

STATE OF MINNESOTA
IN COURT OF APPEALS

Center for Biological Diversity, Howling for Wolves,	)	
	)	
	)	
Petitioners,	)	MOTION FOR PRELIMINARY INJUNCTION
	)	
vs.	)	
	)	
Minnesota Department of Natural Resources, and	)	
Tom Landwehr, in his official capacity as the	)	COURT OF APPEALS NUMBER:
Commissioner of the Minnesota Department of	)	
Natural Resources,	)	
	)	
Respondents.	)	
_____	)	

Petitioners Center for Biological Diversity and Howling for Wolves (collectively, “Petitioners”) respectfully request that the Court grant an injunction to preserve the status quo pending its decision on the Petition for Declaratory Judgment filed concurrently with this motion. Specifically, Petitioners ask that the Court preliminary enjoin rules unlawfully issued by Respondents Minnesota Department of Natural Resources and its Commissioner, Tom Landwehr (collectively, “the DNR”). These controversial rules – that the DNR issued in violation of statutory rulemaking requirements – open Minnesota’s first-ever sport hunting and trapping seasons for wolves and would irreparably harm Petitioners and their members.

INTRODUCTION

The gray wolf (*Canis lupus*) is a Minnesota icon, symbolic of our wild places, which triggers strong emotional reactions from Minnesotans. Some proclaim that “the only good wolf is a dead wolf” while others oppose any shooting or trapping of wolves. Now, with the recent

removal of federal Endangered Species Act protections from Minnesota wolves, state managers bear the responsibility of deciding under what circumstances wolves can be killed.

Amidst tremendous public controversy surrounding the sport hunting and trapping of Minnesota wolves – and despite specific statutory language directing the DNR Commissioner to provide an opportunity for public comment – the DNR this summer issued the “Adopted Expedited Emergency Game and Fish Rules: 2012 Wolf Season” (hereinafter “the Expedited Emergency Wolf Rules” or “Rules”), without providing formal notice or opportunity for public comment. Instead, the DNR merely opened an anonymous 30-day online survey.

The DNR stated that it adopted the Rules through the expedited emergency process prescribed by Minnesota Statutes § 84.027, subdivision 13(b). But Minnesota law provides that the DNR can use this shortcut under only one circumstance: “If conditions exist that do not allow the commissioner to comply with sections 97A.0451 to 97A.0459. . . .” Minn. Stat. § 84.027, subd. 13(b). The DNR had no valid basis to use the expedited emergency rulemaking process of Minnesota Statutes § 84.027, subdivision 13(b), when no conditions exist that prevent the agency from using the rulemaking process of Minnesota Statutes §§ 97A.0451 to 97A.0459.

Minnesota Statutes §§ 97A.0451 to 97A.0459 provide an emergency rulemaking process with a shortened 25-day public comment period. The agency had time to comply with Minnesota Statutes §§ 97A.0451 to 97A.0459 because, as an initial matter, the agency had no obligation to open the wolf hunting and trapping seasons this year. Moreover, the DNR could have promulgated the Rules through the 25-day formal public comment period of Minnesota Statutes §§ 97A.0451 to 97A.0459 in the same time frame as the agency’s ad hoc 30-day online survey.

Because the DNR failed to follow statutory rulemaking requirements, the Center for Biological Diversity and Howling for Wolves have filed a Petition for Declaratory Judgment pursuant to Minnesota Statutes § 14.44. To preserve the effectiveness of any declaratory judgment that this Court would enter, Petitioners ask this Court to preliminary enjoin the Expedited Emergency Wolf Rules until the Court can issue its decision on the Petition for Declaratory Judgment. Petitioners and their members would be irreparably harmed by the wolf sport hunting and trapping seasons, which will open on November 3, 2012, pursuant to the unlawful Rules.

FACTS

Minnesota's wolves survived the state and federal extermination programs that nearly eradicated wolves from the Lower 48 by the early 1960s. After receiving the protections of the Endangered Species Act in 1978, the remnant population of wolves in northeastern Minnesota began to expand their range in Minnesota and later dispersed into northern Wisconsin and the Upper Peninsula of Michigan.

The 2001 Minnesota Wolf Management Plan has helped guide the recovery of Minnesota wolves, and it also outlines how wolves are to be managed after "delisting," which is the removal of federal Endangered Species Act protections. *See generally* Exhibit A, 2001 Minnesota Wolf Management Plan, attached to Declaration of Adkins Giese ("Adkins Giese Dec."), filed herewith. Negotiated by a team of stakeholder groups and approved by the DNR, the Minnesota Wolf Management Plan provides that upon delisting of Minnesota wolves, landowners can legally kill wolves to protect livestock but that sport hunting and trapping cannot occur until five years after delisting. *Id.* at A-22.

In advance of the delisting of Minnesota wolves, the Minnesota Legislature last summer revoked the Minnesota Wolf Management Plan’s five-year moratorium on sport hunting and trapping wolves, authorizing – but not requiring – the DNR to provide rules for wolf hunting and trapping and requiring that the DNR provide an opportunity for public comment before allowing wolf hunting and trapping. The new law provides that upon delisting of Minnesota wolves, “the commissioner may prescribe open seasons and restrictions for taking wolves but must provide opportunity for public comment.” Minn. Stat. § 97B.645, subd. 9 (emphasis added).

On December 28, 2011, the U.S. Fish and Wildlife Service removed wolves in the Great Lakes states from the federal threatened and endangered species list. 76 Fed. Reg. 81666 (Dec. 28, 2011). That rule became effective on January 27, 2012, and management authority for Minnesota wolves officially turned over to the DNR.

On May 3, 2012, Minnesota Governor Mark Dayton signed House File 2171, the 2012 Game and Fish Omnibus Bill. See Exhibit B, House File 2171, attached to Adkins Giese Dec. As with the legislation passed in the summer of 2011, the Game and Fish Omnibus Bill authorizes – but does not require – the DNR to promulgate rules to implement Minnesota’s first regulated wolf hunting and trapping seasons. Minnesota Session Laws 2012, chapter 277, section 97B.647, subdivision 2, provides that “[t]he commissioner may by rule prescribe the open seasons for wolves according to this subdivision.” Minn. Stat. § 97B.647, subd. 2 (emphasis added). The legislation also provides that the commissioner “may by rule designate areas where wolves may be taken,” “may establish by rule the daily and possession limits for wolves,” “may by rule limit the number of persons that may hunt or trap wolves in an area,” “may by rule set an annual quota for the number of wolves that can be taken by hunting and

trapping,” and “may establish a method to monitor harvest and close the season when the quota is reached.” *Id.* at subd. 3-7 (emphasis added).

On May 21, 2012, the DNR announced by press release a proposal for wolf sport hunting and trapping seasons to start in fall of 2012. The DNR explained that “[g]iven how soon the season must be put in place, the DNR will only take comments through an online survey through June 20.” Exhibit C, DNR Press Release Dated May 21, 2012, attached to Adkins Giese Dec. The 30-day online survey asked participants whether they support a wolf season and about various technical details such as open season dates and zones. Exhibit D, DNR Online Survey, attached to Adkins Giese Dec. The vast majority of survey respondents opposed the wolf hunt: of the 7,351 responses, 1,542 people supported a wolf season, and 5,809 opposed it. Exhibit E, DNR Online Survey Results, attached to Adkins Giese Dec. On July 12, 2012, the DNR announced by press release that it finalized the rules for wolf hunting and trapping. Exhibit F, DNR Press Release Dated July 12, 2012, attached to Adkins Giese Dec.

On August 20, 2012, the rules were published in the State Register, entitled the “Adopted Expedited Emergency Game and Fish Rules: 2012 Wolf Season.” Exhibit G, Expedited Emergency Wolf Rules, attached to Adkins Giese Dec. In the State Register, the DNR gave notice “that the above entitled rules have been adopted through the process prescribed by *Minnesota Statutes*, section 84.027, subdivision 13 (b).” *Id.* at G-5. The DNR further explained that: “[t]he 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.” *Id.* Yet the DNR could have complied with *Minnesota Statutes* §§ 97A.0451 to 97A.0459 by offering a formal 25-day comment period instead of the 30-day online survey.

Because the DNR failed to follow statutory rulemaking requirements, the Center for Biological Diversity and Howling for Wolves have filed a Petition for Declaratory Judgment pursuant to Minnesota Statutes § 14.44. The present motion asks that the Court preliminarily enjoin the Expedited Emergency Wolf Rule to preserve the status quo and the effectiveness of any subsequent judgment that this Court would enter.

The Center for Biological Diversity is a non-profit corporation incorporated in California and headquartered in Tucson, Arizona with field offices throughout the United States, including two offices in Minnesota. The Center works through science, law, and creative media to secure a future for all species, great or small, hovering on the brink of extinction. The Center has about 37,000 members and more than 350,000 online supporters, including over 5,000 members and supporters in Minnesota. The Center and its members are concerned with the conservation of imperiled species, including the wolf.

Howling for Wolves is a Minnesota organization created to be a voice for wild wolves. The organization aims to educate the public about Minnesota's wolf population and let people know how they can take action to keep wild wolves in a self-sustaining existence. It is the mission of Howling for Wolves to educate and motivate the public to speak up and even howl for the Minnesota gray wolf.

ARGUMENT

I. THE COURT SHOULD GRANT PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

Rule 62.05 of the Minnesota Rules of Civil Procedure provides that the appellate court retains the power "to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered." Minn. R. Civ. P. 62.05. Through this motion, Petitioners ask that the Court exercise this power to preliminarily enjoin the Expedited

Emergency Wolf Rules and preserve the status quo and the effectiveness of any declaratory judgment that this Court would enter. *See id.*; *Burnsville v. Bloomington*, 117 N.W.2d 746, 750 (Minn. 1962) (“[I]t is clear that injunctive relief is available as an incident to an action for a declaratory judgment where such action will lie, in order to maintain the status quo, if the facts are such as to warrant it.”).

In determining whether to grant preliminary injunctive relief, courts consider the five *Dahlberg* factors. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn 1965). These five factors are: “(1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief. (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial. (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief. (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal. (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.” *Id.* (internal references omitted).

As explained below, all of these factors favor the issuance of an injunction.

A. Petitioners Are Likely To Prevail On The Merits

The Minnesota Court of Appeals has original jurisdiction over actions challenging that rules were adopted without compliance with statutory rulemaking procedures. Minn. Stat. §§ 14.44-14.55; *see also Coalition of Greater Minn. Cities v. State Pollution Control Agency*, 765 N.W.2d 159, 163 (Minn. Ct. App. 2009) (“This court has original jurisdiction to determine the validity of an agency’s rules . . . under Minn. Stat. § 14.44 (2008).”). The proper mechanism for

such a challenge is through a petition for declaratory judgment under Rule 114 of Minnesota Civil Appellate Procedure. The Center for Biological Diversity and Howling for Wolves filed their Petition for Declaratory Judgment along with this motion.

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 below, the text of the relevant laws governing DNR rulemaking demonstrates that the DNR was required to open a formal public comment period and use the emergency process of Minnesota Statutes §§ 97A.0451 to 97A.0459; the agency violated the law when it used the online survey and expedited emergency process of Minnesota Statutes § 84.027, subdivision 13(b).

Generally, agency rulemaking follows procedures outlined in the Minnesota Administrative Procedure Act, chapter 14. Minn. Stat. § 14.001 et seq. (2012). However, some rules can be adopted through exempt or expedited processes. Here, Minnesota Statutes § 84.027, subdivision 13(a), provides that “[t]he commissioner of natural resources may adopt rules under sections 97A.0451 to 97A.0459 and this subdivision that are authorized under: (1) chapters 97A, 97B, and 97C to set open seasons and areas, to close seasons and areas, to select hunters for areas, to provide for tagging and registration of game and fish . . .” Minn. Stat. § 84.027, subd. 13(a)(1). Because Chapter 97B (specifically, Minnesota Statutes § 97B.645 and Minnesota Session Laws 2012, chapter 277, section 97B.647) authorizes the DNR to set open seasons for wolf hunting and trapping, the DNR may adopt rules through the emergency processes prescribed by Minnesota Statutes §§ 97A.0451 to 97A.0459 and Minnesota Statutes § 84.027, subdivision 13, rather than the general rulemaking procedures of the Minnesota Administrative Procedure Act. *See id.*

Both of these two emergency rulemaking processes are shortcuts when compared to full notice and comment rulemaking under the Minnesota Administrative Procedure Act. But an important distinction exists. The expedited emergency rulemaking process of Minnesota Statutes § 84.027, subdivision 13(b), does not require public notice and comment and can only be used in one exceptional circumstance prescribed by statute. In contrast, the emergency process of Minnesota Statutes §§ 97A.0451 to 97A.0459 provides for formal public notice and a 25-day written comment period and must be used for all other rules authorized under chapters 97A, 97B, and 97C. *See* Minn. Stat. § 97A.0451, subd. 1 (providing that “if the commissioner is expressly required or authorized by statute to adopt emergency rules, the commissioner shall adopt emergency rules in accordance with sections 97A.0451 to 97A.0459”) (emphasis added).

Minnesota Statutes § 84.027, Subdivision 13(b) provides a narrow exception to the requirement to use Minnesota Statutes §§ 97A.0451 to 97A.0459. Minnesota Statutes § 84.027, subdivision 13(b) states: “If conditions exist that do not allow the [DNR] to comply with sections 97A.0451 to 97A.0459 [Emergency Rules Procedure], the [DNR] may adopt a rule under this subdivision [Expedited Emergency Rules Procedure] . . .” Minn. Stat. § 84.027, subd. 13(b) (emphasis added). Here, the key question is whether “conditions exist that do not allow the [DNR] to comply with sections 97A.0451 to 97A.0459” because that is the one and only lawful use of the expedited emergency process of Minnesota Statutes § 84.027, subdivision 13(b). No such conditions existed.

The DNR could have complied with the emergency rulemaking procedure of §§ 97A.0451 to 97A.0459 because the entire process takes approximately 40 days. Sections 97A.0451 to 97A.0459 provide that “the proposed emergency rule must be published with a notice of intent to adopt emergency rules in the State Register” and that “[f]or at least 25 days

after publication the commissioner shall afford all interested persons an opportunity to submit data and views on the proposed emergency rule in writing.” Minn. Stat. § 97A.0452. The rule needs to be submitted to the attorney general for approval, and she must issue her decision within 10 days. Minn. Stat. § 97A.0455. “As soon as practicable, notice of the attorney general’s decision must be published in the State Register and the adopted rule must be published in the manner as provided for adopted rules in section 14.18.” Minn. Stat. § 97A.0457. Then the rule goes into effect five days after approval (and no decision is approval). Minn. Stat. § 97A.0456.

The DNR attempted to justify its use of the expedited emergency process of Minnesota Statutes § 84.027, subdivision 13(b), with the following statement: “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.” Exhibit G, Expedited Emergency Wolf Rules, attached to Adkins Giese Dec., at G-5. The Court should review *de novo* the agency’s conclusion as to whether conditions exist to justify use of the expedited emergency rulemaking process. *See Jewish Cmty. Action v. Comm’r of Pub. Safety*, 657 N.W.2d 604, 608 (Minn. Ct. App. 2003) (“[T]he existence of good cause for purposes of exempt rulemaking under Minnesota administrative law is a question of law. This court reviews an agency’s conclusions of law *de novo*.”). Applying the *de novo* standard, the Court is likely to hold that the DNR wrongly concluded that it could not comply with Minnesota Statutes §§ 97A.0451 to 97A.0459.

The DNR had time to comply with §§ 97A.0451 to 97A.0459. Instead of issuing a press release and opening a 30-day online survey, the DNR could have provided formal notice in the State Register and opened a 25-day public comment period. The lawful method prescribed by

statute would have taken about the same amount of time as the ad hoc process using the online survey that the DNR made up.

Moreover, and most importantly, neither of the statutes that authorized the DNR to open wolf hunting and trapping seasons required that the DNR exercise that authority this year. The DNR could have proposed to start the seasons in the fall of 2013 (or later) and allowed the public to fully participate in this highly controversial rulemaking through formal public notice and comment. Specifically, the authority for the wolf hunt that the Minnesota Legislature passed in summer of 2011, Minnesota Statutes § 97B.645, subdivision 9, provides that upon delisting of Minnesota wolves, “the commissioner may prescribe open seasons and restrictions for taking wolves but must provide opportunity for public comment.” Minn. Stat. § 97B.645, subd. 9 (emphasis added). And Minnesota Session Laws 2012, chapter 277, section 97B.647, which was passed in May of 2012, states that the “[t]he commissioner may by rule prescribe the open seasons for wolves according to this subdivision”

In short, no statute requires that the DNR open wolf hunting and trapping seasons, and no statute provides what year the seasons should start if the DNR elects to open wolf hunting and trapping seasons. And importantly, the legislation passed in summer of 2011 directs that public comment must be taken: “After [delisting], the commissioner may prescribe open seasons and restrictions for taking wolves but must provide opportunity for public comment.” Minn. Stat. § 97B.645, subd. 9 (emphasis added). As such, the DNR was required to provide an opportunity for public comment consistent with the statutes that govern DNR rulemaking, and as explained above, those statutes make clear that the DNR was required to open a 25-day public comment period pursuant to Minnesota Statutes §§ 97A.0451 to 97A.0459.

The Minnesota Supreme Court has recognized the importance of agency compliance with public notice and comment procedures. *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985) (quoting *New Jersey*, 670 F.2d at 1281). In *Swenson*, the Supreme Court explained that “notice and comment procedures exist for good reason: to ensure that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public.” *Id.*; see also *Jewish Cmty. Action v. Comm’r of Pub. Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003) (“Exempt rulemaking is an exceptional procedure and is reserved for emergencies. It obviates ‘the opportunity to bring to the agency’s attention all relevant aspects of the proposed action and thereby enhance the quality of agency decisions.’ It has a negative impact on the statutory goal of ‘increasing public accountability of administrative agencies.’”) (internal citations omitted).

For these reasons, the Court is likely to conclude that the DNR violated statutory rulemaking procedures. If so, the Court would invalidate the Rules, as Minnesota Statutes § 14.45 provides that “[i]n proceedings under section 14.44, the court shall declare the rule invalid if it finds that it . . . was adopted without compliance with statutory rulemaking procedures.” Minn. Stat. § 14.45; see also *White Bear Lake Care Center, Inc. v. Minnesota Dep’t of Public Welfare*, 319 N.W.2d 7, 9 (Minn. 1982) (“Rules must be adopted in accordance with specific notice and comment procedures established by statute . . . , and the failure to comply with necessary procedures results in invalidity of the rule.”); *In re Application of Orr*, 396 N.W.2d 657, 663 (Minn. Ct. App. 1986) (“Rules adopted without compliance with notice and comment procedures . . . are invalid.”).

Because Petitioners are likely to prevail on the merits, this factor strongly favors the issuance of an injunction. Compare *Metro. Sports Facilities Comm’n v. Minn. Twins P’Ship*,

638 N.W.2d 214, 226 (Minn. Ct. App. 2002) (“But if a plaintiff makes even a doubtful showing as to the likelihood of prevailing on the merits, a district court may consider issuing a temporary injunction to preserve the status quo”).

B. The Relationship Of The Parties Favors An Injunction

The Court should also consider the “nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.” *Dahlberg Bros.*, 137 N.W.2d at 321. In analyzing this factor, courts consider whether the parties have unfair bargaining positions that may require special or equitable relief. *Carlson v. Bloomington Hous. Partners II*, 2006 Minn. App. Unpub. LEXIS 403, *6 (Minn. Ct. App. April 25, 2006) (Exhibit H, attached to Adkins Giese Dec., at H-3).

Although this factor may deserve little weight here because the parties have no preexisting relationship, the Court should consider that the DNR’s refusal to provide formal public notice and comment prevented Petitioners and their members from effectively influencing the DNR’s decisionmaking on wolf hunting and trapping. As the DNR’s Wildlife Management Section Chief explained, the DNR considers its “primary clients” to be hunters and trappers, and its “secondary clients” to be livestock producers. Exhibit I, Wildlife Management Section Chief Email, attached to Adkins Giese Dec. While these special interest groups have a heightened ability to influence the agency, the interests of wildlife advocacy organizations like the Petitioners were brushed aside by the DNR. *See id.* To be sure, the Wildlife Management Section Chief explained that he would have preferred to “delay the season” and that such a “deliberate and conservative approach would be more palatable to those who are uncomfortable with a wolf season” But that he came “to the conclusion that we owe it to our primary clients, hunters and trappers, and to livestock producers as secondary clients, to do what we can

to establish a legitimate harvest opportunity now that the wolf is under our management authority.” *Id.* A public comment period would have helped “level the playing field” and given Petitioners a forum to try to influence the agency through their participation in the rulemaking process.

Under this *Dahlberg* factor, courts also consider whether a “‘belated change in position’ created the controversy between the parties.” *County of Winona v. Winona*, 453 N.W.2d 710, 711 (Minn. Ct. App. 1990). Here, the DNR’s longstanding position has been that sport hunting and trapping would not occur until five years after delisting, and the DNR formally adopted this position with the 2001 Minnesota Wolf Management Plan. This year the DNR abruptly withdrew its support for the five-year moratorium and authorized sport hunting and trapping seasons, despite the fact that the delisting of wolves just occurred in January of 2012.

For both of these reasons, this factor also favors an injunction. An injunction would preserve the status quo and prevent the harms that would flow from the Expedited Emergency Wolf Rules – harms that could have been avoided if the agency would have allowed Petitioners to fully participate in the rulemaking and if the agency would not have belatedly changed its position on the five-year moratorium.

C. The Balance of Harms Favors An Injunction

Courts also consider the “harm to be suffered by the plaintiff if the temporary restraint is denied, as compared to that inflicted on the defendant if the injunction issues pending trial.” *Dahlberg Bros.*, 137 N.W.2d at 321. As such, this factor focuses on the harm Petitioners and their members would suffer if the Rules are implemented, as compared to any harm suffered by the DNR if the Rules are temporarily enjoined.

As explained below, absent an injunction, up to 400 wolves will soon be hunted and trapped in Minnesota. Exhibit G, Expedited Emergency Wolf Rules, attached to Adkins Giese Dec., at G-7. Petitioners and their members enjoy experiencing encounters with wolves and will be injured by the death of wolves. Only an injunction will halt the killing of wolves and prevent irreparable harm to wolves and Petitioners and their members. Because Petitioners will experience irreparable harm, while the DNR would only experience some administrative burden, the balance of the harms favors an injunction.

1. Absent An Injunction, Wolves – A Public Natural Resource – Will Be Irreparably Harmed

As a direct result of the DNR's issuance of the Expedited Emergency Wolf Rules, up to 400 wolves that otherwise would be protected will be killed under licenses issued for the upcoming hunting and trapping seasons. Other than limited exceptions for depredation control and defense of human life, Minnesota law prohibits the killing of wolves without a wolf hunting or trapping license. See Exhibit B, House File 2171, attached to Adkins Giese Dec., at B-21 ("Except as provided under section 97B.645 or 97B.671, a person may not take a wolf without a wolf hunting or wolf trapping license."). But now that the DNR has issued the Expedited Emergency Wolf Rules, up to 6000 licenses will be issued to kill a quota of 400 wolves. Exhibit G, Expedited Emergency Wolf Rules, attached to Adkins Giese Dec., at G-7. Unless the Court enjoins the Rules, wolf deaths are certain and will begin on the opening of the deer firearms season, which is November 3, 2012. *Id.* at G-6.

There will be nothing the Court can do to replace these wolves once the case is ultimately decided on the merits. Environmental injury is a classic example of irreparable harm that favors an injunction. As the Supreme Court has explained: "Environmental injury, by its nature, can

seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.” *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987).

This Court has affirmed an injunction to protect the environment and preserve the status quo. *State by Drabik v. Martz*, 451 N.W.2d 893, 896 (Minn. Ct. App. 1990). In *State by Drabik*, a landowner sought to construct a radio tower on his land, which was surrounded by areas with outdoor recreational and wilderness uses. *Id.* at 894. The Court of Appeals affirmed the district court’s decision to preliminarily enjoin construction of the tower. *Id.* at 898. The Court explained that “economic considerations are not superior to the state’s interest in preservation of these natural resources.” *Id.* at 897.

As in *State by Drabik*, an injunction is necessary here to preserve public natural resources, namely, to prevent the irreversible death of hundreds of wolves.

2. The Killing Of Wolves Will Irreparably Injure Petitioners’ Interests In Wolves

Just as the death of wolves killed by hunters and trappers will be final, the injury suffered by Petitioners and their members as a result of these deaths is irreparable. Petitioners and their members will suffer irreparable injury to their ability to observe wolves and to their aesthetic interests in wolves, which courts have recognized as cognizable interests.¹ Petitioners enjoy observing wild wolves in Minnesota, where wolves will be killed during the sport hunting and trapping seasons. Declaration of Andrea Zickrick ¶¶ 3-5; Declaration of Troy A. Giese ¶¶ 3-6;

¹ Courts have held that irreparable harm occurs when the challenged action reduces opportunities to experience animals in the wild. *See, e.g., Humane Soc’y of the U.S. v. Hodel*, 840 F.2d 45, 52 (D.C. Cir. 1988) (explaining that harm from “depleting the supply of animals” is a “classic” aesthetic interest); *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 222 (D.D.C. 2003) (preliminarily enjoining the killing of swans by the State of Maryland and finding irreparable harm based in part of the plaintiffs’ reduced ability to view swans in their natural environment); *see also Sonenstahl v. L.E.L.S., Inc.*, 372 N.W.2d 1, 4 (Minn. Ct. App. 1985) (“[F]ederal decisions may be persuasive where the Minnesota courts have not addressed a subject.”).

Declaration of John Neeb ¶¶ 3-5; Declaration of Elanne Palcich ¶¶ 3-6; Declaration of Lori Andresen ¶¶ 3-8; Declaration of Karlyn Berg ¶¶ 9-11, 13-15. Petitioners have members that live or own property within or near wolf territories and have regular opportunities to recreate in wolf habitat and see wolves or hear their howls. Andresen Dec. ¶ 7; Palcich Dec. ¶ 4; Zickrick Dec. ¶¶ 3-5; Berg Dec. ¶¶ 9-11, 13-15. Other members travel to areas inhabited by wolves to seek out opportunities to experience wild wolves. Giese Dec. ¶¶ 3-6; Neeb Dec. ¶¶ 3-5; Declaration of Margaret Porwoll ¶¶ 3-4; Declaration of Maureen Hackett ¶¶ 4-5.

More specifically, the DNR's implementation of the Expedited Emergency Wolf Rules threatens Petitioners' interests in observing wolves because, as a result of the hunting and trapping seasons opened by the Rules, Petitioners and their members will have fewer opportunities to observe wolves. *See, e.g.*, Berg Dec. ¶ 20 ("The loss of hundreds of wolves from hunting and trapping will harm my ability to observe Minnesota wolves in the wild on my property and on public lands that I visit."); Palcich Dec. ¶ 9 ("But my chances of observing a wolf during these trips – and my enjoyment of these experiences – will be hurt by the loss of wolves killed during hunting and trapping seasons. These are the very areas where hunters and trappers would have easy access.").

The killing of hundreds of wolves in Minnesota also prevents these wolves from fulfilling their important ecological role as top predators, and Petitioners' enjoyment of recreating in functioning ecosystems would be diminished. *See, e.g.*, Porwoll Dec. ¶ 8 ("Plus, I appreciate that wolves play an important ecological role in the wild areas of Minnesota – controlling overabundant deer populations and increasing biodiversity by reducing deer overgrazing. The death of hundreds of wolves under state management will decrease the ability of wolves to serve as the top predator. This in turn hurts my ability to enjoy functioning ecosystems in Minnesota.").

In addition, Petitioners are injured because the very animals that their members have enjoyed observing in the past could be legally killed or injured during the wolf hunting and trapping seasons. *See, e.g.*, Andresen Dec. ¶ 12 (“I am very concerned that wolves will suffer and die from hunting and trapping, and I am deeply saddened by the thought that some of the very wolves that I have enjoyed observing in the wild could be killed or injured.”); Berg Dec. ¶ 14 (“The distressing losses of wolves that I experienced in the past makes me fear more such losses in the future because of state management, especially sport hunting and trapping.”). For example, Ms. Zickrick regularly observes wolves in the natural areas around her home in northeastern Minnesota, where people regularly hunt and trap. Zickrick Dec. ¶¶ 3-5, 11. She has developed strong emotional attachments with these wolves. *Id.* at ¶ 3. As she explains:

I know that people regularly hunt and trap in the areas where I walk my dogs and have seen wolves. The very wolves that I have seen and grown to respect could be shot or trapped. It is difficult for me to express in words the great sadness and worry that I will feel if the hunting and trapping seasons are allowed to go forward.

Id. at ¶ 11.

Petitioners are further harmed by the possibility that they may actually witness dead wolves or wolves suffering from injuries, including wolves caught in leghold traps. *See, e.g.*, Giese Dec. ¶ 11 (“I am greatly concerned that I could actually observe a dead wolf or a wolf caught in a trap, especially considering that I usually recreate in wolf country with my small children.”); Berg Dec. ¶ 21 (“Despite my pleasure in visiting their habitat and trying to observe wolves, my concern for wolves – and my dread that I may encounter a suffering wolf caught in a inhumane trap – detracts from my enjoyment of these experiences.”).

In addition to harming aesthetic and recreational interests, the use and enjoyment of some members’ property will be irreparably harmed absent an injunction. For example, Ms. Berg lives

in northern Minnesota in part because of the abundant wildlife, and the presence of wolves around her property is very important to her. Berg Dec. ¶ 3 (“Wolves have been my work focus and they are my welcome neighbors. My ability to experience wolves is an important factor in my decision to live in northern Minnesota.”). Because the wolves Ms. Berg has enjoyed observing around her home could be killed or injured absent an injunction, she will experience irreparable harm to her interests in wolves and the use and enjoyment of her property. *Id.* at ¶ 20.

Petitioners’ members would also be injured by the threat of harm to their dogs, which could be caught in traps set for wolves. *See, e.g.*, Neeb Dec. ¶ 9 (“Sometimes I bring my dogs when I go hiking in northeastern Minnesota, and I am frustrated that trappers will be allowed to set traps for wolves near roadways and trails. I fear that one of my dogs could be harmed by a leghold trap and this concern will detract from my enjoyment of these outdoor experiences.”); Palcich Dec. ¶ 14 (“I know that people regularly hunt and trap in the areas near my home where I like to walk. I won’t be able to take my dog out with me to enjoy these areas during the wolf hunting and trapping season. My dog weighs 140 pounds – similar to the size of a wolf.”).

The interests described here are compelling and serve as examples of the breadth and depth of Petitioners’ and their many members’ interests in wolves that will be irreparably harmed by the Expedited Emergency Wolf Rules.

3. Petitioners Have Suffered Procedural Injury From The DNR’s Refusal To Allow Formal Public Notice And Comment On The Expedited Emergency Wolf Rules

In addition to the recreational, aesthetic, and environmental injuries demonstrated above, Petitioners and their members have suffered procedural injury from the DNR’s refusal to allow formal public notice and comment on the Expedited Emergency Wolf Rules. This procedural

injury is significant because statutory rulemaking procedures serve to allow the public to participate in the rulemaking process and help ensure that the agency is fully informed. See *Swenson*, 374 N.W.2d at 702 (Minn. 1985). Courts have repeatedly recognized that procedural injury bolsters the case for a preliminary injunction.²

Some of Petitioners' members participated in the DNR's online survey but believe that their opinions were not considered because the DNR did not provide formal public notice and comment. Giese Dec. ¶ 14; Palcich Dec. ¶ 17; Andresen Dec. ¶ 18; Hackett Dec. ¶ 18. For example, Mr. Giese explains:

I participated in that online survey and I found it frustrating and ineffective. My participation was hampered by the fact that the Minnesota Department of Natural Resources did not include a copy of the proposed rule. Instead, the agency marginalized the public by offering only an online survey, which asked details about the hunting and trapping seasons that presupposed support for them. Without a full opportunity to participate in a public notice and comment period, my opinions were not fully considered by the Minnesota Department of Natural Resources.

Giese Dec. ¶ 14.

Some members refused to participate in the online survey based on a belief that "such a survey is an ineffective exercise merely designed to appear like real public involvement." Berg Dec. ¶ 23. Other members could not participate in the survey at all because they lack access to the Internet and the DNR accepted comment only through the online survey. Zickwick Dec. ¶ 14. As Ms. Zickrick explains:

² See, e.g., *Fund for Animals*, 281 F. Supp. 2d at 222 ("[W]hen combined with the irreparable aesthetic injuries alleged by plaintiffs, such procedural harm does bolster plaintiffs' case for a preliminary injunction."); *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 24 (D.D.C. 2009) ("When a procedural violation . . . is combined with a showing of environmental or aesthetic injury, courts have not hesitated to find a likelihood of irreparable injury."); *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 (D.D.C. 1993) ("Nor can money damages compensate plaintiffs' procedural injury Thus, the injury experienced and threatened would be irreparable.").

It is my understanding that the Minnesota Department of Natural Resources offered only an electronic online survey and would not accept written comments on the wolf hunting and trapping rule. I live in a remote area and I do not have access to the Internet and I could not participate in the agency's electronic online survey. Opening the first-ever wolf hunting and trapping season is a big deal. The agency should have taken all necessary steps to ensure that all members of public – including people like me from remote areas – could have an effective voice in decisions regarding the future of Minnesota wolves.

Id.

The uninformed Expedited Emergency Wolf Rules are the direct result of the DNR's failure to undertake the rulemaking process required by law. The Rules must be enjoined. Otherwise, Rules that are not fully informed by public comment will be implemented and lead to the killing of wolves and harm to Petitioners and their members who enjoy wolves.

For all these reasons, Petitioners have established that they are likely to experience irreparable harm absent an injunction.³ An injunction is necessary to prevent this irreparable harm and preserve the effectiveness of any declaratory judgment that the Court would subsequently enter. See Minn. R. Civ. P. 62.05; *North Star Int'l Trucks, Inc. v. Navistar, Inc.*, 2011 Minn. App. Unpub. LEXIS 19, *22 (Minn. Ct. App. Jan. 4, 2011) ("Minnesota law recognizes that irreparable harm will result where a party's actions may render the relief sought by the other party ineffectual or impossible to grant at the time of trial.") (Exhibit J, attached to Adkins Giese Dec., at J-7).

4. An Injunction Would Not Substantially Injure The DNR

In contrast to the significant, irreparable harm to wolves and Petitioners' interests that will result if the Expedited Emergency Wolf Rules are not enjoined, the DNR will not suffer any substantial injury if this Court temporarily enjoins the Rules until it addresses the Petition for

³ This showing of irreparable harm also demonstrates that Petitioners have standing to challenge the Expedited Emergency Wolf Rules under Minn. Stat. § 14.44.

Declaratory Judgment. A preliminary injunction would require the DNR to stay implementation of the Rules and treat the wolf as a protected species, as the agency has for decades. The DNR would only be maintaining a previous course of conduct, causing little, if any, harm. To be sure, Minnesota courts routinely issue preliminary injunctions to maintain the status quo. *See, e.g., State by Drabik*, 451 N.W.2d at 898.

Depending on when the case is finally resolved on its merits, the DNR may experience some administrative burden if the wolf hunting and trapping seasons are delayed or cancelled, and the agency chooses to refund application and license fees. However, this burden cannot outweigh the irreparable harm that would be suffered by wolves and Petitioners. As the U.S. Supreme Court has explained, when irreparable harm is likely, “the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Amoco Prod. Co.*, 480 U.S. at 545.

Because an injunction would prevent Petitioners’ irreparable harm but would not substantially injure the DNR, this factor strongly favors an injunction.

D. Public Policy Favors An Injunction

Public policy favors an injunction that would prevent implementation of the Rules that have not been fully informed through public comment. Public comment forces an agency to “justify their quasi-legislative rulemaking before an informed and skeptical public.” *Swenson*, 374 N.W.2d at 702. Public comment also provides “the opportunity to bring to the agency’s attention all relevant aspects of the proposed action and thereby enhance the quality of agency decisions,” and it serves the “statutory goal of increasing public accountability of administrative agencies.” *Jewish Cmty. Action*, 657 N.W.2d at 610; *see also* Minn. Stat. § 14.001 (providing

the purposes of the Minnesota Administrative Procedure Act). Informed agency decisionmaking and accountability are important public policy goals that would be favored by an injunction.

Moreover, Minnesota has a strong public policy favoring protection of the environment and preservation of natural resources such as wildlife. The Minnesota Legislature codified this public policy in the Minnesota Environmental Rights Act, which provides that:

The legislature further declares its policy to create and maintain within the state conditions under which human beings and nature can exist in productive harmony in order that present and future generations may enjoy clean air and water, productive land, and other natural resources with which this state has been endowed.

Minn. Stat. § 116B.01; *see also* Minn. Stat. § 97A.025 (“The ownership of wild animals of the state is in the state, in its sovereign capacity for the benefit of all the people of the state.”). Indeed, this Court has repeatedly issued injunctions that favor the public policy of environmental protection. *State by Drabik*, 451 N.W.2d at 897 (affirming an injunction to protect the “state’s interest in preservation of these natural resources”); *County of Winona v. Winona*, 453 N.W.2d 710, 713 (Minn. Ct. App. 1990) (“It is also in the public interest to protect Minnesota’s environment. The granting of a temporary injunction in this case will further those policies.”).

Minnesota has invested more than 30 years in recovering its wolf population. The decision to allow the sport hunting and trapping of these wolves should not be entered into lightly, and certainly, the DNR should be required to comply with all statutory safeguards that help ensure that its decisionmaking adequately protects the state’s natural resources. This factor strongly favors an injunction.

E. An Injunction Would Require Minimal Judicial Supervision Or Enforcement

The last of the five *Dahlberg* factors favors an injunction because no active Court supervision would be necessary if an injunction is issued, and the administrative burdens imposed upon the court would therefore be minimal. *See County of Winona*, 453 N.W.2d at 713.

CONCLUSION

Petitioners respectfully request that the Court grant their motion for a preliminary injunction, enjoining the Expedited Emergency Wolf Rules pending a final decision on the merits of their Petition for Declaratory Judgment. Absent a preliminary injunction, hundreds of wolves would likely be killed by the time the Court issues its decision, causing irreparable environmental injury and harm to Petitioners' demonstrated interests in Minnesota wolves.

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Respectfully submitted,

Collette L. Adkins Giese
(MN Bar No. 035059x)
Staff Attorney
Center for Biological Diversity
P.O. Box 339
Circle Pines, MN 55014-0339
Telephone: (651) 955-3821
Email: cadkinsgiese@biologicaldiversity.org

Attorney for Petitioners