WISCONSIN COURT OF APPEALS
DISTRICT IV

WISCONSIN FEDERATED HUMANE SOCIETIES, INC., DANE COUNTY HUMANE SOCIETY, WISCONSIN HUMANE SOCIETY, FOX VALLEY HUMANE ASSOCIATION, NORTHWOOD ALLIANCE, INC., NATIONAL WOLFWATCHER COALITION, JAYNE BELSKY, MICHAEL BELSKY and DONNA ONSTOTT,

Plaintiffs-Appellants, **Appeal No. 2013AP000902**

v. Case No. 2012CV003188

CATHY STEPP, SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN DEPARTMENT OF NATURAL RESOURCES and WISCONSIN NATURAL RESOURCES BOARD,

Defendants-Respondents-Cross-Appellants,

UNITED SPORTSMEN OF WISCONSIN, WISCONSIN BEAR HUNTERS ASSOCIATION, SAFARI CLUB INTERNTIONAL and US SPORTSMEN'S ALLIANCE FOUNDATION,

Intervenors-Respondents-Cross-Appellants,

ASPCA,

Other Party.

PRINCIPAL BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS, WISCONSIN FEDERATED HUMANE SOCIETIES, *et al.*

Appeal of a Final Judgment of the Dane County Circuit Court
The Honorable Peter C. Anderson, Presiding

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ISSUES

1. Whether the decision of the Wisconsin Department of Natural Resources ("DNR") to issue emergency regulations relating to the hunting of wolves with dogs without restrictions necessary to limit the use of dogs to tracking and trailing violates the requirements of 2011 Wisconsin Act 169, including but not limited to § 21(1) thereof.

Answered by the Circuit Court: No.

2. Whether Wis. Admin. Code ch. NR 10, as adopted by defendants, allows and enables violation of the prohibition against animal cruelty in Wis. Stat. ch. 951.

Not addressed by Circuit Court.

3. Whether the Circuit Court failed to properly apply the standards for review of administrative regulations, including but not limited to the arbitrary and capricious standard.

Not expressly addressed by Circuit Court, but implicitly answered No.

4. Whether DNR's failure to consider restrictions on the use of dogs to hunt wolves, as proposed by wolf and dog behavioral scientists, was arbitrary and capricious.

Answered by the Circuit Court: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Appellants believe that oral argument would benefit the Court. This is a case of substantial state-wide importance relating to the standards for reviewing administrative rules and the substance of the rules at issue. The issues necessarily require the Court to understand both the procedural and substantive facts underlying this dispute. Oral argument may assist the Court in fleshing out these legal and factual issues.

Appellants also recommend that the decision be published. There is only limited case law relating to the requirements for adopting administrative regulations and judicial review thereof, and there is a need for clarification and reinforcement of administrative agencies' responsibilities to independently and fully evaluate and consider the pertinent evidence before promulgating rules.

INTRODUCTION

On April 16, 2012, Wisconsin became the first and remains the only state in the United States to allow the use of dogs for hunting wolves, through the enactment of 2011 Wisconsin Act 169 ("Act 169"). Facing this new and unprecedented type of hunting, one may have expected the Defendants (collectively "DNR") to be cautious in their emergency rules governing the first such hunt. Instead, DNR decided to impose virtually no restrictions on the use of dogs to either hunt or train to hunt wolves. DNR decided not to include restrictions necessary to prevent or even minimize deadly, violent confrontations

between free-roaming hunting hounds and wolves, despite undisputed evidence of that risk, and it offered no rationale for that decision.

The central substantive issues in this case are whether the emergency wolf hunting rules promulgated by DNR: a) fail to satisfy the legislative directive in Act 169, section 21(1)(b), that DNR adopt rules that are "necessary to implement" newly created Wis. Stat. § 29.185, and the prohibitions against animal cruelty and mistreatment in Wis. Stat. chapter 951; or b) are arbitrary and capricious. Section 29.185 authorizes, in pertinent part, the use of dogs to "track or trail" wolves in connection with the harvesting (hunting) of wolves; but it does not authorize confrontations or fights between wolves and dogs, which also would run afoul of Wis. Stat. § 951.02.

Beyond the compelling legal and factual issues, this case invokes the critical duty of the judiciary to ensure that our system of government is functioning as contemplated by our Constitution and pertinent case law. Judicial oversight of agency actions, including rule-making, must not be so constrained that the Court is relegated to the role of a "rubber-stamp" of form over substance. Rather, the Court must protect against arbitrary or unsubstantiated agency actions by carefully scrutinizing decision-making and holding agencies accountable to a legitimate decision-making process that demonstrates a rational connection between the facts found and the choice reflected in the regulatory action.

The record in this case demonstrates the following:

1. When the Natural Resources Board ("NRB") approved final emergency rules on July 17, 2012, it did not consider or address the issues and evidence submitted by wolf and dog experts, including behavioral scientists and former DNR wolf managers, regarding the risk of violent wolf-hound confrontations, expected grievous harm, and death to dogs that would result from the use of dogs to hunt wolves, as allowed by those rules. Additionally, it did not consider training at all.

2. On August 31, 2012, the Circuit Court issued a stay and encouraged the NRB to consider the hunting-related risks and explain its reasoning. Nevertheless, the only pertinent matter identified in the NRB notice of its September 26, 2012, meeting related to training with dogs; *i.e.*, the NRB never considered additional restrictions in the emergency rules on the use of dogs for hunting. The NRB also did not articulate any reason why it did not adopt additional emergency rules for the wolf hunt.

3. The NRB also did not articulate any coherent or consistent reasons why it elected not to adopt additional dog training restrictions, either when it initially adopted the emergency rules in July 2012, or when it declined to enhance the training rules in September 2012. Rather, the record reflects a morass of inconsistent and incomplete communications among the NRB members, reflecting their confusion whether: a) the NRB and DNR had such authority; b) such rules were necessary but there was insufficient time to develop them for the 2012-13 hunting season; c) such rules were not necessary; or d) the entire matter should be deferred because of the pending litigation.

4. All of the commenters supporting no restrictions on training (and cited or quoted by the Bear Hunters) were lay witnesses who focused on dog behavior. Supporters of the rule, including DNR warden/bear hunters, ignored how the larger, stronger, fiercer, and faster wolves behave. All of the wolf-related evidence and competent information came from expert witnesses proposing additional restrictions for both the hunt and training to mitigate the likelihood of brutal wolf-dog confrontations.

5. All of the scientific evidence consistently and undisputedly demonstrates that the challenged rules do not satisfy the statutory

directive without additional, reasonable restrictions on the use of dogs in both hunting and training to hunt wolves.

The rules as promulgated violate state law as a matter of law for two independent reasons. First, the rules fail to satisfy the "track or trail" limitation in Act 169, as well as the proscriptions against cruelty to animals in ch. 951. Secondly, the rules are arbitrary and capricious, lacking any rational basis. The NRB meeting in September 2012 was no more than a superficial exercise designed to create the appearance of consideration; and even with prodding from its attorney, the NRB failed to articulate a rational basis.

For these reasons, Appellants ask this Court to: a) declare, as a matter of law, that the emergency rules promulgated by DNR, as they relate to the use of dogs, are unlawful; and b) permanently enjoin DNR from authorizing the use of dogs for hunting or training to hunt wolves, until DNR promulgates rules that are necessary to implement the limited statutory authorization for the use of dogs in connection with wolf hunting.

STATEMENT OF FACTS

A. Background Information on Wolf Management

For nearly forty years, wolves were listed on the federal and state endangered species lists, due primarily to prior hunting that reduced wolf populations to unsustainable levels. *See, e.g.*, Wis. Admin. Code § NR 27.03(1)(a) (2011). As a result, wolf hunting was prohibited in Wisconsin and throughout the United States, with very few exceptions. Additionally, state and federal

governments devoted substantial amounts of public funds to study, reestablish and manage wolf packs. DNR's annual expenditures for wolf management and protection (separate from federal or privately funded efforts) grew steadily since the program's inception in 1979, to approximately $350,000 per year. *See, e.g.*, http://dnr.wi.gov/topic/wildlifehabitat/wolf/documents/wolfmanagementplan.pdf (*Wolf Management Plan, Addendum 2006 and 2007*, at 27).[1]

The protections afforded by state and federal endangered species laws and efforts devoted to protecting wolves fostered the reestablishment of a sustainable wolf population and habitat in Wisconsin. Established wolf pack territories in Wisconsin are primarily, though not entirely, in the northern and central forest areas of the state.

B. Wolf Hunting Legislation

In April 2012, the legislature enacted and the governor signed into law Act 169, which creates a wolf hunting season. That statute authorized, *inter alia*, the "harvesting" of wolves by hunting and trapping, subject to a wolf harvesting license to be issued by DNR. Act 169, sec. 6, creating Wis. Stat. § 29.185. Act 169 also authorized DNR to administer a wolf depredation program, to reimburse farmers and others for death or injury to animals caused by wolves. See Act 169, sec. 15, creating Wis. Stat. § 29.188. The provision in the new legislation most pertinent to this action authorizes the use of dogs to "track or trail" wolves. Wis.

[1] The 2007 Wolf Management Plan addendum contains the most recent published compilation of budgetary data, through fiscal year 2005.

Stat. § 29.185(6)(a)2. Additionally, Wis. Stat. § 29.185(6)(c), establishes three specific limitations on the use of dogs: (1) a season that extends from the Monday after the end of deer season to the end of February in the following year; (2) limiting the number of dogs to six per hunting event; and (3) requiring that the hunter keep in his or her possession any tag required for the dog.

Act 169 also directed DNR to promulgate final and interim, emergency rules that are "necessary to implement or interpret" the statutes authorizing the wolf harvesting and wolf depredation programs. Act 169, sec. 21. These rulemaking requirements are in addition to and not a limitation on DNR's authority to promulgate fish and game regulations under Wis. Stat. § 29.014(1), as Act 169 did not modify § 29.014 or impose any constraints on DNR's rulemaking authority.[2] Additionally, the statute does not in any way limit the authority of the state to impose "reasonable restrictions" on hunting in Wis. Const., Art. I, § 26.

C. DNR Regulations

1. Rulemaking Process

The subject of this appeal is the set of regulations promulgated by DNR as an emergency rule. Under Wis. Stat. §§ 227.135 to 227.22, the Administrative Procedures Act establishes the process for administrative agencies to develop and promulgate rules. This process includes development of a scope statement, preparation of the proposed rule and economic impact analysis, legislative council

[2] Act 169 did provide that DNR need not promulgate the wolf hunting season as a rule, as would otherwise be required under § 29.014. *See* Wis. Stat. § 29.185(5)(e)

review, public comment and potential hearing, final adoption by the agency and subsequent legislative committee review. Under revisions to chapter 227 enacted in May 2011, as part of 2011 Wisconsin Act 21, the governor's approval also is required. *See* Act 21, Sec. 4, amending Wis. Stat. § 227.135(2).

Emergency rules are subject to an abbreviated, expedited development process under Wis. Stat. § 227.24, and they may only remain in effect for a limited duration. The regulations at issue here were developed through that abbreviated process.

Rulemaking by DNR also requires an additional step. DNR is subject to "direction and supervision" by the NRB. Wis. Stat. § 15.34(1). As the body with policy-making powers for DNR, the NRB's approval is required for DNR scope statements and rules. Wis. Stat. §§ 227.135(2). That is, the NRB must approve the final rule before it is submitted to the governor for final approval and the legislature for final review.

2. Promulgation of Wolf Hunting Rules

The NRB approved the scope statement for the proposed rules at issue here at its meeting on May 23, 2012.[3] Over the following month, DNR issued the draft rules for public comment and conducted informational hearings and meetings with selected groups and tribes. On June 27, 2012, DNR issued its "Green Sheet," containing the final language of the proposed emergency rules and analysis. R. 6,

[3] The scope statement notably did not include training as part of the anticipated scope of the proposed rule. That is, defendants made a decision not to address training before providing any opportunity for public comment or participation.

Exh. JH-A. The NRB approved the proposed rules without modification at its meeting on July 17, 2012. R. 20, Exh. D, A-Ap-102.

The Green Sheet prepared by DNR virtually ignored the risks and consequences of unrestricted use of dogs to hunt wolves. DNR ignored the impressive number of comments submitted to DNR and the NRB by Wisconsin hunters, wolf and dog experts, retired DNR wolf managers, animal welfare organizations, and other concerned citizens, who strongly urged DNR to impose reasonable restrictions on the use of dogs. *See, e.g.*, R. 5, 7, 8, 14, and 15. While DNR recognized that there were many commenters who opposed the proposed rules as they relate to the use of dogs, its evaluation of mortalities ignored the deaths to both dogs and wolves that will be caused by the authorized fighting among canids. R. 20, Exh. D at 23-26, A-Ap-127-31 Indeed, it was silent regarding the risks and impacts to dogs, wolves, and humans associated with the use of dogs. Moreover, the only economic impact associated with use of dogs identified in DNR's Fiscal Estimate was the enforcement associated with the fact that hunters can train dogs year-round, specifically responding to complaints regarding out-of-season hunting. DNR concluded that the cost associated with even this limited impact "could be significant."

The rules at issue on appeal fall into two categories. First, DNR amended Wis. Admin. Code § NR 10.02(1), to delete wolves from the list of "protected" species. By this amendment, DNR opened the door to the use of dogs to train to

hunt wolves, as well as hunting wolves. Additionally, DNR created § NR 10.07(4)(b), which essentially duplicates the terms of the statute regarding the time and duration of the hunt, limiting the number of dogs to six, and requiring the hunter to have a tag for the dog. Indeed, the new rules impose only two restrictions on the use of dogs that are not found in the statute: they cannot be used for night hunting, and they must be tattooed or wear an identifying collar. *See* Wis. Admin. Code § NR 10.07(4)(a) (2012).

Notably, the new rules did not address training of dogs prior to the hunt, even though training is available by virtue of the delisting amendment to Wis. Admin. Code § NR 10.02(1). DNR's training rules, in Wis. Admin. Code ch. NR 17, include several regulations that apply to training dogs for hunting bear, coyote, and other animals, including seasonal restrictions, exclusion zones, and licensing requirements. *See, e.g.*, §§ NR 17.01 and 17.02 (licenses for bird dogs and hound dogs for certain wild animals); § NR 17.04 (≤ 8-foot leash required for training on DNR lands, other requirements for bear dog training).

In contrast to these rules specifying training requirements for dogs hunting animals far less dangerous to dogs than wolves, DNR completely failed to consider whether to require dogs to undergo training for wolf hunting or to provide any conditions whatsoever on the training of dogs to hunt wolves. As a result of DNR's silence in this respect, the rules allowed the use of dogs to "train" by chasing wolves in Wisconsin 12 months out of the year – before, during and

after the wolf hunting season – day and night, with no dog pack limit or consideration of the safety issues or harm of running dogs on wolves during their breeding and pup seasons.

D. Circuit Court and Subsequent NRB Proceedings

On August 8, 2012, Appellants filed an action for declaratory judgment under Wis. Stat. § 227.40, challenging DNR's new rules as they relate to the use of dogs to hunt and train to hunt wolves. R. 2. The Complaint sought a declaration that the rules were invalid, and both a temporary stay and permanent injunction against the use of dogs to hunt or train to hunt wolves until DNR promulgated adequate regulations. *Id.* Appellants filed an Amended Complaint on August 27, 2012. R. 25.

On August 31, 2012, the Circuit Court issued a temporary stay of the regulations. R. 32, 33. The Circuit Court held that DNR had erroneously concluded that it lacked legal authority to adopt restrictions beyond what were in the statute; and that it offered no rationale supporting its decision not to adopt reasonable restrictions for the use of dogs. *Id.* The Circuit Court therefore invited DNR to consider additional restrictions on the use of dogs in the hunt. *Id*.

The NRB then scheduled a wolf-related agenda item for its September 2012 meeting. However, that agenda item related exclusively to training under both the emergency rules and future, permanent rulemaking. R. 87, A-Ap-136. Additionally, there is no information in the record that the NRB ever considered

additional restrictions on the use of dogs for hunting wolves. *Id*. That is, DNR did not schedule, did not provide public notice, did not consider, and did not take action relating to the hunt itself.

The September 2012 NRB meeting is also noteworthy for several reasons discussed in the Argument, below. In particular, DNR's sole wolf management expert, Adrian Wydeven, did not participate in that proceeding or any of the several other legislative or regulatory proceedings. Mr. Wydeven was DNR's mammalian ecologist and a resident wolf expert for nearly twenty years. He also chaired the Wisconsin Wolf Advisory Committee that prepared DNR's Wolf Management Plan (1999). *See* http://dnr.wi.gov/files/pdf/pubs/er/er0099.pdf.[4] His absence from both legislative and administrative proceedings previously had been noted by the Circuit Court; yet DNR administration continued to hide him from both its NRB and the Circuit Court.

When it subsequently addressed the merits, the Circuit Court distinguished between the manner in which DNR addressed hunting and training to hunt. With respect to hunting regulations, the Circuit Court characterized Appellants' challenge as contesting the absence of a rule, *i.e.*, reasonable restrictions on the use of dogs to hunt; while he viewed the allegations relating to training as a challenge to the adequacy of regulations affirmatively adopted in Wis. Admin. Code ch. NR 17. *See* R137:11, A-Ap-178. For the training rules, the Circuit

[4] The only other members of that committee who had any involvement in these proceedings are Randle Jurewicz and Richard Thiel, two of Appellants' expert witnesses.

Court then scrutinized the record, acknowledged that all of the evidence demonstrated a need to limit the use of dogs to train to hunt wolves, and concluded that the NRB decision not to adopt such rules was arbitrary and capricious and therefore "invalid" because, *inter alia*, it had failed to articulate any explanation for not adopting additional regulations specific to training dogs to hunt wolves. *Id.* at 25, A-Ap-192.

The Circuit Court did not apply the same methodology or standards to the challenge to the hunting regulations. Rather, the judge concluded that "generally, the absence of a rule is not going to be the basis for relief." *Id.* at 28, A-Ap-195. While he concluded that the DNR had the authority to adopt regulations governing the use of dogs to hunt wolves (*Id.* at 30, A-Ap-197), he could not "discern a justiciable standard" for determining whether further regulation is required. *Id.* at 31, A-Ap-198. The Circuit Court also mischaracterized Appellants' claim for declaratory and injunctive relief as a "mandamus" action, and concluded that they had not satisfied the standard for mandamus. *Id.* at 29-31, A-Ap-196-98. The Circuit Court did not address the arbitrary and capricious standard vis-à-vis the hunting regulations.

Prior to issuing a final judgment, counsel for Appellants asked the Court for an opportunity to file a motion for reconsideration relating to application of the arbitrary and capricious standard to the hunting rules. R. 129. Instead, the Circuit Court scheduled a hearing, at which it essentially assumed the issue that

Appellants wished to raise; and reiterated its prior decision, with the added caveat of remanding the matter to DNR to consider whether to adopt further rules on hunting. R. 138, A-Ap-208. The Circuit Court then entered its final order that is the subject of this appeal. R. 131, A-Ap. 101.

ARGUMENT

I. LEGAL STANDARDS APPLICABLE TO THIS APPEAL

A. The Court Should Apply a *De Novo* Standard of Review to this Appeal.

On appeal from a circuit court decision on judicial review, this Court applies the same standards as the Circuit Court. *Andersen v. DNR*, 2011 WI 19, ¶24, 332 Wis. 2d 41, 796 NW.2d 1. The Court of Appeals reviews the agency decision, not the decision of the Circuit Court. *Lake Beulah Mgmt. Dist. v. State*, 2011 WI 54, ¶ 25, 335 Wis. 2d 47, 799 NW.2d 73.

The issues here are legal issues, *i.e.*: a), whether DNR satisfied its duty to promulgate regulations necessary to implement Act 169's limited authorization to use dogs to "track or trail" wolves; and b) whether DNR acted arbitrarily by failing to consider the effects of unrestricted use of dogs to hunt wolves or to explain any rational basis for not including necessary restrictions. Statutory and other legal interpretation "is ordinarily a question of law determined independently by a court …." *Racine Harley-Davidson, Inc. v. State*, 2006 WI 86, ¶ 11, 292 Wis. 2d 549, 717 N.W.2d 184. However, the Court may accord one of three levels of deference to an agency's interpretation of a statute or regulation: great weight,

due weight, or *de novo* review. *See, e.g., id.*; *DaimlerChrysler c/o ESIS v. LIRC*, 2007 WI 1, ¶ 15, 299 Wis. 2d 1, 727 N.W.2d 311; *RURAL v. PSC*, 2000 WI 129, ¶ 21, 239 Wis. 2d 660, 619 N.W.2d 888.

A court gives great weight deference when the agency satisfies four conditions: 1) it is legislatively charged with administering the statute; 2) its interpretation is long-standing; 3) it employed specialized knowledge or expertise in forming the interpretation; and 4) its interpretation will provide uniformity and consistency in the statute's application. *DaimlerChrysler*, ¶ 16. Under that standard, a court will not substitute its views for that of the agency, and will sustain the agency's interpretation if it is reasonable, irrespective of whether there is a more reasonable interpretation. *Id.*

The middle, due weight deference standard, applies where "an agency has some experience in the area, but has not yet developed the expertise that would place it in a better position than a court to make judgments regarding the interpretation of the statute." *Id.*, ¶ 17. *De novo* review applies when the issue is one of first impression, the agency has no particular expertise, or the agency's position is "so inconsistent that it provides no guidance." *Id.*, ¶ 18.

The issues here relate to DNR's adoption of a rule relating to wolf hunting, an activity unprecedented in modern wildlife management history. Additionally, DNR apparently did not solicit or consider any input from its own wolf manger, or from recently retired DNR wolf managers. For these reasons alone, the Court

should accord no deference to DNR's rule. Additionally, the issues here relate to DNR's interpretation of the authority granted by Act 169; and courts typically accord no deference to the agency's interpretation of its own statutory authority. *See Grafft v. DNR*, 2000 WI App 187, ¶ 4, 238 Wis. 2d 750, 618 N.W.2d 897. Accordingly, DNR is entitled to no deference in this case, and the Court should apply a *de novo* standard of review.[5]

B. DNR's Regulations are Invalid if They Exceed the Agency's Statutory Authority or Are Arbitrary and Capricious.

It is a fundamental legal principle that administrative agencies have "'only those powers as are expressly conferred or necessarily implied from the statutory provisions under which [they] operate[].'" *Lake Beulah*, 2011 WI 54, ¶ 23, quoting *Brown Cnty. v. Dep't of Health & Soc. Servs.*, 103 Wis. 2d 37, 43, 307 N.W.2d 247 (1981). An agency may only adopt rules that are expressly or impliedly authorized by the legislature. *See, e.g., City of West Allis v. Sheedy*, 211 Wis. 2d 92, 96-97, 564 N.W.2d 708 (1997); *Peterson v. Natural Resources Bd.*, 94 Wis. 2d 587, 592-93, 288 N.W.2d 845 (1980).

The principal issues in this case are whether DNR acted in excess of its authority or acted arbitrarily.

[5] The "due weight" and "no deference" are similar, as the Court will adopt the more reasonable interpretation of an ambiguous statute. *See, e.g., Racine Harley-Davidson*, 2006 WI 86, ¶ 20. Accordingly, applying either standard here would lead to the same result.

1. The Excess of Authority Standard

The process for evaluating whether an agency has acted in excess of its authority is well described in *Citizens Concerned for Cranes and Doves. v. DNR*, 2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612. The Court stated the following pertinent points:

1. The issue is a legal issue, for which neither party bears any burden of proof. *Id.*, ¶ 10.

2. Court review is *de novo*, without any deference to the agency's interpretation of the scope of its power. *Id.*, ¶ 13.

3. The first question for the court is whether the legislature has authorized the rule. *Id.*, ¶ 14.

4. The rule must match the "elements" contained in the rule; the rule is invalid if it "conflicts with an unambiguous statute or a clear expression of legislative intent …." *Id.*, ¶ 15.

2. The Arbitrary and Capricious Standard

The arbitrary and capricious standard derives from federal cases. *See, e.g.*, *Preston v. Meriter Hospital, Inc.* ("*Preston I*"), 2005 WI 122, ¶¶ 30-32, 284 Wis. 2d 264, 700 N.W.2d 158. The Court in *Preston*, quoting and relying upon United States Supreme Court cases, held that an agency's regulation is arbitrary and capricious when it has either: a) relied on factors that Congress did not intend it to consider; b) failed to consider an important aspect of the problem; c) offered an explanation contrary to the evidence, or d) "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.*, ¶ 32 (quoted and cited sources omitted.) In a subsequent case, the Court of Appeals

characterized the issue as whether the agency "can satisfactorily explain its regulatory action and there is a 'rational connection between the underlying facts and the choices made'" in the regulation. *Preston v. Meriter Hospital, Inc.*, 2008 WI App 25, ¶ 36, 307 Wis. 2d 704, 747 N.W.2d 173, *rev. den.* 2008 WI 40.

The role of the court is to assure that the agency has conducted this necessary examination and explained itself in the record. As the Supreme Court stated in *Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 385, 401 N.W.2d 805 (1985):

> What is the role of the court, given that it can be neither a rubber-stamp nor a super-agency? We conclude that it is the proper role of the court to undertake a study of the record which enables the court to penetrate to the reasons underlying agency decisions so that it may satisfy itself that the agency has exercised reasoned discretion by a rule choice that does not deviate from or ignore the ascertainable governmental objective….

Additionally, it is not the role of the court to provide a rationale to support the agency's decision. In *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, the case most prominently relied upon in *Preston*, the U.S. Supreme Court stated that it is incumbent upon the agency to "articulate a satisfactory explanation for its action." 463 U.S. 29, 43 (1983). It then added:

> The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.

Id. The court also stated:

> We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner … and we reaffirm this principal again today.

Id. at 48-49.

II. DNR'S FAILURE TO INCLUDE REASONABLE RESTRICTIONS ON THE USE OF DOGS TO HUNT OR TRAIN TO HUNT WOLVES EXCEEDED ITS STATUTORY AUTHORITY.

A. State Statutes Limit the Use of Dogs to "Track or Trail" Wolves, Consistent with the Statutory Prohibitions on Animal Mistreatment and Fighting.

In the typical case, the issue of whether the agency exceeded its authority involves allegations of overreaching by the agency, *i.e.*, adopting rules beyond or in the absence of a legislative grant of regulatory authority. *See, e.g., Wisconsin Builders Ass'n v. State Dep't of Commerce*, 2009 WI App 20, 316 Wis. 2d 301, 762 N.W.2d 845, *rev. den.* 2009 WI 34. Here, there is no dispute that the legislature has granted and directed DNR to promulgate rules for the wolf hunt. Rather, DNR has exceeded its authority by not including within those rules restrictions that are necessary to ensure compliance with both the enabling statute and related criminal statutes. As a result, DNR has established a regulatory program that it knows will result in violations of both Wis. Stat. §§ 29.185(6)(a)2 and 951.02.

Wisconsin Stat. § 29.185(6) states in pertinent part:

> (a) *Authorization; hunting*. A wolf harvesting license authorizes the hunting of wolves by using any of the following:
>
> 1. A firearm, as authorized under par. (b), a bow and arrow, or a crossbow.
> 2. Dogs to **track or trail** wolves, subject to par. (c).
>
> * * * *
>
> (c) *Use of dogs*. 1. A person may hunt wolves using dogs beginning with the first Monday that follows the last day of the regular season that is open to hunting deer with firearms and ending on the last day of February of the following year.
>
> 2. No more than 6 dogs in a single pack may be used to **trail or track** a wolf, regardless of the number of hunters assisting the holder of the wolf harvesting license.

> 3. While a person is using a dog to hunt wolf, the person shall keep on his or her person any tag required for the dog under s. 95.21(32)(f), 174.053(2), or 174.07(1)(e).

(Emphasis added.) The non-statutory provisions in Act 169 also direct DNR to promulgate emergency (and permanent) rules that are "necessary to implement or interpret sections 29.185 and 28.888 of the statutes …." Act 169, Sec. 21.

DNR regulations do not specifically define either "track" or "trail." The term "hunt" is broadly defined to include shooting, pursuing, taking, capturing or killing. *See* Wis. Stat. § 29.001(42). In hunting parlance, "take" means to physically acquire, either by capture or kill, consistent with the primary dictionary definition. *See The American Heritage Dictionary*, Second Coll. Ed. (1985) at 1239. By contrast, track and trail are generally synonymous terms that mean to follow and approach, but not to confront or physically engage. *Id.* at 1283 and 1285 ("track" defined as "To follow the footprints or traces of trail;" "trail" defined as "To follow the traces or scent of, as in hunting; track").

The legislative limitation on the use of dogs to track or trail is consistent and compatible with criminal statutes in chapter 951, which prohibit animal mistreatment and fighting. Specifically, Wis. Stat. § 951.02 provides: "No person may treat any animal, whether belonging to the person or another, in a cruel

manner…." "Cruel" is defined in § 951.01(2) to mean "causing unnecessary and excessive pain or suffering or unjustifiable injury or death."[6]

In reviewing whether DNR's rules include reasonable restrictions necessary to limit the use of dogs to tracking and trailing, the Court also should be cognizant of DNR's duty to ensure that its rules meet the intent of the criminal statutes, and do not effectively condone or facilitate violations of those statutes.[7] The DNR rules regulating how dogs are to be used and trained to hunt wolves must not run counter to established Wisconsin law criminalizing animal cruelty or, in effect, foster violations thereof. Yet these rules' lack of reasonable restrictions and silence concerning training will do just that.

B. DNR Was Presented with Substantial, Undisputed Evidence that Without Reasonable Restrictions, the Use of Dogs to Hunt Wolves Will Result in Violent Encounters in which Both Dogs and Wolves Will Be Brutally Killed.

During the rulemaking process, DNR was presented with unequivocal, undisputed evidence that reasonable restrictions are "necessary" to satisfy the statutory limitation that dogs may only "track or trail" wolves. This evidence was submitted by experts in wolf management and dog behavioral science, including professors from the University of Wisconsin and a retired DNR wolf biologist and educator, and a certified applied animal behaviorist. Much of this evidence also

[6] Wisconsin Stat. § 951.08 also prohibits the intentional instigation or promotion of animal fighting, owning an animal with intent for it to engage in fighting, or intentionally be a spectator at a fight between animals.

[7] In *State v. Kuenzi*, 2011 WI App 30, ¶¶ 32-38, 332 Wis. 2d 297, 796 N.W.2d 222, *rev. den.* 2011 WI 100, the Court held that hunting subject to chapter 29 may also violate criminal statutes prohibiting animal mistreatment.

was set forth in affidavits submitted with Appellants' motion for stay in the Circuit Court.

The undisputable evidence paints a disturbing picture of violent confrontations between dogs and wolves, inevitably resulting in horrific injury and death, primarily to dogs. Examples of this evidence, also reflected in the affidavits, include the following:

- Professor Adrian Treves, University of Wisconsin Nelson Institute for Environmental Studies, University of Wisconsin-Madison, an expert in wolf habitat and behavior (R. 8):
    - scientific evidence is clear that dogs will be injured or killed during engagement with wolves in the absence of restrictions that prevent or adequately minimize the risk of direct physical encounters between dogs and wolves;
    - both the practice of hunting wolves with dogs and the practice of training dogs to hunt wolves will be extremely dangerous for dogs unless reasonable restrictions are implemented to mitigate the risk of physical confrontations, including leash tethering of dogs, training, and exclusion of hunting and training dogs from specific areas defended by wolf packs during designated times of the year.
- Richard Thiel, retired DNR wildlife biologist after 33 years in the Bureaus of Endangered Resources and Wildlife Management, and author on wolves and wolf management topics (R. 5):
    - because wolves cannot be treed, like bear or bobcats, and will defend their territories and packs against canine intruders, conflicts between wolves and dogs are inherently violent and dangerous;

- wolves primarily consider dogs as threats, a fact long recognized by DNR, and when defensive behavior is activated, it is exceedingly difficult to get wild wolves to cease their attack;

- without reasonable restrictions imposed by DNR, such as leash tethering during both training and hunting, exclusions of dogs from identified core wolf habitat, and seasonal restrictions for training and hunting wolves during wolf mating and breeding and when pups first leave the den, serious injury and death to dogs and wolves is virtually certain.

- Dr. Patricia McConnell, an expert in dog behavior (R. 7):

  - restrictions on breeds to scent hounds, on-leash requirement for dogs training and hunting wolves, and certified training in pursuit hunting with a dog on line are all necessary to prevent dogs from confronting or attacking wolves and, in turn, from suffering severe injury, pain and suffering, and death in the ensuing fight.

This evidence was supported by a wealth of scientific, peer reviewed literature, which was cited by these experts and others.[8]

While DNR administration offered two warden/bear hunters at the September 2012 NRB meeting, it inexplicably persisted in concealing Mr. Wydeven, its only expert in wolf management, from the NRB and public. Other bear hunters speculated that they could protect their dogs from wolves, but these statements are belied by the nearly $1.5 million in depredation payments made by DNR to bear hunters and others for wolves killing or injuring their dogs and livestock. *See, e.g.*, R. 14, Exh. RJ-2. The NRB therefore was deprived of the

[8] Appellants' court affidavits included testimony and peer-reviewed literature presented to the NRB, including Ruid, *et al.*, "Wolf-Human Conflicts and Management in Minnesota, Wisconisn, and Michigan," published in Wydeven, *et al.*, *Recovery of Gray Wolves in the Great Lakes Region of the United States*, Springer (2009). R. 5, Exh. RPT-5.

expertise necessary to make a rational decision, which would be necessary for the courts to conclude that the NRB's adoption of the rules could "be ascribed to a difference in view or the product of agency expertise." *Preston v. Meriter Hospital, Inc.* ("*Preston I*"), 2005 WI 122, ¶ 32.

C. The NRB Did Not Reconsider Its Failure to Include Restrictions on the Use of Dogs to Hunt Wolves.

Although the NRB scheduled and noticed a meeting agenda item in response to the Circuit Court's order granting a stay, that agenda did not relate to hunting with dogs, *i.e.*, the focus of the stay. The issue of amending the emergency rules for hunting wolves with dogs was not on the agenda for the NRB's September 2012 meeting, and it was only discussed in passing. R. 87, A-Ap-136-67. The NRB did not seek to develop a record on this issue, did not take any action (other than not to consider totally prohibiting dogs), and did not make any findings or explain its decision. *Id.*

As discussed in Sections II.E and III, below, DNR's training regulations suffered a similar absence of consideration and explanation, which led the Circuit Court to declare those rules invalid as they relate to training dogs to hunt wolves. Yet the Circuit Court inconsistently ignored DNR's failure to analyze or explain its decision not to include reasonable restrictions in its rules specifically relating to the hunt.

D. DNR Has Previously Included Reasonable Restrictions on the Use of Dogs to Hunt and Train to Hunt Game, and Could Have Done So Here.

There can be no dispute that the type of restrictions suggested by the experts – breed restrictions, leash or lead requirements, training and certification, and seasonal restrictions on training – are reasonable. DNR has already included many of these restrictions in Wis. Admin. Code ch. NR 17, which regulates the training and use of dogs for hunting game, including bears. While ch. NR 17 training standards and restrictions are not mandatory on most lands, they are generally mandatory on DNR lands. There is no reason why they could not be adapted and made mandatory to protect against the more dangerous use of dogs to hunt wolves.

Additionally, DNR cannot contend that it is without authority to impose restrictions beyond the limitations written into the statute. Its new rules already add a restriction on the use of dogs that is not found in the statute: prohibiting their use during night hunting. Wis. Admin. Code § NR 10.07(4)(a). Thus, DNR has recognized that it has the authority to impose reasonable restrictions on the use of dogs to hunt wolves.

E. DNR's Actions Relating to Training Dogs to Hunt Wolves Did Not Satisfy State Law.

1. DNR's "Consideration" of Restrictions on Training Was an Insincere Exercise Designed to Superficially Satisfy the Perceived Intent of this Court's Decision.

The "consideration" that an agency must undertake is an earnest, sincere effort by decision-makers to collect and evaluate information, to develop a reasoned decision grounded in fact, and to articulate their reasoning. Failure to engage in and verbalize that consideration renders the rule invalid. *See* Section I.B.2, above.

Here, the record demonstrates that the NRB did not engage in that character of consideration and did not satisfy such legal requirements. The minutes and transcript of the September 26, 2012 NRB meeting reveal that the NRB was encouraged to engage in the appearance of consideration, rather than to conduct an actual, substantive evaluation of the available facts. The NRB obliged, questioning DNR's attorney on what they would have to do to prevail in this lawsuit. It is evident from these exchanges – excerpted below – that NRB members were of the opinion that simply having a documented discussion would satisfy legal requirements. That kind of result-oriented, process-over-substance formality does not satisfy defendants' legal obligations.

This conclusion is compelled by several statements in the September 2012 NRB meeting minutes. First, the Scope Statement that was the subject of the proceeding was limited in pertinent part to "restrictions on training dogs in

tracking and trailing wolves and also for emergency dog training rules under ACT 169." R. 87 at 380, A-Ap-139. This agenda item illustrates two important points: 1) hunting was not within the scope; and 2) DNR acknowledged its authority to adopt training rules under Act 169.

DNR Attorney Tim Andryk provided board members with his perspective on the import of the Court's decision:

> **Tim Andryk**, Legal Services Bureau Director briefly told the Board about the court decision and how it affects this scope statement. Judge Peter Anderson, Dane County Circuit Court, enjoined the use of dogs for hunting wolves and for training dogs to hunt wolves. He basically said the department did not adequately consider the concerns regarding dog use and the concerns raised by the plaintiffs in the lawsuit which are in the affidavit. The Judge said that the department needed to go back to the Board to adequately consider the issues regarding the use of dogs and perhaps impose additional restrictions in the emergency rule. The Judge stated that the department did have the authority to include in the emergency rule restrictions on dog training and basically strongly suggested the department do so. He said that even if the Board decides to not make any additional changes or impose any additional restrictions this year to the emergency rule, **we would be entitled to due deference in this court if the department and Board considers the concerns of the plaintiffs and address them either through response from department staff and through testimony, we would be entitled to due deference**. The Judge said that it was the department and the Board's decision to make whether additional restrictions on the use of dogs were necessary for this year. **The department needs to get a record to the judge to show that there was discussion and it was a discussion on addressing concerns of the plaintiffs. In that regard, the department also has a couple of wardens here who have spent their lives hunting with hounds** ….

Id. at 382-383, A-Ap-141-42 (emphasis added).

Mr. Andryk's characterization of the objective of this exercise is revealing because nowhere did he mention the need to make a rational decision based on facts. Rather, he advised the NRB that: a) all they needed to do was "consider"

and "have a discussion" regarding plaintiffs' concerns; b) plaintiffs' concerns could be addressed through DNR staff responses; and c) DNR made available two wardens who were hound hunters, and not surprisingly supportive of the use of dogs. Notably, he did not make DNR's wolf expert, Mr. Wydeven, available to the NRB as part of their "consideration." He also provided an advocacy memo from Secretary Stepp. R.79, Exh. I at 292.

After taking public comments, NRB Chair Clausen posed the question to Mr. Andryk why he proposed that the NRB consider additional emergency training rules, if Secretary Stepp opposed it:

> Chair Clausen stated he had only one other question, for Attorney Andryk. Like he said, he thought Pandora's box has been opened here and we may not have heard the last of this. He is looking here and he is almost thinking back to the day that he attended the court hearing. If he goes back here on the page that says "we feel a permanent rule process is adequate to put dog training restrictions on wolves in place. The judge has determined …." Anyway it says "the department questions the necessity to engage in emergency rules on this topic at this time." If that is the case, why did you even bring it forward?
> Attorney Andryk stated the Judge to the department to. The Judge basically said that under Act 169, the department has authority to promulgate emergency rules on wolves and **told us to go back to the Board and consider it**. The Judge said the department would be entitled to deference if the Board decides to make no additional changes or if they make changes but the department needs to adequately ...
> Chari Clausen stated **basically, we have created a record here by fact that we've discussed this and regardless of what we do on this, we have created that record**.
> Attorney Andryk stated yes.

R. 87 at 402, A-Ap-161 (bold emphasis added).[9]

[9] Quotations from the September 2012 meeting are from the DNR-prepared minutes and therefore re in third person.

It is apparent from these colloquies and from the minutes as a whole that this NRB exercise was not designed to scrutinize a factual record, exercise reasoned discretion based on those facts, and then develop and articulate a reasoned decision. Indeed, the Circuit Court specifically observed that the NRB did not act in good faith: "I do not believe I can agree with the State's view that, following my decision last summer, the Board took this matter up in a good faith way." R. 137:15-16, A-Ap-182-83. Rather, the NRB viewed this as a perfunctory exercise designed solely to satisfy its lawyer's understanding of what would satisfy this Court.

III. DNR'S ADOPTION OF THE CHALLENGED RULES WAS ARBITRARY AND CAPRICIOUS BECAUSE, *INTER ALIA*, DNR DID NOT PROVIDE ANY REASONS OR RATIONAL EXPLANATION FOR ITS DECISION NOT TO INCLUDE RESTRICTIONS ON HUNTING OR TRAINING TO HUNT WOLVES WITH DOGS.

A. DNR Did Not Explain Its Decision Not to Require Any of the Hunting Restrictions Recommended by Wolf and Dog Experts.

As discussed in Section I.B.2, above, a regulation is arbitrary and capricious if, *inter alia*, the agency failed to consider an important aspect of the problem, offered an explanation contrary to the evidence, or is "implausible."

Here, Defendants' conduct was arbitrary and capricious because they wholly ignored a significant problem brought to their attention by the letters and testimony of a wide range of citizens and organizations, including the state's foremost dog and wolf experts, who spoke to the necessity of imposing reasonable restrictions on the use of dogs to hunt and train to hunt wolves. DNR offered no

explanation why it did not adopt the recommendations of the experts in the field, in the face of extraordinary risks to wolves, dogs, and humans participating in the hunt or simply enjoying the woods, unknowingly in harm's way.

The persistent absence of Adrian Wydeven, DNR's wolf expert, from any of the proceedings before the legislature, NRB and Circuit Court also is significant, because it suggests a strategy by DNR administration to not inform the legislature, NRB, courts, or the public about the risks associated with wolf-dog confrontations.[10] Indeed, the NRB's decision to promulgate a rule relating to hunting wolves without the benefit of DNR's only wolf behavioral scientist may be deemed *per se* arbitrary and capricious.

The Circuit Court struggled with how to gauge whether the failure to adopt a regulation exceeds the agency's authority. R. 137:30; A-Ap-197. Appellants' submit that ignoring repeated and consistent testimony and submittals by the foremost experts in the field, including its own retired experts, plainly crosses that line.

B. DNR Did Not Explain Its Decision or Articulate a Rational Basis for Not Including Necessary Restrictions on Training.

While the September 26, 2012, NRB meeting focused on training regulations, it also did not include any reasons or explanation for the decision to

[10] In a conventional civil case, the judge or jury may infer from the absence of a party's witness that the witness' testimony would be adverse to that party. Wis. JI-Civil 410. While that jury instruction does not directly apply to this case, it raises the serious issue whether the NRB was prevented from considering adverse information from the most knowledgeable DNR employee.

do nothing. There was significant confusion and widely divergent views regarding the need for emergency training rules, as well as the ability to timely develop those rules. Chair Clausen repeatedly referred to this issue as a "Pandora's Box" and suggested the whole matter should be revisited by the legislature. R. 87 at 402; A-Ap-161.[11] Mr. Kazmierski apparently thought that rules were necessary, but that the matter should be deferred until the permanent rulemaking. *Id.* at 403, A-Ap-162. Mr. Bruins, who made the motion to exclude emergency training rules and focus on permanent training rules, explained his reasoning as follows:

> We have a judge's ruling but this whole thing is very fluid, it is not totally through the court process yet. So in his estimation we are still under the directive of the Legislature. That is why he made this motion. He is fully supportive of developing a permanent rule as to how dogs can be utilized in the hunt but to put something in emergency status with how fluid the situation is, he thinks it is foolish for them to go there.

Id. at 405, A-Ap-164. Thus, the author of the motion also agreed that training rules were necessary, but he was perplexed by the effect of this lawsuit.

DNR Attorney Andryk seemed to agree with the need for controls, as he stated that there would be no violation of animal cruelty laws or Act 169 as long as the hound hunters "are following best management practices as they described …." *Id.* at 403, A-Ap-162. Unfortunately, Mr. Andryk did not articulate or list what he considered to be those "best management practices" or how such practices

[11] This statement from the NRB Chair suggests a belief that the NRB had no discretion or authority to limit the use of dogs in hunting or training to hunt wolves.

would be consistently followed or enforceable without being documented in rules.[12]

Dr. Thomas, another Board member, questioned whether it mattered what the reason was, or even if there was a reason:

> Dr. Thomas stated …. Going back to Mr. Kazmierski's question, have we actually considered this and decided that there's no point in going forward right now because there is not enough time to do an adequate job of going forward That is one conclusion we might have come to. We could have come to the conclusion that no violation of the animal cruelty is happening under the current situation and that is a different reason for coming to the conclusion of not going forward for emergency rule. Does the Judge care which reason we use or is it only that we had a deliberation?

Id. 404, A-Ap-163. In his response, Mr. Andryk strongly suggested which response he believed would be viewed more favorably by this Court:

> Attorney Andryk stated he thought the Judge would look at your decision on whether additional restrictions in use of dogs are needed right now and if they are not needed. In the future, the follow-up permanent rule will be appropriate. If you feel they are needed now but you do not go forward, that would probably not be very favorable by the judge. If you decide they are not needed now, and based on the record before you, you managed consideration of that record, he thought the Judge would be more inclined to give deference to that decision.

Id.

Appellants partially concur with Mr. Andryk's advice. He correctly stated that merely deferring regulations that are necessary to implement Act 169 to permanent rulemaking would be contrary to the legislature's directive to DNR, and therefore would exceed its authority.

[12] There also is no indication in the record that the NRB considered any best management practices in its discussions.

Despite being spoon-fed a reason that Mr. Andryk advised would satisfy the Circuit Court, the NRB did not adopt that reasoning – or any reasoning. However, implicit in the NRB's action is that it agreed that regulation of training was necessary, but that it was going to punt that issue down the road. This is because the NRB specifically approved a Scope Statement to regulate training with dogs to hunt wolves, pursuant to Act 169, as a permanent rule. *Id.* at 026-027. There would be no logical reason to direct DNR to develop permanent rules for training dogs to hunt wolves if the NRB were satisfied that such rules were not necessary. Additionally, nobody provided any information, and the NRB never concluded, that there was something unique about the 2012-13 hunting season that would make training unnecessary for that season while necessary in subsequent years. The only reasonable inference from the actions of the NRB is that restrictions on training are necessary.

DNR likewise failed to explain why it entirely ignored the need for dog training and parameters relating thereto, when DNR has consistently specified training as a condition of hunting with dogs with respect to bird and mammal species posing far fewer risks than wolves. In practical effect, DNR's regulatory silence on how dogs may be trained to hunt wolves created a regulatory loophole so large that it will impede regulation of the hunting season itself. This is because dogs can be trained to hunt wolves throughout the year (10-12 months, depending on location), without a license, including the duration of the four-and-a-half-month

hunting season. Even during the hunting season when such practices are prohibited for dogs hunting wolves, hunters without a wolf hunting license still can train dogs to hunt wolves at night and in numbers above the six-dog limit.

With wolves just recently de-listed from the federal Endangered Species List, DNR's regulatory silence is even more questionable. Under the rules as adopted, dogs would be permitted to train on wolves throughout the year almost everywhere in the state.[13] As such, there would be no relief for the state's recently recovered wolf population from dogs being trained to hunt wolves, which can be released into core wolf habitat, unleashed, in dog packs of unlimited size, during all times of the year, including the vulnerable and volatile mating, breeding and post-denning periods.

The Circuit Court correctly concluded that this absence of consideration or explanation rendered DNR's training rules arbitrary and capricious. As discussed in Section IV, below, this same methodology applies to DNR's hunting regulations and dictates the same result. DNR's failure to consider the reasonable restrictions repeatedly proposed by the foremost experts in the fields of wolf management and canid behavior, and its failure to explain its decision not to include those restrictions, dictates that these rules be reversed and vacated as arbitrary and capricious, as well as exceeding the agency's authority.

[13] There is a limited restriction on using dogs to hunt or pursue free-roaming wild animals in far northern Wisconsin during May and June. Wis. Admin. Code § NR 10.07(1)(i).

IV. THE CIRCUIT COURT DID NOT APPLY THE CORRECT LEGAL STANDARDS TO DNR'S HUNTING REGULATIONS.

A. The Circuit Court Created an Artificial Distinction between the Hunting and Training Regulations.

As discussed in the Statement of Facts, Section D at 12-13, above, the Circuit Court attempted to make a distinction between an agency's adoption of inadequate rules and failure to adopt a rule. Specifically, the judge characterized Wis. Admin. Code ch. NR 17 as DNR having adopting regulation that did not address training dogs to hunt wolves. R. 137:11, A-Ap-178. He attempted to contrast that with his characterization of DNR's hunting rules, in Wis. Admin. Code ch. NR 10, as "the absence of a rule …." *Id.*

Both the judge's intended distinction and the legal basis for it are elusive. Appellants' challenge to the hunting and training rules is based on a failure to adopt rules that are "necessary to implement" the new hunting statutes, as mandated by Act 169; and the failure to articulate any facts, reasons or explanation for not adopting those reasonable regulations. The Circuit Court appears to have adopted this analysis with respect to the hunting rules in ch. NR 17, *i.e.*, DNR did not adopt necessary regulations and did not explain its decision not to adopt regulations. R. 86. This is precisely the same deficiency that infects the hunting regulations in ch. NR 10; yet this fact somehow eluded the Circuit Court.

Additionally, the appellate courts have not made the distinction that the Circuit Court attempted to create. Rather, the courts have looked to whether the

regulation fulfills the agency's statutory duties, and whether it is in harmony with the statute. *See, e.g.*, *Seider v. O'Connell*, 2000 WI 76, ¶ 26, 236 Wis. 2d 211, 612 N.W.2d 65 ("A rule out of harmony with the statute is a mere nullity") (quoted source omitted); *Grafft v. DNR*, 2000 WI App 187, ¶ 7 (whether the rule matches the statutory elements") (quotes source omitted). The case law is clear that a regulation may exceed an agency's authority either because of what it includes or what it is statutorily required but fails to include. This is consistent with the principle that an agency cannot refuse to perform its statutory duties:

> An administrative agency cannot abdicate its responsibility to implement statutory standards under the guise of determining that inaction is the best method of implementation.

United States v. Markgraf, 736 F.2d 1179 (7th Cir. 1984) (cited source omitted).

Because the Circuit Court adopted this novel rule of law to preclude consideration of the merits of Appellants' claim, it never addressed whether DNR failed to adopt reasonable restrictions that were "necessary to implement" Act 169. Additionally, the illogical consequence of the Circuit Court's decision is that the training of dogs to hunt wolves is correctly prohibited, but the use of untrained dogs to actually hunt wolves may go forward.

B. The Circuit Court Did Not Apply the Arbitrary and Capricious Standard to DNR's Hunting Regulations.

Under the arbitrary and capricious analysis, the Circuit Court should have determined whether the NRB had truly considered the facts, made factual findings, and developed and articulated a reason for its choice. If the NRB had undertaken

and documented that evaluation, the Circuit Court's next step would be to determine whether that agency action was supported by the facts found. In the absence of that analysis, the Circuit Court was required to set aside or vacate the rules as arbitrary and capricious, and remand the matter back to DNR for further rulemaking.

The Circuit Court followed that methodology with respect to training rules, concluding that the absence of any explanation or rationale for not adopting regulations limiting the use of dogs to train to hunt wolves violated state law, and that it required a permanent injunction prohibiting training until such rules were formulated.

However, the Circuit Court abandoned this methodology with respect to hunting rules, apparently believing that the court was constrained to affirm the rules because DNR had taken affirmative action to adopt them. R. 137:28, A-Ap-195. The Circuit Court then compounded this error by assuming the basis for Appellants' planned motion for reconsideration, thereby not addressing a core deficiency in its prior analysis.

C. The Circuit Court Inaccurately Characterized and Treated Appellants' Claim as Seeking Mandamus.

Finally, in deciding not to decide whether DNR's hunting regulations were arbitrary and capricious or otherwise exceeded its authority, the Circuit Court treated Appellants' claim as seeking a mandamus compelling specific action. R. 137:29-31, A-Ap-196-98. The judge then held that DNR had the authority to

adopt hunting rules, but he was not going to enjoin the use of dogs in the hunt because Appellants had not made a case for mandamus. *Id.* at 31, A-Ap-198.

The Circuit Court erred by mischaracterizing Appellants' claim as seeking mandamus. Mandamus by its terms is an action to compel a governmental body or lower court "to perform a particular act." *State ex rel. J.H. Findorff v. Milwaukee County*, 2000 WI 30, ¶ 8 n. 5, 233 Wis. 2d 429, 608 N.W.2d 679 (quoted source and internal quotes omitted); *see also, State ex rel. Robbins v. Madden*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 766 N.W.2d 542.

Appellants have not sought to compel DNR to perform a particular act. Rather, they have pled a claim for declaratory judgment that the rules, as adopted, do not comply with state law, to declare those rules invalid, and as additional relief to issue a temporary and permanent injunction prohibiting the use of dogs in the wolf hunt unless and until DNR issues rules that do comply with state law. While the effect of that ruling may result in DNR issuing a new set of rules, Appellants never asked the Circuit Court to compel DNR to issue new rules or to dictate the scope of those rules.

V. APPELLANTS ARE ENTITLED TO A PROHIBITORY INJUNCTION

Had the Circuit Court based its decision on Appellants' actual claims, it should have issued a prohibitory injunction. Where, as here, the agency has exceeded its authority by adopting a regulation that either violates its statutory

directive or is arbitrary and capricious, the rule is "a mere nullity." *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W. 2d 47 (1955).

Additionally, to obtain a permanent injunction, Appellants were only required to show that "a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff." *Pure Milk Prod. Coop. v. National Farmers Organ.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979).

In this action, affidavits filed by Appellants and their witnesses demonstrated a substantial and factually uncontested risk of substantial harm to Appellants. For example, Appellants Jayne Belsky and Donna Onstott reside in wolf territory in central Wisconsin and are wolf trackers, *i.e.*, they collect wolf data that supports DNR's wolf management program. R13, ¶¶ 7, 8; R. 25, ¶¶ 4-8. They are personally at risk of bodily harm associated with dogs chasing wolves outside their normal territorial patterns, particularly when they are in the woods collecting data. *Id*. Personal risks of this nature are in addition to the general risk to the public users of our forests associated with dogs disrupting cohesive packs and chasing wolves from their territories into agricultural or residential areas.

Finally, the equities strongly favored issuance of an injunction. While the risk of harm to Appellants, other users of the forest, and both dogs and wolves are great, last season's wolf hunt demonstrated that dogs are not necessary to achieve the legislative goal of establishing a hunt as a tool to managing the wolf population. Trappers and hunters without dogs had taken almost the entire quota

of wolves before dogs would have been permitted under Act 169 and DNR rules; and the season was closed less than half way through its scheduled duration. *See* http://dnr.wi.gov/topic/hunt/wolf.html.

The defendants offered no evidence that they would suffer any harm from a permanent injunction prohibiting the use of dogs to hunt or train to hunt wolves until rules satisfying Act 169 are adopted.

CONCLUSION

The State of Wisconsin is embarking on a new, unprecedented and highly controversial wildlife management practice: the use of dogs to hunt wolves. No other state in the United States authorized this method of hunting, and there is no precedent in modern American history.[14] The Legislature, in Act 169, only authorized the use of dogs to "track or trail" and not to "take" wolves; and it expressly directed DNR to adopt rules "necessary to implement" that limited use. Nevertheless, DNR has determined to merely mirror the statute, thereby not adopting any additional regulations focusing on the statutorily limited authorization. Moreover, DNR has not articulated or explained any coherent reasons for failing to comply with that statutory duty.

The Circuit Court compounded this abdication of DNR's statutory obligation by improperly curtailing its duty of judicial review. First, the Circuit Court created a distinction between the training and hunting rules that has no legal

[14] The use of dogs to hunt wolves is practiced in Russia and some other countries, with gruesome results. *See, e.g.*, http://www.youtube.com/watch?v=TQIoig6GMDM.

or factual justification, given the essentially identical conduct of dogs that enter into wolf territory to hunt or train to hunt wolves. As a result, the Circuit Court reached the odd conclusion that hunters can use unrestrained packs of dogs to pursue and hunt wolves without restrictions necessary to prevent brutal dog-wolf confrontations, but they cannot train the dogs without restrictions. The Circuit Court's decision therefore makes the use of dogs even more dangerous for landowners and users of the forest in the vicinity of wolf territories.

Secondly, the Circuit Court misconstrued Appellants' claim as one for mandamus to direct DNR to adopt specific rules. In fact, Appellants only sought a declaration that the rules as adopted violated state law and were invalid, and then to issue a prohibitory injunction precluding the use of dogs unless and until valid rules were adopted. As a result, the Circuit Court reached another inconsistent result: it declared that DNR had authority to adopt restrictions on the use of dogs to hunt wolves, which it did not do; but then it did not prohibit the hunt in the absence of those required rules.

Finally, it is apparent that the once-admired DNR has lost its way. It has failed to consider or address the overwhelming scientific evidence necessitating restrictions on the use of dogs to protect against violations of animal cruelty laws, instead relying on the speculative, anecdotal, lay statements of influential bear hunters. Its NRB brazenly made clear that it was only interested in the appearance

of compliance with the Circuit Court's recommendation to consider additional regulations, not in the sincere consideration and application of science.

The courts are literally the court-of-last-resort to ensure that DNR complies with state law, and that it engages in reasoned and articulated decision-making. Only this Court can provide the backstop needed to enforce DNR's statutory duty and mission to manage public resources based on sound science and the best available information.

For the reasons set forth herein, Appellants request that this Court reverse and vacate DNR's wolf hunting regulations, as they relate to the use of dogs to hunt wolves, for DNR's failure to comply with its obligations under both Act 169 and Wis. Stat. ch. 951, and to permanently enjoin the use of dogs to hunt wolves until DNR adopts rules that comply with state law.

Dated this 18th day of July, 2013.

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CERTIFICATION OF SERVICE

I hereby certify that an original and nine copies of this Brief were hand delivered to the Clerk of the Court of Appeals on July 18, 2013. I further certify that copies of the Brief were served on all parties of record by First Class Mail on July 18, 2013. I further certify that the Brief was correctly addressed and postage was prepaid.

Dated: July 18, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

CERTIFICATION OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this Brief, which complies with the requirements of § 809.19(12).

This electronic Brief is identical in content and format to the printed form of the Brief filed as of this date.

A copy of this certificate has been served with the paper copies of this Brief filed with the court and served on all opposing parties.

Dated: July 18, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in § 809.19(8)(b) and (d) for a brief produced with a proportional serif font.

The length of this Brief is 43 pages and 10,949 words.

Dated: July 18, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

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PLAINTIFFS-APPELLANTS' BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of June 2013

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

APPENDIX