

STATE OF MINNESOTA
IN SUPREME COURT

Center for Biological Diversity, Howling for Wolves,	)	
	)	
	)	
Petitioners,	)	
	)	
vs.	)	EMERGENCY MOTION FOR INJUNCTION OR STAY OF RULES
	)	
Minnesota Department of Natural Resources, and Tom Landwehr, in his official capacity as the Commissioner of the Minnesota Department of Natural Resources,	)	
	)	COURT OF APPEALS NO.: A12-1680
	)	
Respondents.	)	DATE OF FILING OF COURT OF APPEALS DECISION: October 10, 2012
	)	

Petitioners Center for Biological Diversity and Howling for Wolves (collectively, “Petitioners”) respectfully request that the Court grant an emergency order to preserve the status quo pending its decision on the Petition for Review filed concurrently with this motion. Specifically, Petitioners ask that the Court enjoin or stay 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 – start wolf hunting on November 3, 2012 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, the state bears 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 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.0451-0459.

Minnesota Statutes §§ 97A.0451-0459 provide an emergency rulemaking process with a shortened 25-day public comment period. The agency had time to comply with Minnesota Statutes §§ 97A.0451-0459 because, as an initial matter, the legislature merely authorized the hunt and the agency had no obligation to open the wolf hunting and trapping seasons this year or ever. Plus, the DNR could have promulgated the Rules through the 25-day public comment period of Minnesota Statutes §§ 97A.0451-0459 in the same time frame as the agency’s ad hoc 30-day online survey. Moreover, nothing in the statute prevents the DNR from lawfully utilizing the 25-day public comment process each year to issue new emergency rules governing quotas, zones, and other details of the wolf hunt.

To challenge the DNR's violation of statutory rulemaking requirements, the Center for Biological Diversity and Howling for Wolves filed a Petition for Declaratory Judgment before the Court of Appeals pursuant to Minnesota Statutes § 14.44. Petitioners asked the Court of Appeals to preliminary enjoin the Expedited Emergency Wolf Rules pending a decision on the Petition for Declaratory Judgment. On October 10, 2012, the Court of Appeals denied the injunction motion, holding that Petitioners could not show "irreparable harm attributable to the DNR rules, rather than the legislature's decision to authorize wolf hunting and trapping and determine when the firearms season will open." Order, attached to Declaration of Adkins Giese ("Adkins Giese Dec.") at L-3, filed herewith. As explained in the Petition for Review filed with this Motion, the Court of Appeals erred by denying the injunction. Because the legislature did not mandate the hunt, Petitioners' irreparable harm is directly attributable to the DNR's Rules, which open the wolf seasons and set a quota of 400 wolves.

Because the Court of Appeals unlawfully denied the injunction and because Petitioners cannot receive effective relief on their Petition for Review (or their Petition for Declaratory Judgment) absent an order from this Court preserving the status quo, Petitioners ask this Court to enjoin or stay implementation of the Rules. Absent such an order, 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 DNR's unlawful Rules.

FACTS

Minnesota's wolves survived 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 Adkins Giese Dec. 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 lifted 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, but requiring that in the event that the DNR were to promulgate such rules, that it do so only after providing an opportunity for public comment. Specifically, 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 state.

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. The legislation provides that “[t]he commissioner may by rule prescribe the open seasons for wolves according to this subdivision.” 2012 Minn. Laws ch. 277, art. 1, § 65 (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.* (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. Nearly 80 percent 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.*

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 450,000 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

The Supreme Court has the power to enjoin the Rules or issue any other order to preserve the status quo. Rule 62.05 of the Minnesota Rules of Civil Procedure provides that the appellate court retains the power “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. P. 62.05. In addition, Rule 108.03 of the Minnesota Civil Appellate Rules provides that the “Supreme Court may make any order appropriate to preserve the status quo . . . during pendency of review in the Supreme Court.” Minn. Civ. App. R. 108.03. In addition, Minnesota Statutes § 480.04 provides that the Supreme Court “shall have power to issue to all courts of inferior jurisdiction and to all corporations and individuals . . . all other writs and processes, whether especially provided for by statute or not, that are necessary to the execution of the laws and the furtherance of justice.” Minn. Stat. § 480.04.

Through this motion, Petitioners ask that the Court exercise this power to enjoin the Expedited Emergency Wolf Rules and preserve the status quo and the effectiveness of any judgment that would be entered. Otherwise, while this case is pending, the Expedited Emergency Wolf Rules would be implemented, hundreds of wolves would be killed, and Petitioners and their members would be irreparably harmed. Any judgment that this Court or the Court of Appeals would thereafter issue would be largely meaningless, as the harm from the illegal rules would have already occurred. This Court has the power to prevent this result and preserve its judicial function.

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 with the Court of Appeals on September 18, 2012.

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; the agency violated the law when it used the online survey and expedited emergency process of Minnesota Statutes § 84.027, subdivision 13(b).

1. The DNR Had Time To Comply With A 25-day Public Comment Period

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 2012 Minnesota Laws ch. 277, art. 1, § 65 at 97B.647) authorizes the DNR to set open seasons for wolf hunting and trapping, the DNR is not required to use the general rulemaking procedures of the Minnesota Administrative Procedure Act. *See id.*

Both of the available 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.0451-0459 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.0451-0459. 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 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. As explained below, the need for annual modifications cannot excuse shutting out the public and relying on the expedited emergency process.

The DNR had time to comply with the emergency rulemaking procedure of §§ 97A.0451-0459 because the entire process takes approximately 40 days. Sections 97A.0451-0459 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.

In short, the DNR had time to comply with §§ 97A.0451-0459. 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, as the statutes required. 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 at all, or 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, sensitive rulemaking through formal public notice and comment. Again, 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 summary, 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. As such, the DNR had time to comply with the 25-day comment period of the emergency process under Minnesota Statutes §§ 97A.0451-0459.

2. The Only “Condition” That The DNR Identifies As Preventing Compliance With Minnesota Statutes §§ 97A.0451-0459 Is Not A Statutory Requirement

The expedited emergency process must be reserved for true emergencies (*e.g.*, closing a season to respond to a disease outbreak) where the DNR does not have time to comply with the requirement for a 25-day public comment period under the emergency process of Minnesota Statutes §§ 97A.0451-0459. Yet Respondents have explained that “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 . . . under expedited processes.” Exhibit N, DNR’s Response, attached to Adkins Giese Dec. at N-11 (emphasis in original). According to Respondents, it is lawful for the DNR to routinely use the expedited emergency process. If an argument can be oxymoronic, this is it.

Respondents have attempted to justify the DNR’s reliance on the expedited emergency process by arguing that the emergency rulemaking process of Minnesota Statutes §§ 97A.0451-0459 is a “one-time approach that can only be continued on a given subject matter for a single year.” Exhibit N, DNR’s Response, attached to Adkins Giese Dec. at N-10. It is true that any one emergency rule cannot remain in effect after 360 days without permanent rulemaking. Minn. Stat. § 97A.0458. This sunset provision makes good sense, preventing the DNR from creating a de facto permanent rule by indefinitely continuing the same emergency rule. Yet contrary to Respondents’ assertions, nothing in Minnesota Statutes § 97A.0458 provides that once an emergency rule has been issued “on a given subject matter,” new emergency rules covering that subject matter cannot be issued in subsequent years. Each year, the DNR can issue a new emergency rule (making needed changes to quota numbers, bag limits, and season

structure) after complying with the notice and 25-day public comment requirement of Minnesota Statutes § 97A.0458.

As explained above, the legislature directed that the emergency process of Minnesota Statutes §§ 97A.0451-0459 be used for hunting rules, which by necessity involve annual modifications. Specifically, Minnesota Statutes § 84.027, subdivision 13(a), provides:

The 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, to prohibit or allow taking of wild animals to protect a species

Minn. Stat. § 84.027, subd. 13(a). Yet, why would the legislature in Section 84.027 give the DNR authority to issue hunting rules under the emergency process if Section 97A.0458 bars the DNR from using that process? Based on the plain language of the statute, the DNR's interpretation is untenable and must be rejected. *See* Minn. Stat. § 645.16 ("Every law shall be construed, if possible, to give effect to all its provisions."); *Sanchez v. State*, 816 N.W.2d 550, 556 (Minn. 2012) ("An unambiguous statute must be construed according to its plain language.").

The plain language of the statute requires that the Court reject the DNR's interpretation, but if ambiguity can be found, the Court should consider the consequences of the agency interpretation and its impact on the public interest. Minn. Stat. § 645.16(6); *id.* § 645.17(5); *see Lolling v. Midwest Patrol*, 545 N.W.2d 372, 376 (Minn. 1996) (relying on section 645.17(5) in adopting a statutory interpretation that favored the public interest). The DNR's interpretation requires that the expedited emergency process – a shortcut that shuts out the public – become the default for all hunting rules and other rules requiring annual modifications. Indeed, the DNR used the expedited emergency process nearly 200 times since FY 2001 but used the emergency

process just once during that same time period. Exhibit H, Carlson Aff., attached to Adkins Giese Dec. at H-8. The DNR's interpretation derogates the important public interest served by notice and comment rulemaking: to promote informed agency decisionmaking and increased public accountability of administrative agencies. *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985); *Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003). Because the DNR's approach is not supported by the plain language of the statute and has consequences that are contrary to the public interest, the Court should reject it.

Moreover, the courts owe no deference to the agency. Issues of statutory interpretation are conclusions of law that are reviewed *de novo*. *Schmidt ex rel P.M.S. v. Coons*, 818 N.W.2d 523, 526 (Minn. 2012). To be sure, the DNR's decision stems from the legal conclusion that Minnesota Statutes § 97A.0458 prevents the issuance of rules that require such annual modifications. Thus, the Court of Appeals is likely to 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*, 657 N.W.2d at 608 (reviewing *de novo* an agency conclusion on the existence of good cause for the purposes of exempt rulemaking).

In short, the only "condition" that the DNR identifies as preventing compliance with Minnesota Statutes §§ 97A.0451-0459 is not even a statutory requirement. The DNR was therefore required to provide formal notice and an opportunity for public comment under Minnesota Statutes §§ 97A.0451-0459. It is particularly critical that these procedures be followed here, where hunting of wolves is highly controversial, as made evident by the large number of Minnesotans who participated in the online survey – indeed, the vast majority of which (79 percent) opposed the hunt.

For these reasons, the Court of Appeals is likely to conclude that the DNR violated statutory rulemaking procedures when it considers this case on the merits. If so, the Court of Appeals 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.”).

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 I, attached to Adkins Giese Dec. at I-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 J, 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" *Id.* 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 Minnesota Wolf Management Plan. This year the DNR abruptly reneged on its promise of no hunting for five years and opened 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 simply allowed Petitioners and the public to fully participate in the rulemaking and had not abruptly reversed 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 as a direct result of the unlawful Rules. 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. An injunction would halt the killing of wolves and prevent irreparable harm to wolves and Petitioners and their members. Where Petitioners would experience irreparable harm and the DNR would only experience some administrative burden, the balance of the harms tips sharply in favor of 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 appellate courts 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 United States 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); see *State by Drabik v. Martz*, 451 N.W.2d 893, 896-97 (Minn. Ct. App. 1990) (affirming an injunction to protect the environment and preserve the status quo and explaining that “economic considerations are not superior to the state’s interest in preservation of these natural resources”).

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; 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

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.").

wolves killed during hunting and trapping seasons. These are the very areas where hunters and trappers would have easy access.”).

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 is a woman of Native American heritage who 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 and spiritual 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 as a direct result of the DNR's refusal to allow formal public notice and comment on the Expedited Emergency Wolf Rules. Courts have repeatedly recognized that procedural injury bolsters the case for a preliminary injunction.²

Procedural harm arises because several crucial differences exist between the detailed public notice and comment process prescribed by Minnesota Statutes §§ 97A.0451-0459 and the DNR's ad hoc process using a press release and online survey. First, Minnesota Statutes § 97A.0452 mandates that the DNR publish a copy of the proposed emergency rule in the State Register and make the rule available to interested persons prior to opening the comment period. The law states:

The proposed emergency rule must be published with a notice of intent to adopt emergency rules in the State Register, and the same notice must be mailed to all persons registered with the commissioner to receive notice of any rulemaking proceedings. The notice must include a statement advising the public that a free copy of the proposed rule is available on request from the commissioner and that notice of the date of submission of the proposed emergency rule to the attorney general will be mailed to any person requesting to receive the notice. For 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.

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.”).

Minn. Stat. § 97A.0452.

The DNR first published the Expedited Emergency Wolf Rules on the same day they became effective, and the DNR never provided the proposed rules to the public. Exhibit K, Merchant Aff. ¶ 8 (“DNR presented several options on what a hunt could look like, but the agency did not present a draft rule.”), attached to Adkins Giese Dec. at K-5; Exhibit H, Carlson Aff. ¶¶ 12-13 (explaining the DNR’s rulemaking process), attached to Adkins Giese Dec. at H-5 to H-6. Instead of providing notice of the proposed rulemaking by publishing the proposed emergency rules in the State Register, the DNR issued a press release that provided an overview of the agency’s ideas for the wolf seasons. Exhibit C, DNR Press Release Dated May 21, 2012, attached to Adkins Giese Dec. It would be quite a stretch to equate such a press release with formal public notice through publication of a proposed rule in the State Register.

To be sure, the DNR’s failure to provide the proposed rules to the public impaired the ability of Petitioners and their members to meaningfully comment on the rules. *See, e.g.*, Giese Dec. ¶ 14 (“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.”); *see also* Berg Dec. ¶ 23 (“Such a survey is an ineffective exercise merely designed to appear like real public involvement.”). The law requires that proposed rules be published in the State Register so that the public can understand the interests at stake and tailor their comments appropriately. Courts recognize the importance of such notice requirements, and in the context of the federal Administrative Procedure Act, courts will invalidate rules if the notice deprives the public of a meaningful opportunity to respond to the proposal. *See, e.g., Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553, 561-62 (D. Vt.

2005) (invalidating a rule delisting gray wolves for notice violations and summarizing cases invalidating rules on this basis).

In addition to requiring notice of the proposed rules in the State Register, Minnesota Statutes § 97A.0452 requires that the agency provide an opportunity to submit comments on the proposed rules in writing for 25 days. The statute provides: “For 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. While an online survey could provide a helpful additional forum to solicit public input, it lacks several important elements of a formal public comment period and cannot substitute for the processes specified by statute.

Specifically, Minnesota Statutes § 97A.0452 requires that the agency give the public the opportunity to submit comments “in writing.” But the DNR refused to accept comments in writing; the DNR’s press release 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 DNR’s insistence on using online submissions prevented participation by the segment of the public that lacks access to the Internet, including some of Petitioners’ members. Zickwick Dec. ¶ 14 (“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.”). The DNR’s exclusion of these people also violates section 97A.0452’s mandate to provide the opportunity to comment to “all interested persons.” Minn. Stat. § 97A.0452 (emphasis added).

Minnesota Statutes § 97A.0452 also requires that the comment period allow the public to “submit data and views on the proposed emergency rule.” Minn. Stat. § 97A.0452. Yet it was

impossible for the public to comment “on the proposed emergency rule” because, as explained above, the proposed rule was never provided to the public. Moreover, the DNR’s chosen online format impeded the submission of data because it did not allow attachment of scientific studies or other documents with relevant data. Exhibit D, DNR Online Survey, attached to Adkins Giese Dec.

Importantly, a public comment period is designed to give the public an opportunity to shape the agency’s record – and hopefully, inform its rulemaking – by presenting data and viewpoints. *Swenson*, 374 N.W.2d at 702. The public’s opportunity to develop the agency’s record is crucial because challenges to agency rulemaking are made on the record before the agency. *See Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984) (holding that judicial review of rules is confined to the agency’s rulemaking record). The DNR’s online survey impeded such crucial record-building and was no substitute for a formal public comment period under Minn. Stat. § 97A.0452. *See generally* R. Meador, *Challenge to DNR over wolf seasons raises serious issues of policymaking*, MinnPost (Sept. 19, 2012), <http://www.minnpost.com/earth-journal/2012/09/challenge-dnr-over-wolf-seasons-raises-serious-issues-policymaking> (“Let’s be clear: This was not a public-comment process. It was a public-relations exercise.”).

In the numerous ways explained above, the agency’s failure to provide formal notice and opportunity to comment harmed Petitioners and their members.

4. The Irreparable Harm Is Directly Attributable To The Rules

The Court of Appeals denied Petitioners’ motion for an injunction by holding that Petitioners could not show “irreparable harm attributable to the DNR rules, rather than the legislature’s decision to authorize wolf hunting and trapping and determine when the firearms

season will open.” Exhibit L, Order, attached to Adkins Giese Dec. at L-3. But the irreparable harm facing Petitioners flows directly from the DNR’s decisions that were codified in the Rules and not mandated by the legislature. The Rules provide that 400 wolves will be hunted and trapped, and the Rules create open zones across the near entirety of the wolf’s occupied range in Minnesota. The death of these wolves in these areas will cause the irreparable harms asserted by Petitioners, which are directly caused by the Rules.

In denying the injunction, the Court of Appeals also stated that “the statute, rather than the DNR rules, mandates that there be a firearms season that begins on November 3.” *Id.* While the legislature mandated that any wolf season that the DNR might choose to open would begin on the opening of the firearms deer season, the legislature did not require that the DNR open the wolf seasons this year, or ever. The legislature left this key decision to the discretion of the wildlife agency. The DNR could have followed the wolf management plan and delayed hunting for five years after delisting. Indeed, the DNR had many choices that could have prevented the asserted harms, including setting a lower quota or restricting hunting to a small area of the wolf’s range. *Compare Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373-74 (Minn. 2008) (explaining that an intervening voluntary act severs the chain of causation). Therefore, the irreparable harm facing Petitioners is attributable to the DNR’s voluntary decision to go forward with the hunt, set the quota of 400 wolves, and issue the unlawful Rules in violation of statutory rulemaking requirements.

For all these reasons, Petitioners have established that they are likely to experience irreparable harm caused by the Rules.³ An injunction is necessary to prevent this irreparable

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

harm and preserve the effectiveness of any 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 M, attached to Adkins Giese Dec. at M-7).

5. An Injunction Would Not Substantially Injure The DNR

In contrast to the significant, irreparable harm to wolves and Petitioners 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. 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.

The DNR may experience some administrative burden if the wolf hunting and trapping seasons are delayed, 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 United States 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 unlawful Rules that have not been fully informed through public comment. Public comment helps 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.” *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, the Minnesota courts have repeatedly issued injunctions that favor the public policy of environmental protection. *See, e.g., 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 judicial supervision would be necessary if an injunction is issued, and the administrative burdens imposed would therefore be minimal. *See County of Winona*, 453 N.W.2d at 713.

For all the reasons explained above, the Court should grant the motion for an emergency injunction.

II. ALTERNATIVELY, THE COURT SHOULD STAY IMPLEMENTATION OF THE RULES

As an alternative to an injunction, the Court could stay implementation of the Rules to preserve the status quo and the effectiveness of any judgment. *See* Minn. R. Civ. P. 62.05 (power of Supreme Court to issue orders to preserve status quo and the effectiveness of its judgments); Minn. Civ. App. R. 108.03 (similar); Minn. Stat. § 480.04 (similar). The Supreme Court has previously exercised this inherent power in the context of issuing stays. *See, e.g., Minneapolis Fed’n of Teachers v. Obermeyer*, 144 N.W.2d 789, 790 (Minn. 1966) (staying proceedings of a labor conciliator “[u]nder the discretionary power inherent in this court as

codified in §§ 480.04 and 480.05 and Rule 62.05”); see *State and Port Auth. of St. Paul v. Northern Pac. Ry. Co.*, 22 N.W.2d 569, 575 (Minn. 1946) (“[T]he power to stay proceedings pending appeal is inherent in the courts and exists notwithstanding the statutes may be silent on the matter.”).

In determining whether to grant a stay, the Court weighs the potential harm from granting a stay against the potential harm from denying the stay. *Minneapolis Fed’n of Teachers*, 144 N.W.2d at 79 (“[W]e are of the opinion that the potential harm which might result from revoking the stay far outweighs that which is likely if it is now extended until a decision on the merits has been handed down.”).

Applying this balancing test here shows that a stay is warranted. As explained above, absent a stay or other order preserving the status quo, the Rules will cause irreparable harm to wolves and Petitioners’ interests in wolves. But if a stay is granted, Respondents would merely continue to treat wolves as a protected species, which the agency has done for decades. The administrative burden of delaying the hunt cannot outweigh the significant irreparable harm facing Petitioners and their members if the unlawful Rules are implemented and hundreds of wolves are killed.

To summarize, the Expedited Emergency Wolf Rules are the product of the DNR’s failure to undertake the rulemaking process required by law. If not enjoined or stayed by November 3, 2012, Rules that are not informed by meaningful public comment will be implemented and lead to the killing of wolves and irreparable harm to Petitioners and their members. The Court should enjoin or stay the Rules to prevent such irreparable harm and preserve the effectiveness of any judgment to be subsequently entered.

CONCLUSION

Petitioners respectfully request that the Court grant their emergency motion for an injunction or stay of the Expedited Emergency Wolf Rules pending this Court's resolution of their Petition for Review. Absent an ordering preserving the status quo, 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,

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