STATE OF MINNESOTA

IN SUPREME COURT

Court File No. A12-1680

Center for Biological Diversity, Howling for Wolves,

Petitioners,

vs.

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

Respondents.

RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' EMERGENCY MOTION FOR INJUNCTION OR STAY OF RULES

Petitioners request that the Court issue a stay of enforcement (which they relabel a "preliminary injunction") in the instant case. Because Petitioners' request fails to meet either the relevant criteria for requests for stays or the mandatory conditions imposed on such requests by the Rules of Civil Appellate Procedure, the motion should be denied.

FACTS

The eastern timber wolf, or gray wolf, was first placed under the protection of the federal Endangered Species Act ("the ESA") in 1974. (Affidavit of Daniel W. Stark ("Stark Aff.") at ¶ 3.) At that time, Minnesota had the only viable wolf population in the lower 48 states. (*Id.*) Through the exceptional efforts of the State of Minnesota and the federal government, this population now far exceeds all recovery goals and has expanded into the states of Wisconsin and Michigan. (Affidavit of John Erb ("Erb Aff.") at ¶ 4.)

As a leading example of the success that can be achieved in species recovery under the ESA, the federal government removed the wolf from the list of threatened and endangered species in January 2012, returning management of their respective wolf populations to the states of Minnesota, Wisconsin, and Michigan. (Stark Aff. ¶ 12.) The present matter is before the Minnesota Court of Appeals as a challenge to the State of Minnesota's efforts to manage its wolf population in a safe, conservative, and sustaining manner. The facts underlying the petition do not support Petitioners' various claims of harm and improper procedure.

A. The ESA Listing of the Gray Wolf.

After first being classified as endangered in Minnesota in 1974, the wolf was relisted under the ESA in 1978 as endangered in the lower 48 states, except for the Minnesota population, which was reclassified as threatened. (Stark Aff. ¶ 3.) Under the ESA, the U.S. Fish and Wildlife Service ("USFWS") first developed the Wolf Recovery Plan in 1978; it then revised the Plan in 1992 ("the 1992 Recovery Plan"). (Stark Aff. ¶ 4.) The 1992 Recovery Plan set a population goal of 1,251 to 1,400 wolves in Minnesota, a number that USFWS determined to be sufficient to ensure the survival of the wolf within the state. (*Id.*)

After the wolf was given full protection under the ESA, the federal government and DNR managed the state's wolf population with the primary objective of growing the population in Minnesota and re-establishing a viable population in a neighboring state. (*See* 2001 Minnesota Wolf Management Plan, attached to Petitioners' Declaration of Collette L. Adkins Giese ("Giese Decl.") at Ex. A-10; *see also* Stark Aff. ¶ 5.) The wolf population in Minnesota reached the recovery goal of 1,251 to 1,400 wolves by approximately 1989, and a sustaining population was established in Wisconsin in 1994. (Giese Decl. Ex. A-3; Stark Aff. ¶ 5.) By the mid-1990s, the Minnesota wolf population had reached a number that was nearly double the 1992 Recovery Plan's objective. (Stark Aff. ¶ 5.)

B. DNR Develops a Wolf Management Plan.

In 1998, as the requirements of the 1992 Recovery Plan were being met, DNR began to develop a Minnesota wolf management plan in anticipation of management of the wolf being returned to the state through imminent ESA delisting. (*Id.* at ¶ 6.) As part of this development, DNR obtained extensive public input through a series of twelve public information meetings held throughout the state in January of 1998. (*Id.*) Later in 1998, DNR convened a wolf management "Roundtable" comprised of representatives of environmental, agricultural, hunting, trapping, and wolf-advocate organizations, as well as other government agencies and private citizens who had specific interest in wolf management. (*Id.*) The purpose of the Roundtable was to provide guidance to DNR in its development of the wolf management plan. (*Id.*) The Roundtable met its goals, and in 2000 the Minnesota Legislature passed a wolf management bill that incorporated many of the Roundtable recommendations. (*Id.* at ¶ 6; *see also* 2000 Minn. Laws ch. 463.) The legislation included the provision that "[t]here shall be no open season for gray wolves for five years after the gray wolf is delisted under the federal Endangered Species Act of 1973." 2000 Minn. Laws ch. 463, § 5.

As authorized by the Legislature, DNR adopted its Minnesota Wolf Management Plan in 2001. 2000 Minn. Laws ch. 463, § 6; Minn. Stat. § 97B.646 (2010); *see also* Giese Decl. Ex. A. The Minnesota Wolf Management Plan states that "[t]he Minnesota Department of Natural Resources is committed to ensuring the long-term survival of the wolf in Minnesota, and also to resolve conflicts between wolves and humans." (Giese Decl. Ex. A-10.) With its management plan in place, DNR awaited what was then thought to be the imminent removal of the wolf from the protections of the ESA by the USFWS.

C. USFWS Attempts to Delist the Gray Wolf in Minnesota.

With the wolf exceeding the recovery goals set forth in the 1992 Recovery Plan, the USFWS made its first attempt to delist the wolf in 2003. (Stark Aff. ¶ 8.) This effort, however, was reversed by the U.S. District Courts of Vermont and Oregon in 2005. (*Id.*; *Defenders of Wildlife v. Secretary, U.S. Dep't of the Interior,* 354 F.Supp.2d 1156, 1174 (D. Or. 2005), and *National Wildlife Federation v. Norton*, 386 F.Supp.2d 553, 568 (D. Vt. 2005)).

The USFWS again attempted to delist the wolf in February 2007 by issuing a final rule that assigned management of the wolf back to the state of Minnesota. (Stark Aff. ¶ 9; 72 Fed. Reg. 6052 (Feb. 8, 2007)). DNR managed its wolf population for eighteen months until September 2008, at which time the U.S. District Court for the District of Columbia once again reversed the decision of the USFWS, reinstating the protections of the ESA and taking management authority from the states. (Stark Aff. ¶ 9; *Humane Soc'y of the U.S. v. Kempthorne*, 579 F.Supp.2d 7, 21 (D. D.C. 2008).)

In April 2009, the USFWS again delisted the wolf, returning its management to the State of Minnesota. (Stark Aff. ¶ 9.) But in July 2009, the USFWS agreed to vacation of its decision in response to a further legal challenge, and the wolf once again was placed under the protection of the ESA. (*Id.*; 74 Fed. Reg. 15070 (April 2, 2009) and *Humane Soc'y v. Salazaar*, No. 09-cv-1092 (D. D.C., July 1, 2009) (stipulation and order).)

Recognizing that (1) the wolf population in Minnesota had exceeded its recovery goal more than two decades earlier and (2) the state had successfully managed its wolf population twice after attempted delistings by the USFWS, DNR took the affirmative step to petition the USFWS on March 15, 2010, to delist the wolf in Minnesota. (Stark Aff. ¶ 11.) The USFWS accepted DNR's petition on September 14, 2010, finding that it presented substantial information that delisting may be warranted and initiating a full status review. 75 Fed. Reg. 55730 (September 14, 2010).

In anticipation of the removal of the wolf from the protections of the ESA, and recognizing the near-ten-year delay in delisting due to frequent legal challenges, the Minnesota Legislature in 2011 amended Minn. Stat. § 97B.645, subd. 9 (2010), by removing the requirement that a wolf hunting and trapping season be delayed by five years after delisting. 2011 Minn. Laws 1st Sp. Sess. ch. 2, art. 5, § 1. On December 28, 2011, the USFWS announced its final rule removing the wolf from the list of threatened and endangered species. (Stark Aff. ¶¶ 11-12; 76 Fed. Reg. 81666 (Dec. 28, 2011).) The delisting regulation became effective January 27, 2012, and, for the third time, the wolf came under the management of the State of Minnesota. (Stark Aff. ¶ 12.)

D. The Minnesota Legislature Mandates a Wolf Hunting and Trapping Season.

In reaction to the delisting of the wolf by the USFWS, a wolf season was included by DNR within the Game and Fish Bill that was considered by the Minnesota Legislature during the 2012 session. (*Id.* at ¶ 3.) The bill was ultimately passed and signed into law by Governor Dayton on May 3, 2012. (*Id.* at ¶ 4.) As noted by the court of appeals in its Order below, the law specifically established a wolf hunting and trapping season and set the season opening as the first day of the firearm deer season. 2012 Minn. Laws ch. 277, art. 1, § 5. The legislation also gave DNR the authority to prescribe the details of the seasons for wolves, establish quotas, designate areas where wolves may be taken, establish possession limits, limit the number of hunters and trappers that can take wolves, and prescribe an application and fee structure for a wolf hunting and trapping season. *Id*; Affidavit of Steve Merchant ("Merchant Aff.") at ¶ 2.

E. DNR Undertakes Rulemaking to Provide the Details of the 2012 Wolf Hunting and Trapping Season.

After the USFWS announcement of delisting, DNR informed the public in January 2012 of its intention to hold a conservative, science-based hunting and trapping season for wolves beginning in the fall or winter of 2012. (Merchant Aff. ¶ 2.) In a bill passed and signed into law during the 2011 special legislative session, the Minnesota Legislature mandated that DNR "must provide opportunity for public comment" prior to prescribing seasons and restrictions for the taking of gray wolves. Minn. Stat. § 97B.645, subd. 9 (2010); Merchant Aff. ¶ 5. Consequently, after the wolf was delisted, DNR began discussions regarding how to provide the public with the opportunity for input on rules regarding the state season once the Legislature acted on the Game and Fish Bill. (Merchant Aff. ¶ 6.) DNR considered holding in-person public input meetings throughout the state, as well as using an online process to solicit input. (*Id.*) DNR's experience, however, had been that the online format results in more public participation than public meetings; therefore, DNR chose to utilize an online format for public comment. (*Id.*)

Upon the Governor's signing of the Game and Fish Bill on May 3, 2012, DNR began development of a rule to implement a 2012 wolf season. (Affidavit of Elizabeth P. Carlson ("Carlson Aff.") at ¶ 12.) As it does for other game and fish rules that require annual modification, DNR proceeded pursuant to the expedited rulemaking process set forth in Minn. Stat. § 84.027, subd. 13 (2010). (Carlson Aff. ¶¶ 9-11; Merchant Aff. ¶ 13; Affidavit of Jason Abraham ("Abraham Aff.") ¶¶ 3-6.) DNR chose to use the expedited rulemaking process authorized in Minn. Stat. § 84.027, subd. 13, rather than the emergency rulemaking process set forth in Minn. Stat. § 97A.0451 - .0459 because the latter process limits the number of allowable revisions that can be made to the rule before permanent rulemaking must be used. (Merchant Aff. ¶ 13; Abraham Aff. ¶ 14.) It was determined that DNR needed the flexibility provided by the expedited rulemaking process for the wolf season in order to make needed annual adjustments to the season and harvest quotas in order to maintain populations at the desired level. (Merchant Aff. ¶ 13.)

On May 21, 2012, DNR issued a press release again proposing a wolf hunting and trapping season for the fall and winter of 2012, and announcing that public comments would be taken online. (*See* Giese Decl. Ex. C-1.) The online questionnaire consisted of ten questions, and participants were provided an opportunity to add written comments at the end of the questionnaire. (Merchant Aff. ¶ 7.) DNR did not include a proposed rule with the online questionnaire, as it intended to use the public input to inform the subsequent rule. (*Id.*) However, participants were required to view an informational presentation prior to providing written comments, where they were informed of DNR's proposed harvest quota of 400 wolves and the number of licenses to be sold. (*Id,*) The comment period closed on June 20, 2012. (*See* Giese Decl. Ex. F-1.) A total of 7,351 persons participated in the survey, and DNR received 4,808 written comments. (Merchant Aff. ¶ 9.) This constitutes one of the largest responses DNR has ever received to a proposed game rule. (*Id.*) The instant Petitioners actively participated in the online survey by informing their membership of the availability of the DNR survey and encouraging their participation. (*Id.* at ¶ 12.) DNR also received hundreds of emails, telephone calls, and letters from the public regarding their thoughts on the proposed hunting and trapping season. (*Id.* at ¶ 11.)

The online survey was never intended to be a public referendum on a wolf hunting and trapping season; rather, it was meant to elicit input on a proposed season structure, its extent, and its timing. (*Id.* at ¶ 8.) DNR believed that the Legislature had provided strong direction to the agency that a wolf season should be held in the fall of 2012. (*Id.*) The survey fulfilled its purpose: the information gathered through the public input process informed DNR's wolf rule development, resulting in a number of substantive modifications. (*Id.* at ¶ 10.) Upon completion, DNR issued a press release on July 12, 2012, announcing that the agency had finalized the rules for the 2012 wolf season. (*See*

Giese Decl. Ex. F.) The rule was then published in the State Register on August 20, 2012. (Carlson Aff. ¶ 13; 37 SR 279-282 (August 20, 2012).)

It is DNR's policy to have game rules adopted and in place prior to selecting hunters for hunting seasons that have more applicants than licenses available. (Merchant Aff. ¶ 14.) Therefore, applications for wolf permits were made available online upon the effective date of the rule—July 12, 2012. DNR received 23,433 wolf season applications by the September 6, 2012, deadline. (*Id.* at ¶ 17.) A total of 6,000 hunters and trappers were chosen, and the applicants were able to check the DNR website beginning on September 26, 2012, to determine if they had been chosen. (*Id.* at ¶ 21.) A wolf regulation booklet has been sent to the printer by DNR and will be mailed to the successful applicants in time for the opening of the first wolf season on November 3, 2012. (*Id.* at ¶ 22.)

F. The Status of Minnesota's Wolf Population.

Current data available to DNR indicates that Minnesota's wolf population currently stands at more than double the level stated in the federal recovery goals; the data show that there are approximately 3,000 wolves in an estimated 500 packs in Minnesota. (Erb. Aff. ¶¶ 5, 15.) DNR's proposed conservative harvest for the 2012 season is well within the bounds of sustainability. (*Id.* at ¶ 16.) The proposed harvest quota of 400 wolves, along with a projected non-hunting depredation take of approximately 275 wolves, represents less than half the current estimated sustainable level of human-caused mortality. (*Id.*) Consequently, any claim that Minnesota's wolf population will be harmed by DNR's proposed 2012 harvest season is unfounded.

Likewise, the level of harvest proposed by DNR will have little if any impact on the long-term ability of wolves to serve their many important ecological roles, nor will it hinder the opportunity for public observation or wolf-related ecotourism. (*Id.* at ¶ 15.)

G. DNR's Monitoring of Wolf Population Status.

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

ARGUMENT

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

With regard to the instant motion, Petitioners ask for the same relief denied by the court of appeals that is now the subject of their Petition for Review: an injunction preventing the opening of the wolf hunting and trapping season. As this Court has noted, denying temporary injunctive relief is within the sole discretion of the lower court and will not be reversed "unless there has been an abuse of discretion evidencing a disregard of the facts or the principles of equity applicable to the case." *Williams v. Rolfe,* 257 Minn. 237, 239, 101 N.W.2d 923, 925 (1960). In fact, "this court is loath to disturb a discretionary order issuing or withholding a temporary injunction." *Thermorama, Inc. v. J. Buckwold*, 267 Minn. 551, 552, 125 N.W.2d 844, 845 (1964).

Petitioners do not even attempt to demonstrate that the court of appeals abused its discretion below in denying their request for preliminary injunctive relief. As noted by the court below, it is the Minnesota Legislature, not Respondent DNR, that has created the wolf hunting and trapping season and set the opening day for the season. *Center for Biological Diversity v. Minnesota Dep't of Natural Resources,* No. A12-1680, at 3 (Minn. App. October 9, 2012) (order denying preliminary injunction). Any alleged harm to Petitioners or their members is not a result of DNR's adoption of rules meant to provide the details of the season; rather, any alleged harm flows directly from the Legislature's decision to authorize a wolf season. Consequently, the court of appeals did not abuse its discretion, and therefore its order should not be disturbed.

If this Court does consider Petitioners' motion for a stay,[1] it should deny that motion for two reasons. First, the factors Minnesota courts apply to requests for preliminary injunctive relief do not support a stay here, chiefly because (a) the rule at issue does not actually threaten legally cognizable harm to Petitioners and (b) DNR's rulemaking process was entirely in keeping with applicable law. Second, the instant motion for stay is barred by the relevant court rule, Minn. R. Civ. App. P. 108.02, subd. 1(a), because Petitioners entirely failed to request a stay from DNR before attempting to acquire it from the appellate courts. For these reasons, Petitioners' motion should be denied.

I. PETITIONERS CANNOT MEET THE APPLICABLE LEGAL STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF.

The court of appeals below held that Petitioners' request failed to meet the relevant state standards for preliminary injunctive relief. *Center for Biological Diversity*, No. A12-1680, at 3. As noted above, in order to achieve a reversal of that decision, Petitioners must demonstrate here that the court of appeals abused its discretion in issuing

---

[1] Petitioners style their motion for a stay as a motion for an "injunction," in an attempt to end-run the limitations of the Civil Appellate Rules analyzed in Part II, *infra*. They cite no precedent, and Respondent is aware of none, in which a Minnesota appellate court has *ever* issued an injunction during proceedings on a Minn. Stat. § 14.44 petition. The only legal authority authorizing anything resembling the relief Petitioners seek here is Minn. R. Civ. App. P. 108.02, subd. 1(a)—the requirements of which, as explained in Part II below, Petitioners have failed to meet. Petitioners cannot escape the commands of the Civil Appellate Rules by arbitrarily giving the relief they seek a name that differs from the one provided by the applicable rule.

it. *Williams*, 257 Minn. at 239, 101 N.W.2d at 925. In fact, however, the court of appeals' application of state case law on preliminary injunctive relief was not an abuse of the court's discretion. To the contrary, that decision was correct.

A. Petitioners Are Not At Risk Of "Great And Irreparable Injury."

As this Court has held:

> The granting of an injunction generally rests within the sound discretion of the trial court, and its action will not be disturbed on appeal unless, based upon the whole record, it appears that there has been an abuse of such discretion. The party seeking the injunction must establish that his legal remedy is not adequate and that the injunction is necessary to prevent great and irreparable injury.

Cherne Indus., Inc. v. Grounds & Assocs., Inc., 278 N.W.2d 81, 91-92 (Minn. 1979) (citations omitted). Petitioners presumably believe that their "legal remedy" (a decision from the state appellate courts on the merits of the instant appeal) is inadequate because it cannot pragmatically be issued before the wolf season begins, or perhaps even ends. However, Petitioners cannot possibly establish the second element of the *Cherne* test—that "the injunction is necessary to prevent great and irreparable injury."

The notions presented in Petitioners' declarations regarding the danger the upcoming hunt poses to Minnesota's wolf population are unfounded. There are currently approximately 3,000 wolves in 500 packs in the state—more than twice as many as the federal USFWS determined were necessary to sustain Minnesota's wolf population. (Erb Aff. ¶¶ 5 and 15.) The hunt will take less than 30% of the number of wolves the state population could withstand losing to human-caused mortality. (*Id.* at ¶ 16.) And contrary to Petitioners' claims, DNR has multiple annual sources of population status data that have established track records for providing reliable data on wolf populations trends. (*Id.* at ¶12.) In short, the wolf population in Minnesota is in no danger from the upcoming wolf harvest season.

Regarding Petitioners' assertions of harm to individual wolves due to the season, within the context of a request for injunctive relief under the ESA the demonstration of irreparable harm must be to the species as a whole, not to individual wolves. In considering injunctive relief to enjoin the Maine trapping season in order to avoid incidental take of Canada lynx, a listed species under the ESA, the U.S. District Court stated that even where an illegal take has occurred, injunctive relief is not mandatory:

> [T]he proper test for determining irreparable harm is effect on the species as a whole, not on individual members of the species, unless the take of an individual member has been demonstrated to affect the species as a whole.

Animal Welfare Institute v Martin, 668 F.Supp.2d 254, 264 (D. Me. 2009), *aff'd* 623 F.3d 18 (1st Cir. 2010). Similarly, the U.S. District Court for Montana refused to grant a preliminary injunction against a state-regulated wolf harvest in a case challenging the delisting of the wolves in the northern Rocky Mountains:

> [T]he purpose of the ESA is to prevent species "endangerment and extinction." With this purpose in mind, the measure of irreparable harm is taken in relation to the health of the overall species rather than individual members.

Defenders of Wildlife v. Salazar, 812 F.Supp.2d 1205, 1210 (D. Mt. 2009) (citation omitted). Petitioners' concern of harm occurring to individual wolves does not provide a demonstration of irreparable harm necessary to warrant issuance of injunctive relief here.

Petitioners have also failed to demonstrate "great and irreparable injury" to themselves or their members. Assertions that the season, and the tiny fraction of

Minnesota's wolves that will be taken during it, will lead to reduced opportunity to view a wolf or will pose a threat to pets is overwhelmingly speculative. (P.M. 19-21; Erb Aff. ¶15.) And as noted above, Petitioners and their members had ample opportunity (which they utilized) to provide comment to DNR to influence its consideration of the details of the 2012 wolf hunting and trapping season. (Merchant Aff. ¶¶9-12.) Consequently, Petitioners have failed to meet their threshold requirement of demonstrating "great and irreparable injury" in order to achieve preliminary injunctive relief here.

B. Petitioners' Motion Fails The *Dahlberg Brothers* Test.

Under Minnesota case law, in addition to the "great and irreparable injury" requirement stated in *Cherne*, a trial-court plaintiff seeking preliminary injunctive relief must show that his or her claim passes the five-pronged test set out by this Court in *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (Minn. 1965). The *Dahlberg Brothers* Court stated "five considerations which we consider relevant in deciding whether" a trial court should grant a request for preliminary injunctive relief:

> (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[; and]

(5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

137 N.W.2d at 321-22 (footnotes omitted). In this case, at least four of the five prongs of this test cut in favor of denial, and none favor granting the motion.

1. Nature and background of relationship.

Petitioners make no allegation that they had any variety of special relationship with DNR that could support some variety of estoppel argument. As a result, this factor cuts in favor of denying the instant motion. *Compare Shakopee Mdewakanton Sioux (Dakota) Community v. Minnesota Campaign Finance & Public Disclosure Bd.*, 586 N.W.2d 406, 409 (1998) (hereinafter "*Shakopee Sioux Community*") (examining this factor and holding, in support of decision affirming district court's denial of injunctive relief, that "[t]he district court did not abuse its discretion in holding that appellants have no special relationship with [the defendant-respondent] Board.").

Though they acknowledge that there was no special relationship between the parties, Petitioners assert that this Court should consider that they and their members were "prevented . . . from effectively influencing the DNR's decision-making on wolf hunting and trapping" due to the agency's use of the expedited rulemaking process. (P.M. 15-16.) To the contrary, as discussed in the Facts section above, DNR provided an online survey that allowed participants to provide whatever comments they may have had regarding the proposed wolf season. (Merchant ¶ 12.) In fact, Petitioners encouraged their membership to participate in the survey. (*Id.*) Thus, any claim that Petitioners were unable to "influence' DNR's consideration of the season is without factual basis.[2]

2. Balance of Harm.

"A party requesting an injunction must show irreparable harm if the injunction is not issued, while the party opposing the injunction need only show substantial harm if it is issued." *Shakopee Sioux Community*, 586 N.W.2d at 410. As noted above, the imminent wolf-hunting season poses no risk of irreparable injury to Petitioners. Meanwhile, DNR as well as the public is under considerable risk of harm if Petitioners' stay is granted.

The inaugural wolf season is scheduled to begin a mere twelve days after the date of this responsive memorandum: November 3, 2012. Permits have been applied for and awarded to 6,000 applicants for wolf hunting and trapping licenses. (Merchant Aff. ¶¶ 17, 22.) It can be safely assumed that these successful hunters and trappers are making plans for their participation in the state's first modern wolf season. In addition,

---

[2] Petitioners also assert that there was a "belated change" in DNR's position that created the controversy between the parties. (P.M. 16.) That "belated change" was the elimination of the five-year waiting period after delisting of the wolf by the USFWS before implementation of a wolf season. (*Id.*) But DNR did not eliminate the waiting period; the Minnesota Legislature did. 2011 Minn. Laws 1st Sp. Sess. ch. 2, art. 5. Moreover, the legislature made that change on July 20, 2011, well over a year before the promulgation of the wolf-season rules. (*Id.*) And, finally, from the moment the USFWS delisted the wolf in January 2012, DNR informed the public that a season was being considered. (Merchant Aff. ¶ 2.) Consequently, Petitioners' implication that they were somehow surprised by the elimination of the five-year waiting period is without factual support.

DNR is currently having the wolf season regulation booklet printed in expedited fashion in order that it may be made available to these successful applicants prior to the beginning of the season. (*Id.* at ¶ 21.) DNR has also expended significant resources contracting with its Electronic License System vendor for the taking of applications, issuance of the wolf licenses, and registering of harvested wolves. (*Id.* at ¶¶ 17-18.) In short, the loss of the 2012 wolf hunting and trapping season will significantly harm DNR, as well as numerous members of the public. Therefore, the balance of harm in this case weighs entirely against granting Petitioners' motion.

3. Likelihood of Success on the Merits.

Petitioners are unlikely to prevail in this appeal, because the rulemaking process DNR followed in the case at bar was entirely legal, and neither this Court nor the court of appeals is likely to hold otherwise.

Petitioners note that emergency rulemaking processes are governed by Minn. Stat. §§ 97A.0451 - .0459. (P.M. 2.) Pursuant to those statutes, administrative agencies are allowed to conduct emergency rulemaking "[w]hen the commissioner is directed by statute, federal law, or court order to adopt, amend, suspend, or repeal a rule in a manner that does not allow for compliance with sections 14.14 to 14.28, or if the commissioner is expressly required or authorized by statute to adopt emergency rules . . . ." Minn. Stat. § 97A.0451, subd. 1 (2010).

However, an additional statute permits DNR to conduct *expedited* rulemaking under certain circumstances:

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

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

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

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

(P.M. 6 (quoting Giese Dec. Exh. G-5) (hereinafter "Expediting Conditions").) Petitioners dispute these conditions.

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

The Expediting Conditions explicitly reference DNR's need to study populations and tweak such matters as "quota numbers, bag limits, and season structure" on an annual basis. (See Expediting Conditions.) This need implicates, and directly conflicts with, the emergency rulemaking process—specifically, with Minn. Stat. § 97A.0458:

> Emergency rules adopted under sections 97A.0451 to 97A.0459 shall be effective for the period stated in the notice of intent to adopt emergency rules *which may not be longer than 180 days*. The emergency rules *may* be continued in effect for *an additional period of up to 180 days* if the commissioner gives notice of continuation by publishing notice in the State Register and mailing the same notice to all persons registered with the commissioner to receive notice of any rulemaking proceedings. The

> continuation is not effective until these notices have been mailed. No emergency rule may remain in effect on a date 361 days after its original effective date. *The emergency rules may not be continued in effect after 360 days without following the procedure of sections 14.14 to 14.28.*

Minn. Stat. § 97A.0458 (2010) (emphasis added). In other words, emergency rulemaking is a one-time approach that can only be continued in effect for a single year; after that, an agency is limited to the use of the standard Administrative Procedure Act ("APA") rulemaking procedures in Chapter 14. *Id.*

As DNR's emergency-conditions statement explains, under ordinary conditions, this makes emergency rulemaking fundamentally incompatible with the agency's needs when it is setting hunting seasons. To achieve appropriate and effective continuing management of wildlife populations, DNR is forced to evaluate and potentially change quota numbers, bag limits, and season structure *every year*—a process that is simply impossible within the timeline required for standard APA processes. (Abraham Aff. ¶¶ 4-6; Merchant Aff. ¶ 13; Carlson Aff. ¶¶ 8-11.)[3] Emergency rulemaking can, by design, offer only a one-year reprieve from this timeline, *see* Minn. Stat. § 97A.0458; as a result, hunting seasons for species that DNR manages invariably create a "condition . . .

---

[3] If Petitioners' argument were correct, this would leave DNR in an impossible situation: (1) establishing hunting seasons via emergency rulemaking violates Minn. Stat. § 97A.0458; (2) establishing them via standard APA rulemaking forces DNR to set bag limits and other elements of the rule so many months before the opening of the season that the settings for those elements could only be arbitrary and capricious; and (3) establishing the seasons via expedited rulemaking gives rise to Petitioners' claim that there are no "conditions" justifying expedited processes. The potential for such vicious cycles is one of the basic reasons expedited rulemaking was created in the first place.

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

Petitioners respond to this point by declaring that DNR should, indeed must, read the emergency-rulemaking statutes in a manner that simply ignores section 97A.0458's 360-day limit. (*See* P.M. 12-13.) They suggest that, in flagrant disregard of the statute's command that "emergency rules may not be continued in effect after 360 days without following" standard APA rulemaking procedure, DNR should continue their hunting-season rules in permanent effect by adopting them via emergency rulemaking year after year after year. (*Id.* ("Each year, the DNR can issue a new emergency rule . . . .").) That approach is *precisely* what the 360-day limit in section 97A.0458 bars: under that statute, "emergency rules *may not be continued in effect*" after 360 days have elapsed without the use of APA procedures. Using emergency rulemaking to create a wolf season (or any other hunting season) over and over again *is* "continu[ing]" "emergency rules . . . in effect" after the first 360 days, a practice that the statute specifically bans.[4] The very

---

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

purpose of section 97A.0458 is to ensure that the emergency rulemaking process is a one-year-only remedy, one to be followed *only* by standard APA rulemaking. *See* Minn. Stat. § 97A.0458. The solution Petitioners offer to the problem identified in the Expedited Condition pretends that this explicit command does not exist, thus deleting the core requirement of section 97A.0458. There is no possible basis in law for such an approach.

At the same time that Petitioners pretend that the 360-day limit in section 97A.0458 is meaningless verbiage that can be evaded simply by calling the continuation of a year-old emergency rule "a new emergency rule," they also attempt to insert new provisions of Petitioners' own creation into the statute governing expedited rulemaking. According to Petitioners, it is, for some reason, "[un]lawful for the DNR to <u>routinely</u> use the expedited emergency process." (P.M. 12 (emphasis in original).) They cite no legal authority for this surprising contention.

There is nothing in Minnesota law that so much as hints that DNR is barred from utilizing the expedited procedures provided in Minn. Stat. § 84.027, subd. 13, "<u>routinely</u>." State law contains no limitation whatsoever on repeated use of those procedures; to the contrary, they are available at any and every point at which "conditions exist that do not allow the commissioner to comply with" the stringent restrictions state law places on emergency rulemaking. Minn. Stat. § 84.027, subd. 13(b) (2010). If the "conditions" in question *routinely* arise—and, according to DNR's findings of fact, in the current context of hunting-season regulation *they do*—then section 84.027 demonstrably does license routine use of expedited rulemaking. Petitioners appear to be troubled by the terms of Minnesota law on this point, but they have cited, and can cite, no legal authority that calls those terms into question.

State law bars the "routine" and repeated use of *emergency* rulemaking, *not* expedited rulemaking. Petitioners' legal theory on this appeal requires them to deny the plain meaning of state law on *both* sides of this contrast—deleting a key provision from section 97A.0458 at they same time they insert a new one into section 84.027. No legal theory that requires such arbitrary private revisions to state law is ever likely to prevail in Minnesota courts.

b. The Existence Of Conditions Is A Fact Issue.

DNR's finding regarding the "exist[ence]" of "conditions . . . that do not allow the commissioner to comply with sections 97A.0451 to 97A.0459" is entirely concerned with the facts inherent in the practice of regulating hunting seasons. This Court reviews agencies' factual findings within rulemaking proceedings on an arbitrary-and-capricious standard. *Manufactured Hous. Inst. v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984). The finding at issue here states:

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

(Expediting Conditions.) The only specifically *legal* element of this explanation is the premise that Minn. Stat. § 97A.0458 does not allow an agency to use emergency rulemaking to continue rules in effect year after year after year—but that premise is indisputable, despite Petitioners' statute-revising insistence to the contrary. *See* Part I-B-

3-a, *supra*. The actual substance of DNR's Expediting Condition finding is that responsible management of hunting seasons requires a regulatory agency to be able to review and potentially change quota numbers, bag limits, and season structure every year. (*See* Expediting Conditions.) That conclusion is a finding of *fact*, not law, and it is not arbitrary and capricious. As a result, this state's appellate courts are unlikely to hold that "conditions" rendering emergency rulemaking inapposite did not "exist."

4. Public Policy.

As the years' worth of work conducted by all three branches of government (including the legislation that the Minnesota Legislature passed specifically to create the wolf-hunting season at issue) demonstrate, public policy uniformly favors the commencement of the wolf-hunting season at issue. This is precisely what Petitioners' motion for stay seeks to prevent. As a result, public policy cuts entirely in favor of denying the motion.

5. Administrative Burden.

It is unlikely that any particular outcome of the instant motion will result in meaningful administrative burdens stemming specifically from "judicial supervision and enforcement"; as a result, the fifth *Dahlberg Brothers* factor, at worst, favors neither approval nor denial of the motion for stay.

However, as noted in Part I-B-2 above, granting Petitioners' motion presents a severe risk of wasting the vast state resources that have already been committed to preparing for the upcoming season. (*See* Merchant Aff. ¶¶ 17-21.) All of these harms are administrative burdens, though they do not impact judicial supervision and enforcement.

Moreover, in light of the limited time that the planned wolf season will be in effect, a stay of enforcement during the pendency of the instant appeal threatens to destroy the season entirely, rendering worthless the entire effort that DNR has mounted, at the legislature's command, to create that season. Said effort is at serious risk of being wasted even if, as is likely (*see* Part I-B-3, *supra*), DNR prevails in this appeal. Squandering enormous quantities of state resources by *de facto* invalidating, with a crippling stay, the rule those resources were invested in creating constitutes an overwhelming administrative burden.

For these reasons, the legal standards applicable to trial-court decisions on preliminary injunctive relief do not support granting Petitioners' stay request. That request should therefore be denied.

II. PETITIONERS' MOTION FOR STAY SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO MEET THE MANDATORY REQUIREMENTS OF RULE 108.02.

Petitioners cite no Rule of Civil Appellate Procedure that authorizes their request for a stay of enforcement of the DNR rule at issue.[5] The only court rule that is even potentially applicable to the instant motion is Minn. R. Civ. App. P. 108.02, subd. 1, which states:

> **Motion in Trial Court.** A party seeking any of the following relief must move first in the trial court:

[5] Petitioners do cite Minn. R. Civ. App. P. 108.03, which authorizes this Court to "make any order appropriate to preserve the status quo . . . during pendency of review in the Supreme Court." (P.M. 7, 29.) But the instant appeal is *not*, at present, under "review" in the Supreme Court—and as a result that Rule is irrelevant to the motion at bar.

> (a) a stay of enforcement of the judgment or order of a trial court pending appeal;
>
> (b) approval of the form and amount of security, if any, to be provided in connection with such a stay; or
>
> (c) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending pursuant to Minn. R. Civ. P. 62.02.

Minn. R. Civ. App. P. 108.02, subd. 1. The Rule's references to the "trial court" are applicable in the instant matter as references to DNR, because within the Civil Appellate Rules "'[t]rial court' means the court or agency whose decision is sought to be reviewed." Minn. R. Civ. App. P. 101.02, subd. 4. However, subdivision 1(c) above—and, indeed, the entire *injunction* concept that Petitioners are attempting to utilize—is inapposite here, because there has not been, cannot be, and cannot have been a motion "pursuant to Minn. R. Civ. P. 62.02" in this matter. This action is a petition for a declaratory judgment regarding rulemaking procedures at DNR, an entity that is not governed by the Minnesota Rules of Civil Procedure. *See* Minn. R. Civ. P. 1 ("These rules govern the procedure in the district courts of the State of Minnesota....").[6]

---

[6] For the same reasons, Petitioners' use of Minn. R. Civ. P. 62.05 (*see* P.M. 6-7) is legally baseless. The quotation from Rule 62.05 in Petitioners' Memorandum simply omits the language demonstrating that that Rule has nothing to do with this case: Rule 62.05 merely states that "*[t]he provisions of Rule 62* do not *limit* any power of an appellate court" to grant equitable relief to preserve the status quo. Minn. R. Civ. P. 62.05. In light of the fact that neither Rule 62 nor any other Minnesota Rule of Civil Procedure is relevant to this matter, the "limit[ations]," or lack thereof, described in Rule 62.05 are entirely immaterial here.

As a result, Petitioners' request for a stay is subject to the limiting requirement stated in Rule 108.02, subdivision 1 and 1(a): because they are "seeking ... the relief" of a stay of enforcement of the challenged rule, Petitioners "must move first in [DNR]" for a stay before asking this Court for one. *See* Minn. R. Civ. App. P. 108.02, subd. 1 and 1(a). And there is no dispute that Petitioners failed to make any such request from DNR at all, opting instead to disregard the requirements of the Rule. Because Petitioners have failed to meet the mandatory duty placed on them by Rule 108.02, subdivision 1, their motion should be denied.

In their filings in the court of appeals below, Petitioners dismissed as "nonsensical" the notion that they could possibly have been required to request a stay from DNR before moving for one in the appellate courts. (*See* Petitioners' Reply Brief before the court of appeals at 10 n.4.) They justified their rejection of the Appellate Rules' mandate by declaring that "there were no proceedings before the agency" during which they could have submitted such a request to DNR. (*Id.*) But this is nonsense: the notice-and-comment procedure mandated by the legislature, carried out by DNR, and *participated in by Petitioners* (Merchant Aff. ¶ 12), indisputably constituted "proceedings." During those proceedings—that is, at any point between (a) DNR's initial announcement of the wolf-season rulemaking on May 21, 2012, and (b) the publication of the new rules on August 20—Petitioners were perfectly capable of serving DNR with a formal request to stay enforcement of the contemplated rule in light of the very legal theories Petitioners have introduced in the instant petition. Such a request could easily have been communicated in a simple letter from Petitioners' counsel to Respondent

Landwehr. In fact, however, Petitioners made no such request, and as a result they cannot permissibly acquire a stay of enforcement before this Court. *See* Minn. R. Civ. App. P. 108.02, subd. 1 and 1(a).

This conclusion is directly in keeping with a closely analogous case the Minnesota Court of Appeals decided in 2007. In *DRJ, Inc., v. City of St. Paul*, Relator DRJ, which operated a bar, sought a writ of certiorari reversing the respondent City's decision to revoke relator's operating licenses. *DRJ, Inc., v. City of St. Paul*, 741 N.W.2d 141, 142 (Minn. App. 2007). The court of appeals explained:

> In early 2007, hearings were held before two administrative law judges on alleged violations of the license conditions and a variety of city regulations. In August 2007, the city council voted to revoke the licenses. Relator moved the city council for a stay. In a written decision denying the stay, the city council cited relator's failure to abide by conditions previously imposed on the licenses and the large number of violations, and it found that granting a stay so that the bar could continue operations during the appeal would endanger "the health and safety of ... citizens."

Id. Relator thereupon sought a writ of certiorari, pursuant to Minn. Stat. §§ 606.01 - .06 and Minn. R. Civ. App. P. 115, from the court of appeals. *DRJ*, 741 N.W.2d at 142. Importantly, relator asked the appeals court to examine its stay request "in the first instance," that is, *without* an appeal-style examination of the City's denial below—but the court refused:

> Rule 108 applies generally to all appeals and it also requires that a party seeking a stay pending appeal apply "in the first instance to the trial court." Minn. R. Civ. App. P. 108.01, subd. 1; *see* Minn. R. Civ. App. P. 101.02, subd. 4 (defining "trial court" to include court or agency whose decision is being reviewed). *Under rules 108.01 and 115.03, relator was required to make its motion for a stay pending appeal first to the city council, subject to review by motion in this court.* Relator insists that it is not seeking "review of [respondent's] decision" on the motion for a stay,

> but is moving this court "in the first instance to issue a stay." But the only authority cited for this request is Minn. Stat. § 14.65 (2006), a provision of the administrative procedures act that (a) has no application to this appeal from a decision by a local governmental body and (b) specifically recognizes the authority of an administrative agency to grant a stay pending a certiorari appeal. *Relator's request is inconsistent with the provisions of the cited appellate rules and we reject the invitation to "consider the merits of [the] stay request anew, without deference to" the city council's decision.*

DRJ, 741 N.W.2d at 143 (emphasis added). The *DRJ* court of appeals then proceeded to analyze relator's stay request as an appeal from the City's denial of the stay below, as Rule 108 commands. *Id.* at 143-46. In the end, the court affirmed the City's rejection of relator's stay request. *Id.*

The facts of the instant case cut every bit as strongly against Petitioners' motion for a stay as the facts in *DRJ* cut against the relator's request for consideration "anew" of their stay motion. Rule 108.02, now as then, requires a party seeking a stay of enforcement from a Minnesota appellate court to first ask "the trial court"—that is, where applicable, the city council or state agency—to grant the stay, so that the court can perform its normal function of appellate review. Minn. R. Civ. App. P. 108.02, subd. 1; *see also DRJ*, 741 N.W.2d at 143. But whereas relator DRJ did at least ask the City of St. Paul for a stay of enforcement, Petitioners in the instant case didn't bother; instead, they simply ran to the appellate courts and proceeded to do precisely what Rule 108.02, subdivision 1, declares they are not permitted to do: ask for a stay of enforcement without requesting it first from the "trial court" (i.e., from DNR). This Court should not reward such direct disregard of the plain language of the Civil Appellate Rules.

Petitioners are, if anything, in a *weaker* position than Relator DRJ was, because they never even attempted to acquire a stay from DNR. As a result, granting their request for a stay would empty the mandatory requirement stated in Rule 108.02 of any meaning. (Allowing Petitioners to end-run that requirement by baselessly restyling their stay request as a motion for an "injunction" would have the same effect.) For the same reasons that DRJ's request for the court to "consider the merits of [its] stay request anew" was rejected, Petitioners' request should be rejected as well.

CONCLUSION

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

Dated: October 22, 2012

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

DAVID P. IVERSON
Assistant Attorney General
Atty. Reg. No. 180944
445 Minnesota Street, Suite 1800
St. Paul, MN 55101-2134
(651) 757-1466

NATHAN J. HARTSHORN
Assistant Attorney General
Atty. Reg. No. 0320602
445 Minnesota Street, Suite 1800
St. Paul, Minnesota 55101-2134
(651) 757-1252

ATTORNEYS FOR RESPONDENTS

AG: #3102553-v3