemaking was created in the first place.

from this timeline, *see* Minn. Stat. § 97A.0458; as a result, every hunting season for a species that DNR manages necessarily creates a "condition . . . that do[es] not allow the commissioner to comply with sections 97A.0451 to 97A.0459." Minn. Stat. § 84.027, subd. 13(b) (2010). This is why DNR's rules governing *every hunting season*—seasons for deer, for elk, for bear, and for all other species—for the past *seventeen years* have been adopted, by necessity, under expedited processes. (Merchant Aff. ¶ 13; Carlson Aff ¶ 11.)

As a result, Petitioners' statement that "[n]o such conditions" preventing emergency rulemaking "existed" is false to fact; it simply disregards DNR's factual findings regarding the on-the-ground conditions inherent in the agency's regulation of hunting seasons.

B. The Existence Of Conditions Is A Fact Issue.

Finally, Petitioners' assertion that this Court should examine *de novo* 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 false: as is clear from the very nature of the finding in question, it is entirely concerned with the *facts* inherent in the practice of regulating hunting seasons. This Court reviews agencies' factual findings within rulemaking proceedings on an arbitrary-and-capricious standard, not a *de novo* one. *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). And the finding at issue here is entirely factual:

> 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 on the same subject matter year after year after year—but that premise is indisputable. *See* Minn. Stat. § 97A.0458, subd. 1 (2010) ("The emergency rules may not be continued in effect after 360 days without following the procedure of sections 14.14 to 14.28."). The actual substance of DNR's Expediting Condition finding is that responsible management of hunting seasons requires a regulatory agency to be able to review and potentially change quota numbers, bag limits, and season structure every year. (*See* Expediting Conditions.) That conclusion is a finding of *fact*, not law, and it is not arbitrary and capricious. As a result, this Court is unlikely to hold that "conditions" rendering emergency rulemaking inapposite did not "exist."

II. PETITIONERS CITE NO LAW AUTHORIZING THIS COURT TO GRANT AN INJUNCTION UNDER ANY CIRCUMSTANCES.

The Minnesota Court of Appeals was created by Article VI, Section 2 of the Minnesota Constitution:

> The legislature may establish a court of appeals and provide by law for the number of its judges, who shall not be judges of any other court, and its organization and for the review of its decisions by the supreme court. The court of appeals shall have appellate jurisdiction over all courts, except the supreme court, and *other appellate jurisdiction as prescribed by law.*

Minn. Const. art. VI, § 2, ¶ 2 (2010) (emphasis added). Longstanding Minnesota precedent holds that, while the above section grants the Court of Appeals unlimited jurisdiction over lower courts, *Metropolitan Airports Comm'n v. Metropolitan Airports*

Police Fed'n, 443 N.W.2d 519, 523 (Minn. 1989), over *other* matters (such as appeals from agency decisions), the Court only possesses jurisdiction insofar as that jurisdiction is directly provided by law—that is, "by legislative enactment." *Minnesota Public Interest Research Group v. Northern States Power Co.*, 360 N.W.2d 654, 656 (quoting Minn. Const. art. VI, § 2, ¶ 2).

As a result, in order to gain the relief they seek in the petition at bar, Petitioners must cite applicable law—a statute, or at least a rule—providing this Court with the power to order that relief. With regard to the preliminary injunction Petitioners request, this is simply impossible: no statute or rule grants this Court the power to issue an injunction under the current circumstances.

The authorities Petitioners cite on this point are entirely immaterial to this proceeding. Petitioners first cite Minn. R. Civ. Proc. 62.05 (P.M. 6), but that Rule patently does not apply to their petition. Rule 62, on its face, governs "Stay[s] of Proceedings to Enforce a [trial court] Judgment"; there being no trial court judgment in this case, Rule 62 is (and, indeed, the entire Rules of Civil Procedure are) simply irrelevant here. Rule 62.05, in particular, says far less than Petitioners assert:

> *The provisions of Rule 62 do not limit* any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Minn. R. Civ. Proc. 62.05 (2010) (emphasis added). As the first eight words of the above Rule (words Petitioners omitted from their quotation at P.M. 6) explain, the above passage does nothing more than state that *Rule 62* does not *alter* the power this Court possesses to grant preliminary equitable relief. The purpose of Rule 62.05 is merely to clarify that trial-court proceedings pursuant to Rule 62.01 do not affect this court's power to grant preliminary relief of its own in such a case. Again, in light of the fact that this case does not involve a trial court, a judgment, or a stay of that judgment, neither Civil Rule 62 nor the lack-of-limitation stated in Rule 62.05 has any bearing here whatsoever.

Likewise, Petitioners' citation to *Burnsville v. Bloomington*, 264 Minn. 133, 138, 117 N.W.2d 746, 750 (1962) (P.M. 7), is irrelevant, because it (like every other Minnesota decision Respondents are aware of involving injunctions) involves a *trial* court granting or denying a motion for injunction. The state supreme court decided the *Burnsville* case in 1962, twenty years before the creation of the Minnesota Court of Appeals and twenty-two before the amendment to Minn. Stat. § 14.44 that vested this Court with jurisdiction over petitions like the one at bar; as a result, *Burnsville* is not relevant here.

In short, an injunction is simply *not an appellate remedy*: after a lengthy search, Respondents can find no published decision indicating that this Court has ever issued an injunction in its nearly thirty-year history. And unlike the district court decision at issue in *Burnsville*, the instant petition is an appellate proceeding, not a "trial-type" one:

> A preenforcement rule challenge under the APA is initiated by a "petition for a declaratory judgment…, addressed to the court of appeals." The legislature, by a 1984 amendment, directed that the petition be addressed to the court of appeals instead of, as before, to the district court. This change was likely made because it seemed unnecessary to have the district court review the agency's rulemaking record when, on appeal, the court of appeals would be making its own independent review on the same record. *It was also felt that rule review was an appellate function rather*

> *than a trial-type function.* It was further hoped that concentrating review in the court of appeals would provide greater uniformity in reported decisions.
>
> In this context, *the "petition for a declaratory judgment" should be considered in the nature of a writ, somewhat analogous to a petition for a writ of certiorari, whereby the agency's action is brought before the court of appeals for judicial review.*

George A. Beck, *Minnesota Administrative Procedure* 372 § 24.3 (2d ed. 1998) (emphasis added; footnotes omitted); *see also Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 247 (Minn. 1984) (declaratory judgment action "has become, in many ways, 'an all-purpose writ'").

Because injunctions are not relevant here, neither are the legal tests that are applicable to injunctions. Petitioners' analysis of the *Dahlberg Bros.* standards—standards that are, by their very nature, designed to be examined and applied by fact-finding courts, not appellate ones—is immaterial to this proceeding. After another lengthy search, Respondents can find no published record that this Court has ever applied the *Dahlberg Bros.* standards in order to make its own initial decision (as opposed to reviewing a lower-court's prior decision, with facts already found) regarding preliminary equitable relief.

Minnesota law provides this Court with no power to issue injunctions in a case stemming from a Minn. Stat. § 14.44 petition. As a result, Petitioners' motion should be denied.

III. THIS COURT SHOULD NOT GRANT PETITIONERS A STAY IN ENFORCEMENT OF THE RULE.

The appropriate *appellate* remedy Petitioners could have, and presumably should have, requested in the instant motion is not an injunction but a *stay* of enforcement of the DNR rule at issue. However, there is no law granting the Court the power to order such a stay in the instant case.

A. This Court Does Not Have The Power To Grant A Stay Of Proceedings In Minn. Stat. § 14.44 Petitions.

This Court unquestionably has legal authority to issue stays in numerous contexts—one of them being the certiorari procedure that treatise author Beck, quoted above, presents as an instructive analog to petitions under Minn. Stat. § 14.44. *See* Beck, *supra*, at 372 § 24.3 ("[T]he 'petition for a declaratory judgment' should be considered in the nature of a writ, somewhat analogous to a petition for a writ of certiorari, whereby the agency's action is brought before the court of appeals for judicial review.")

Writs of certiorari from agency decisions in contested cases are governed by Minn. Stat. §§ 14.63 - .68 and Minn. R. Civ. App. P. 115. Notably, in that context both statute and rule explicitly empower this Court to stay the agency decision (and/or review the agency's own decision on a motion for stay) pending appeal:

> The filing of the writ of certiorari shall not stay the enforcement of the agency decision; but the agency may do so, *or the Court of Appeals may order a stay upon such terms as it deems proper.*

Minn. Stat. § 14.65 (2010) (emphasis added).

> The agency or body may stay enforcement of the decision in accordance with Rule 108. Application for a supersedeas bond or a stay on other terms must be made in the first instance to the agency or body. *Upon motion, the*

> *Court of Appeals may review the agency's or body's decision on a stay and the terms of any stay.*

Minn. R. Civ. App. P. 115.03, subd. 2(b) (emphasis added).

Likewise, in numerous other contexts, Minnesota Statutes and Minnesota Rules of Civil Appellate Procedure expressly provide this Court with the power to grant stays. *See, e.g.,* Minn. R. Civ. App. P. 108, subd. 1 (stay of trial court judgment or order); Minn. R. Civ. P. 62.03 (stay of execution of judgment or of proceedings to enforce judgment); Minn. Stat. §§ 548.29, subds. 1 and 2, and 548.61 (stay of proceedings pertaining to a foreign judgment); Minn. R. Crim P. 28.02, subd. 6 (stay of execution of criminal judgment or sentence); and Minn. Stat. § 260B.415, subds. 1 and 2, Minn. R. Juv. Del. P. 21.03, subd. 3(A), and Minn. R. Adopt. P. 48.03 (stay of juvenile court judgment or order).

As noted in Part II, above, the Minnesota Constitution only grants this Court appellate jurisdiction over non-court proceedings insofar as that jurisdiction is prescribed "by legislative enactment." *Minnesota Public Interest Research Group*, 360 N.W.2d at 656 (citing Minn. Const. art. VI, § 2, ¶ 2). In that light, it is noteworthy that the statute and appellate rule at issue here, in direct contrast to the statutes and rules cited above, do *not* grant this Court any power to stay proceedings below—that is, to stay enforcement of the challenged administrative rule. Neither Minn. Stat. § 14.44, Minn. R. Civ. App. P. 114, nor any other statute or rule that is applicable to the instant petition vests this Court with the authority to issue a stay in the context of the instant section 14.44 petition.

As a result, it has no such power to grant Petitioners, or any party filing a petition under section 14.44, a stay of enforcement of the challenged administrative rule.[3]

Next, Respondents note that Petitioners have cited no decision, and Respondents are aware of none, in which this Court has ever granted a stay of enforcement of a rule (or, for that matter, granted a preliminary injunction) during proceedings on a Minn. Stat. § 14.44 petition. This absence of precedent is noteworthy in itself: since the 1984 statutory amendment that committed jurisdiction of such cases to the court of appeals, this Court has decided numerous § 14.44 petitions, many of them implicating weighty issues such as basic constitutional rights. *See, e.g., Peterson v. Minnesota Dept. of Labor and Indus.*, 591 N.W.2d 76, 80 (Minn. App. 1999) (Labor and Industry rule did not violate equal-protection rights); *Minnesota League of Credit Unions v. Minnesota Dept. of Commerce*, 467 N.W.2d 42, 48 (Minn. App. 1991), *aff'd* 486 N.W.2d 399 (Minn. 1992) (Commerce rule did not violate free-speech rights). Nonetheless, Respondents can find no record in published decisions that any other § 14.44 petitioner—even the ones who believed that the administrative rules at issue violated their core

[3] It should be noted that the same is likely not true of the Minnesota *Supreme* Court, which possesses *unlimited* appellate jurisdiction pursuant to Article VI, Section 2 of the state constitution. (*See* Minn. Const. art VI, § 2, ¶ 1.) *That* court, as it held in 1946, possesses an inherent "power to stay proceedings pending appeal . . . notwithstanding the statutes may be silent on the matter." *State v. Northern Pacific Ry. Co.*, 221 Minn. 400, 410, 22 N.W.2d 569, 575 (1946). *Northern Pacific* was decided decades before the Minnesota Court of Appeals (with its constitutionally more limited jurisdiction) and Minnesota Rules of Civil Appellate Procedure (which are a declaration by the Supreme Court of the limited manner in which the state judicial branch's "inherent" appellate power is to be exercised) were created; as a result, that decision does not govern this Court's power to issue stays in the absence of authorization in statute or court rule.

constitutional rights—has ever even asked this Court for a stay in enforcement of a challenged administrative rule.

For these reasons, the remedy Petitioners request in this motion is an extraordinary one with no basis in § 14.44 or Rule 114, even though there is nothing extraordinary about the factual or procedural posture of their petition. As a result, Petitioners' request should be denied.

B. Even If This Court Had The Power To Grant Petitioners A Stay, Petitioners Would Have Been Required To Request It From DNR First.

The only precedent Respondents can find that could conceivably support an argument that this Court has the power to grant stays in § 14.44 proceedings is *DRJ, Inc. v. City of St. Paul*, 741 N.W.2d 141, 142-43 (Minn. App. 2007). That case was a certiorari appeal, under Minn. Stat. ch. 606 and Minn. R. Civ. App. P. 115, from a decision the City of St. Paul had made regarding a license held by the relator. *Id.* at 142. Relator requested that the city stay enforcement of its decision pending appeal, but the city denied the request. *Id.* Relator then asked this Court "to 'consider the merits of [the] stay request anew, without deference to' the city council's decision," but the Court refused:

> The appellate rules provide that an agency or governmental body whose decision is subject to certiorari review "may stay enforcement of the decision in accordance with Rule 108," which governs supersedeas bonds and stays. Minn. R. Civ. App. P. 115.03, subd. 2(b). In a certiorari appeal, the "[a]pplication for a supersedeas bond or a stay on other terms must be made in the first instance to the agency or body." *Id.* But a party may seek review of the ruling on a request for a stay pending appeal, or of the terms established by the agency or governmental body, by making a motion to this court for review of that ruling. *Id.*

> Rule 108 applies generally to all appeals and it also requires that a party seeking a stay pending appeal apply "in the first instance to the trial court." Minn. R. Civ. App. P. 108.01, subd. 1; see Minn. R. Civ. App. P. 101.02, subd. 4 (defining "trial court" to include court or agency whose decision is being reviewed). Under rules 108.01 and 115.03, relator was required to make its motion for a stay pending appeal first to the city council, subject to review by motion in this court. Relator insists that it is not seeking "*review* of [respondent's] decision" on the motion for a stay, but is moving this court "in the first instance to issue a stay." But the only authority cited for this request is Minn. Stat. § 14.65 (2006), a provision of the administrative procedures act that (a) has no application to this appeal from a decision by a local governmental body and (b) specifically recognizes the authority of an administrative agency to grant a stay pending a certiorari appeal. Relator's request is inconsistent with the provisions of the cited appellate rules and we reject the invitation to "consider the merits of [the] stay request anew, without deference to" the city council's decision.

DRJ, Inc., 741 N.W.2d at 142-43 (emphasis in original). Thus, at most,[4] Rule 108 provides Petitioners with the right (by reading the Rule's references to "the trial court" as references to DNR) to ask this Court for a stay of proceedings; but in order to do so, Petitioners "*must* move first in [DNR] … [for] a stay of enforcement of the judgment or order of a trial court [i.e., the rule at issue] pending appeal. . . ." Minn. R. Civ. App. P. 108.02, subd. 1 (emphasis added). Petitioners failed to request any such stay from DNR. (Carlson Aff. ¶ 14; Merchant Aff. ¶ 22.) As a result, following the precedent of *DRJ*, the Court should "reject the invitation" to consider Petitioners' request for a stay here.

[4] In the *DRJ* case, the appeal was governed by an appellate rule (Rule 115) that explicitly authorized stays under some conditions. *See* Minn. R. Civ. App. P. 115.03, subd. 2(b). The analogous rule here, Rule 114, contains no such provision. As a result, it is not clear that Petitioners have even as much power as the *DRJ* relator did to ask the Court to "consider the merits of [their] stay request."

C. The Facts Of This Case Do Not Meet the Court's General Standards For Stays.

As noted, this Court has no apparent recorded history of issuing stays, or even of analyzing the question of whether stays *should* be issued, in the context § 14.44 petitions. As a result, if the Court decides that it does have the authority to stay enforcement of the instant DNR rule, it must first determine the appropriate standard to apply to the question.

In the analogous context of motions for stays under Minn. R. Civ. App. P. 108, treatise authors Magnuson, Herr, and Hanson state that Rule 108

> is designed to afford a respondent some measure of the protection or security that would exist, in the absence of a stay, by virtue of the ability to immediately pursue enforcement of the judgment or order. It also provides an appellant protection from enforcement of the judgment or order in the event the lower court's decision is reversed. The rule strikes a balance between the right of a prevailing party to be secure in victory and the right of a party who has lost to preserve the status quo pending appeal.

3 Eric J. Magnuson, David F. Herr, and Sam Hanson, *Appellate Rules Annotated* 421 § 108.1 (2012 ed.) (citing *DRJ*, 741 N.W.2d at 144).

In the instant case, the only supposed infirmity of the Rule that Petitioners have alleged is that DNR followed the expedited rulemaking procedures detailed in Minn. Stat. § 84.027, subd. 13(b) - (g), rather than the emergency procedures described in Minn. Stat. §§ 97A.0451 - .0459. (*See* P.M. 8 ("The sole question presented in the Petition for Declaratory Judgment is whether the DNR violated statutory rulemaking requirements when it issued the Expedited Emergency Wolf Rules.").) As explained in Part I, above, DNR's use of the expedited procedures was well grounded in applicable law—but even presuming the contrary, the only harm Petitioners can relevantly allege here is that the expedited procedures DNR followed in formulating the challenged rule deprived them of some kind of opportunity. The only such deprivation Petitioners suggest—indeed, the only one they conceivably could cite—is that expedited rulemaking does not carry the same requirement for public notice and comment that standard emergency rulemaking does. (*See* P.M. 9 (expedited process "does not require public notice and comment," whereas emergency process "provides for formal public notice and a 25-day written comment period") and 10-11 ("DNR could have provided formal notice in the State Register and opened a 25-day public comment period").)

However, Petitioners ignore the fact that DNR *did* provide public notice and an opportunity for public comment on the challenged rule—as was *mandated* by the statute requiring DNR to open a wolf hunt. Minn. Stat. § 97B.645, subd. 9 (2010) (DNR "may prescribe open seasons and restrictions for taking gray wolves but must provide opportunity for public comment"). In point of fact, DNR obeyed that statutory command; after publishing notice of its rulemaking, the agency *did* solicit and receive thousands of comments from the public regarding its proposed wolf-season rules. (Merchant Aff. ¶¶ 8-9.)

As a result, Petitioners cannot possibly claim to have suffered, or to be about to suffer, any harm that is *relevant* to the alleged infirmity of the rulemaking process here: regardless of what expedited rulemaking does and does not require in general, in *this* case Petitioners in particular would not have gained anything from the emergency procedure that they did not receive from the combination of (1) expedited procedure and (2) § 97B.645 notice and comment. This Court's balancing test for stays of enforcement "provides an appellant protection from enforcement of the judgment or order in the event the lower court's decision is reversed," Magnuson et al., *Appellate Rules Annotated* at 421 § 108.1, but given that Petitioners in this case can cite no relevant harm that the expedited/§ 97B.645 procedure inflicted on them, there is nothing to "protect[ ]" them from.

On the other side of the balancing test, "the right of [the] prevailing party to be secure in victory"—here, DNR's right to enforce the rule it enacted pursuant to sections 84.027, subd. 13, and 97B.645, subd. 9—is directly and entirely at risk. With a hunting season that is scheduled to begin on November 3, 2012, and end on January 31, 2013 (*see* 37 SR 279-282 (August 20, 2012)), a stay of enforcement while proceedings continue in this Court threatens to obliterate the season—and therefore the rule—entirely. As a result, granting injunctive relief to Petitioners here would be tantamount to invalidating the rule entirely, without a hearing on the merits.[5]

Petitioners, having already been afforded all of the notice and opportunity for comment that the procedure they now demand would have provided them anyway, stand to lose nothing relevant if the Court allows the wolf season to proceed while the Court considers Petitioners' petition. Respondents, by contrast, stand to lose the entire wolf

[5] Respondents note that Petitioners have intensified this problem by waiting an extra two months before filing the instant petition; had they challenged the rule in question when it was announced on July 12, 2012 (*see* Giese Dec. ¶ 7 & Dec. F), there could have been enough time for this Court to stay enforcement of the rule, examine the petition on the merits, and then reactivate the wolf season if the petition had been denied. Petitioners' own laches have turned their supposed motion for preliminary injunctive relief into a *de facto* motion for immediate invalidation of the rule.

season they conducted rulemaking (to say nothing of years' worth of previous study and public filings) to establish. In this light, the Court's balancing test for stays of adjudication strongly favors Respondents.

CONCLUSION

For the reasons set forth above, Respondents DNR and Tom Landwehr, in his official capacity as DNR Commissioner, respectfully request that the Court deny Petitioners' Motion for Preliminary Injunction.

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Respectfully submitted,

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