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November 20, 2012

The Honorable Peter C. Anderson
Dane County Circuit Court Branch 17
Dane County Courthouse, 6th Floor
215 S. Hamilton Street
Madison, WI 53703-3285

Re: *Wisconsin Federated Humane Societies, Inc., et al. v. Cathy Stepp, et al.*
Case No. 12-CV-3188

Dear Judge Anderson:

Enclosed for filing are an original and two copies of the Plaintiffs' Notice of Motion and Motion for Judgment on the Merits and Plaintiffs' Brief in Support of Plaintiffs' Motion for Judgment on the Merits and in Opposition to Defendants' and Intervenors' Motions for Decision on the Merits and Alternative Motions to Vacate Stay. By copy of this letter, we are serving all counsel of record by e-mail with same.

Sincerely,

AXLEY BRYNELSON, LLP

Carl A. Sinderbrand
CAS:mj
Enclosure
cc: (via e-mail w/enc.)
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Attorney Thomas A. Janczewski
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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

WISCONSIN FEDERATED HUMANE SOCIETIES, INC., *et al.*,

Plaintiffs,

vs.

Case No. 12-CV-3188

CATHY STEPP, SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Classification Code: 30701

Defendants

and

UNITED SPORTSMEN OF WISCONSIN, *et al.*,

Intervenors.

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE MERITS

To: the above-named Defendants and Intervenors:

PLEASE TAKE NOTICE that the Plaintiffs, by and through their attorneys, Robert L. Habush and Habush Habush & Rottier, S.C., Jodi L. Habush Sinykin and HS Law, and Carl A. Sinderbrand and Axley Brynelson, LLP, will move this Court, the Honorable Peter C. Anderson presiding, on the 20th day of December, 2012, at 1:15 p.m., at the Dane County Courthouse, Madison, Wisconsin, pursuant to Wis. Stat. § 227.40, for a judgment declaring that the emergency rules promulgated by the Defendants (collectively "DNR") are unlawful and invalid as they relate to the use of dogs in connection with the hunting of wolves or training to hunt wolves, and permanently enjoining the Defendants from issuing wolf harvesting licenses that authorize the use of dogs in connection therewith, or from authorizing or allowing the use of

dogs to train to hunt wolves, unless and until the Defendants promulgate rules that impose those reasonable restrictions that are necessary to implement Wis. Stat. § 29.185(6).

The grounds for this motion are more fully set forth in the accompanying Brief in Support of Plaintiffs' Motion for Judgment on the Merits and in Opposition to Defendants' and Intervenors' Motions for Decision on the Merits and Alternative Motions to Vacate Stay.

Dated this 20th day of November, 2012.

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 17 | DANE COUNTY

WISCONSIN FEDERATED HUMANE SOCIETIES, INC., *et al.*,

Plaintiffs,

vs.

Case No. 12-CV-3188

Classification Code: 30701

CATHY STEPP, SECRETARY, WISCONSIN DEPARTMENT OF NATURAL RESOURCES, *et al.*,

Defendants,

and

WISCONSIN BEAR HUNTERS ASSOCIATION, *et al.*,

Intervenors.

PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE MERITS AND IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS FOR DECISION ON THE MERITS AND ALTERNATIVE MOTIONS TO VACATE STAY

INTRODUCTION

On April 16, 2012, Wisconsin became the first and only state in the United States to allow the use of dogs for hunting wolves, through the enactment of 2012 Wisconsin Act 169 ("Act 169"). Facing this new and unprecedented type of hunting, Defendants (collectively "DNR") decided to impose virtually no restrictions on the use of dogs to either hunt or train to hunt wolves. DNR has promulgated no restrictions to prevent or even minimize deadly, violent confrontations between free-roaming hunting hounds and wolves, despite undisputed evidence of that risk, and it continues to offer literally no rationale for that decision.

The central issue in this case is whether the emergency wolf hunting rules promulgated by DNR 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. 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 would also run afoul of Wis. Stat. § 951.02.[1]

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 evolving 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 or inaction 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.

DNR argues that it must prevail on the merits because DNR "considered" the issue of whether to impose restrictions on the use of dogs in both hunting and training to hunt wolves, and that there are facts in the record that would support a decision to do nothing. The

[1] The terms "track" and "trail" are generally synonymous terms that mean to follow and approach, but not to confront or physically engage. *See, e.g.*, *The American Heritage Dictionary*, Second Coll. Ed. (1985) 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").

intervenors (collectively the "Bear Hunters") make similar arguments.[2] However, they each rely on a stilted representation of the applicable law and a mischaracterization of this Court's prior ruling, while largely ignoring the basis for Plaintiffs' claim.

The record in this case, as already augmented through the motion for stay and temporary injunction, demonstrate the following:

1. The only pertinent matter identified in the Natural Resources Board ("NRB") notice of its September 26, 2012 meeting related to training with dogs; *i.e.*, the NRB and DNR neither noticed nor considered additional restrictions on the use of dogs for hunting wolves. Nor did the NRB articulate any reason why it did not adopt additional emergency rules for this year's wolf hunt. As such, the record as it relates to hunting wolves with dogs is **no different** than the record available at the time the Court issued its stay and temporary injunction on August 31, 2012.

2. 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 on July 17, 2012, or when it declined to enhance the training rules on September 26, 2012. Rather, the record reflects a morass of inconsistent and incomplete communications among the NRB members, reflecting Board 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.

3. All of the commenters supporting no restrictions on training (and cited or quoted by the Bear Hunters) focused on dog behavior. However, the issue here is **not how the dogs will behave, but how the larger, stronger, fiercer, and faster wolves will behave**. All of the evidence and competent information regarding wolf behavior, and documented wolf attacks on hunting dogs in Wisconsin over the past twenty-five years, came from witnesses conclusively finding additional restrictions necessary for both training dogs to hunt wolves and using dogs to hunt wolves. Defendants neither heard nor presented any credible evidence that contradicted the plaintiffs' experts on wolf behavior, including any evidence offered by DNR's only wolf behavior expert, Adrian Wydeven, who has remained notably absent throughout the proceedings, from enactment of Act 169 to the present.

[2] DNR and the Bear Hunters also move the Court to vacate the stay, in the alternative. Only the Bear Hunters have argued that motion. Plaintiffs address the alternative motions at the end of this brief.

4. 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 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. Second, there remains no factual dispute regarding Plaintiffs' claims for relief, as 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. DNR's motion does not even address this issue, relying solely on a procedural argument. The Bear Hunters' brief provides a deceptively inaccurate account of the NRB meeting, providing partial quotations and ignoring other pertinent information.

It also is important to point out that a central factual predicate for the Bear Hunters' arguments is untrue. Their representatives have stated that use of dogs is necessary to hunt wolves. *See, e.g.*, Lobner Affidavit, ¶ 9; Linzmeier Affidavit, ¶ 7 (without dogs, "there would be little chance of ever spotting a wolf.").[3] Beyond the fact that wolf hunting has proceeded without the use of dogs, these statements are simply false. In fact, DNR reports that there have already been 83 wolves killed in the initial five weeks of the hunting season (nearly 75% of the quota in 25% of the season); and DNR has already closed two of the six zones before dogs could have been used under Act 169, absent an injunction. *See* http://dnr.wi.gov/topic/hunt/wolf.html.

[3] Mr. Lobner is president and Mr. Linzmeier is a member of the Wisconsin Bear Hunters' Association. These affidavits were submitted in connection with the Bear Hunters' motion to intervene.

While these facts underscore the speculative nature of the Bear Hunters' arguments, they by no means minimize the importance of a ruling from this Court. To the contrary, a final decision by this Court is necessary to prevent the immediate onset of unrestricted training of dogs for wolf hunting, which is not contingent upon hunting quotas, during the upcoming high-risk months of wolf mating and breeding. Moreover, a final decision by the Court will provide essential guidance to DNR as it embarks on permanent rulemaking for both wolf hunting and training with dogs. Based on the conduct of DNR and the NRB to date, without guidance from this Court, a repeat performance of the emergency rule-making process will likely ensue. The defendants' conduct at the September 2012 NRB proceeding foreshadows a comparable disregard of best available science and the law in the absence of a ruling by this Court.

Plaintiffs therefore 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) 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. Nature of Action and Parties

This is an action for declaratory judgment challenging administrative rules, pursuant to Wis. Stat. § 227.40. Plaintiffs are humane societies, other charitable, non-profit organizations, and individual wolf trackers, hunters, and a farmer and veterinarian. Their specific interests and concerns relate to the use of dogs in connection with hunting or training to hunt wolves, in particular the grave risks of harm to wolves, dogs, hunters, wolf trackers, and other users of the forests if dogs are allowed to chase (or be chased by) wolves without reasonable restrictions.

Defendants include the Secretary and Board of DNR, as well as the agency itself. The Court has also allowed the Bear Hunters, a collection of several hunter groups supporting DNR's rules, to intervene in support of defendants. A group of mainstream hunters and the American Society for the Prevention of Cruelty to Animals ("ASPCA") have been granted permission to participate as *amici curiae*.

B. Background Facts

In April 2012, the Legislature enacted and the Governor signed Act 169, which created, *inter alia*: § 29.185, authorized a hunting season for wolves; and modified § 29.188, the wolf depredation compensation program.

1. Scope of NRB Proceedings

DNR discusses three NRB proceedings, in support of its argument that issues and facts relating to the use of dogs were presented to DNR and the NRB on several occasions. It is important to understand what was and was not included within the scope of these three NRB proceedings.

The May 23, 2012 NRB proceeding related to adopting a scope for emergency rules relating exclusively to hunting wolves. DNR Exhs. C and H. The scope statement included nothing relating to training of dogs to hunt wolves.

The July 17, 2012 NRB proceeding also related exclusively to using dogs in connection with the hunt itself, and not training. *See, e.g.*, DNR Exh. D at 1-4 of 4; Exh. G. Training only became an issue because DNR's emergency rule deleted wolves from the list of protected species under Wis. Admin. Code § NR 10.02(1), thereby making wolves available for virtually unrestricted dog training. That is, training was not a subject of the rulemaking, and the record

reveals no NRB discussion or evaluation of the impact of these rules on training, or the harm that could result from unrestricted training.

Additionally, while there were presentations and evidence submitted relating to the dangers of wolf-dog interactions during the hunt, the NRB neither discussed nor considered potential restrictions on the use of dogs for hunting wolves, other than nighttime restrictions included in the draft rules, seemingly based on its erroneous belief that Act 169 precluded any additional restrictions. DNR Exh. D at 23-29 of 29. This Court's oral decision granting a stay and temporary injunction, and inviting DNR to consider additional restrictions, discussed this mistaken legal conclusion and, notably, the absence of any supporting rationale.[4]

After the Court's decision, the NRB scheduled a wolf-related agenda item for its September meeting. However, that agenda item related exclusively to training under both the emergency rules and future, permanent rulemaking. DNR Exh. I at 003; Exh. M at 380. Additionally, there is no information in the record indicating that the NRB ever considered additional restrictions on the use of dogs for hunting wolves. That is, **DNR did not schedule, provide public notice, consider, or not take action relating to the hunt itself.** To the extent that this case focuses on the rules relating to the use of dogs during the hunt, the record remains literally devoid of any consideration of restrictions on the use of dogs for hunting wolves or rationale for not including them.

The September 26, 2012 NRB meeting is noteworthy for several reasons, which are discussed later in this brief. At this juncture, it is particularly noteworthy that DNR's single wolf expert, Adrian Wydeven, did not participate in this proceeding, or any of the other legislative or

[4] At the September 26, 2012 NRB meeting, Board member William Bruins suggested that the Board had discussed restrictions on the use of dogs at the July meeting. DNR Exh. M at 405. The minutes of the July meeting demonstrate that no such discussion occurred.

regulatory proceedings. Mr. Wydeven has been 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 Wisconsin Wolf Management Plan (1999). *See* http://dnr.wi.gov/files/pdf/pubs/er/er0099.pdf.[5] His absence has been noted several times in this proceeding; yet DNR administration continues to hide him from both its NRB and this Court. His absence is significant, because it suggests a strategy by DNR to not inform the legislature, the NRB, this Court, or the public about the risks associated with wolf-dog confrontations.[6] 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.

2. The NRB Never Concluded that Additional Restrictions Were Unnecessary.

DNR does not dispute that there is substantial scientific evidence in the record describing and documenting the risk of grievous injuries and deaths if dogs are allowed to be used to hunt or train to hunt wolves without additional restrictions. DNR also does not dispute its own record of depredation payments, documenting the nearly 200 confirmed deaths and brutal injuries suffered by unleashed hunting dogs in proximity to wolves and/or core wolf habitat. *See, e.g.*, Jurewicz Affidavit, Exh. RJ-2. Plaintiffs do not dispute that there are statements supporting no further restrictions, albeit speculative and unscientific, from both DNR wardens and private citizens who

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

[6] 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.

hunt bears and coyotes.[7] As noted immediately above, DNR administration did not produce its one wolf expert to inform the NRB.

The issue raised by DNR's argument is not merely whether the NRB "considered" the information presented, but whether it articulated a rational basis for its decision to do nothing, based on facts found by the Board. *See* Argument Section I.A, below. This is important because the NRB was informed and believed that it only had to create a record showing consideration, irrespective of any reasons. Asked by Chair Clausen why Mr. Andryk placed emergency training rules on the agenda, the minutes read as follows:

> MR. ANDRYK: The Judge told the department to.
> CHAIRMAN CLAUSEN: Okay.
> MR. ANDRYK: The judge basically said that under Act 169, we have authority to promulgate emergency rules on wolves and told us to go back to the Board and consider it. And the judge said we'd be entitled to deference if the Board decides to make no additional changes or if they make changes, but the Board and the department need to adequately consider it.
> CHAIRMAN CLAUSEN: So basically we have created a record here by the fact that we've discussed this, and regardless of what we do on this, we have created that record.
> MR. ANDRYK: Yes.

Sinderbrand Affidavit, Exhibit 1 (hereinafter "Transcript") at 3.[8]

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[7] DNR's brief and exhibits highlight virtually every instance in the record in which dogs were mentioned, irrespective of whether they related in any way to the issues before this Court. While some of those comments expressed concerns about the inevitable, violent confrontations between wolves and dogs – *see, e.g.*, Habush (Exh. D (7/17/12 minutes) at 9); Warren (*id.* at 13) – most comments were unrelated to that concern. For example, several of the cited comments related to whether hunters should be compensated under the depredation program for dogs killed or injured while hunting. *See, e.g.*, Wollenhaup (*id.* at 4); White (*id.* at 14). Others disagreed with any use of dogs. *See, e.g.*, Givnish (*id.* at 6); McClure (*id.* at 13); Matthews (R-Ap. 219). Mr. Stahl (*id.* at 15) merely noted that Wisconsin would be "the only state to allow wolf hunting with dogs ...." Additionally, the DNR-cited colloquy (*id.* at 9-10) was only a dialogue correcting a DNR administrator's misstatement regarding seasonal limits on training with dogs in the northern one-third of Wisconsin.

[8] Exhibit 1 is the transcript of pertinent portions of the audio recording of the meeting; DNR Exh. I includes the draft minutes of that meeting; and DNR Exh. M includes the approved minutes. This brief relies on the Transcript where available, as the more accurate account.

The record also reflects the absence of any single or even multiple reasons why DNR declined to adopt emergency training rules. Chair Clausen commented that "it should be up to [the legislature] to go back and revisit this thing and either alter the humane laws or alter the dog training laws." *Id.* at 5. Mr. Kazmierski suggested that there may not be sufficient time to do the rules correctly, and that it should be considered in permanent training rules. *Id.* at 7-8. Mr. Bruins, who made the motion, was concerned that the NRB not take action because the matter was "fluid." *Id.* at 15. Dr. Thomas had the following interchange with Attorney Andryk:

> DR. THOMAS: But if you – I'm going back to Kaz's question. Have we actually considered this, and if we've considered it and decided that there's no point in going forward right now because there's not enough time to do an adequate job of going forward, that's 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's 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?
>
> MR. ANDRYK: Well, I think the judge would look at your decision on whether additional restrictions in the use of dogs are needed right now, and if they're not needed in the future, a follow-up permanent rule will be appropriate. If you feel they're needed now but you don't go forward with it now, that would probably be not viewed very favorably by the judge.
>
> But if you decide they're not needed now based on the record before you, and adequate consideration of that record, I think the Judge would be more inclined to give deference to that decision.

Id. at 10-11.

Despite being offered a specific rationale for its decision that, in Mr. Andryk's view, would satisfy this Court – and a warning about not adopting that rationale – the Board still offered no rationale. The Board did not come to an agreement or provide any explanation why it decided not to adopt any additional restrictions on training dogs to hunt wolves to comply with the statute's "track or trail" directive. More revealing, the NRB did approve going forward with permanent training rules in the Spring, implicitly acknowledging the need for additional rules and restrictions governing training of dogs to hunt wolves. *Id.* at 026-027.

ARGUMENT

I. DNR'S ACTIONS HERE ARE ARBITRARY AND CAPRICIOUS AND UNREASONABLE, BECAUSE DNR GAVE NO RATIONALE FOR NOT IMPOSING REASONABLE RESTRICTIONS ON BOTH HUNTING AND TRAINING TO HUNT WOLVES.

Plaintiffs' claim is predicated on two premises: a) the rule is arbitrary and capricious, because DNR did not consider the matter, exercise its judgment, and develop a reasoned decision based on the evidence; and b) the rule fails to satisfy the requirements of Act 169, Section 21(1), to adopt emergency rules that are "necessary" to "implement" newly created Wis. Stat. § 29.185, specifically its prescription that dogs may be used on hunting only to "track or trail" wolves, consistent with the proscriptions against animal cruelty in Wis. Stat. ch. 951.

The motions by DNR and the Bear Hunters focus on the first premise, and we therefore address that matter first.

A. A Rule is Arbitrary and Capricious if the Agency Did Not Consider the Matter, Exercise Its Judgment, Explain Its Reasoning, and Support its Reasoning by Facts Found by the Agency.

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 I*, 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 *Preston I*, and in the Court of Appeals' subsequent decision, the courts characterized the issue as whether the agency "can satisfactorily explain its regulatory action and if there is 'a rational connection between the facts found and the choice made'" in the regulation.

Id.; *Preston v. Meriter Hospital, Inc.* ("*Preston II*"), 2008 WI App 25, ¶ 36, 307 Wis. 2d 704, 747 N.W.2d 173, *rev. den.* 2008 WI 40.

DNR devotes greater attention to *Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 401 N.W.2d 805 (1985), which is about twenty years older than the *Preston* cases. Although DNR quotes liberally from *Liberty Homes*, it fails to quote the most salient paragraph, in which the Supreme Court articulated the role of the courts:

> 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....

Liberty Homes, 136 Wis. 2d at 385.

DNR quotes *Liberty Homes* at 387 for the proposition that the Court's role is limited to determining whether there are any facts in the record from which a reasonable person could reach the same conclusion as the agency. DNR Br. at 9. This quotation, in isolation, suggests that there need not be any cognitive connection between the fact and the agency action; *i.e.*, the agency need not actually rely upon found facts, only that such facts are in the record. If that ever was the law, it is no longer.

In *Preston I*, the Supreme Court made clear that the presence of facts in the record is not the end of the analysis. The agency must "**satisfactorily explain** its regulatory decision ..." and there must be a **rational connection** between "'the **facts found** and the choice made ....'" *Preston I*, ¶ 32 (emphasis added). That is, the agency's action may be upheld only if it explains its decision, the facts upon which it relies, and there is a rational connection between the reasoning and the facts.

The *Preston I* analysis relied upon federal law, particularly *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Indeed, it quotes *Motor Vehicle Mfrs.* for the four independent grounds on which a rule may be deemed arbitrary and capricious, including that the agency has "'offered an explanation for its decision that runs counter to the evidence before the agency ....'" *Preston I*, ¶ 32. The United States Supreme Court also stated that "the agency must examine the relevant data and articulate a satisfactory explanation for its action ...", and further stated: "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." *Motor Vehicle Mfrs.*, 463 U.S. at 43 (citation omitted). The Court later stated that "[w]e 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 (citations omitted).

DNR also mischaracterizes *Liberty Homes* regarding this Court's authority to take additional evidence, stating that "where there is an extensive rulemaking record, the taking of further evidence is unnecessary." DNR Br. at 11. The court in *Liberty Homes* did not reach that conclusion. On the contrary, portions of the decision quoted by DNR state that "the trial court must be free to accept relevant evidence to supplement the agency record if it appears necessary to perform its judicial review function." 136 Wis. 2d at 379. The *Liberty Homes* court also stated that a voluminous record "**might** make the taking of further evidence unnecessary." *Id.* at 380 (emphasis added).[9]

[9] Plaintiffs do not believe that additional evidence is necessary to grant their motion, for the reasons stated herein. We note DNR's mischaracterization of *Liberty Homes* to illustrate DNR's predilection to take liberty with both facts and law to reach its erroneous conclusions. However, if the Court concludes that summary disposition is not appropriate, Plaintiffs urge the Court to take testimony on those restrictions that are "necessary to implement" § 29.185(6).

Finally, DNR argues that there is a presumption of validity of administrative rules, relying on *Law Enforce. Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 489, 305 N.W.2d 89 (1981). *See* DNR Br. at 6. The quoted language, however, only states the boilerplate rule for construing an ambiguous rule, *i.e.*, that it should be construed, if at all possible, to sustain its validity. The more pertinent case on presumptions is *Citizens Concerned for Cranes and Doves*, which held that there is no burden of proof in a declaratory judgment action challenging a rule, the courts engage in de novo review, and there is no deference accorded the agency. 2004 WI 40, ¶¶ 10-13, 270 Wis. 2d 318, 677 N.W.2d 612.[10]

B. DNR Did Not Consider Restrictions on the Use of Dogs to Hunt Wolves.

As discussed in Statement of Facts Section I.B.1, above, the record has not changed with respect to hunting with dogs since the Court issued its decision granting a stay on August 31, 2012. 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. 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 therefore did not make any findings or explain its decision.

For these reasons, the Court should make a final determination that Plaintiffs succeed on the merits of their claim that DNR exceeded its authority by promulgating a rule that: a) fails to include reasonable restrictions on the use of dogs for hunting wolves; b) facilitates violations of the limited authorized use of dogs in Act 169 to "track or trail" wolves; and c) facilitates violations of chapter 951, which prohibits animal cruelty and mistreatment.

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[10] There is a presumption of validity in constitutional challenges to rules. *Id.*, fn. 6. That presumption does not apply to this action, which challenges the rule as exceeding DNR's authority under Act 169, both because DNR failed to satisfy the legislative mandate to adopt rules necessary to implement the act, and because the rule is arbitrary, capricious, and unreasonable. *See Liberty Homes*, fn. 6.

C. DNR's Actions Relating to Training Dogs to Hunt Wolves Do 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" required by state and federal law 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.

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 how 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 26, 2012 NRB meeting minutes, including those quoted earlier in this brief. 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." DNR Exh. M at 380 and 382. 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, who has advocated for affirmation of DNR's rules in this Court, then gave 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 (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."

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 per her advocacy memo (DNR Exh. I at 292):

> CHAIRMAN CLAUSEN: I guess that the only other question I have is for Tim. Like I say, I think Pandora's box has been opened here and we maybe have not heard the last of this. So Tim, I'm looking here and I'm almost thinking back to the day that I attended the court hearing.
>
> But if I go back here on the page it says, "We feel a permanent rule process is adequate to put dog training restrictions on wolves in place. The judge has determined," da, da, da, da.
>
> Anyway it says, "The department questions the necessity to engage in emergency rules on this topic at this time." If that's the case, why did you even bring it forward?
>
> MR. ANDRYK: The Judge told us to.
>
> CHAIRMAN CLAUSEN: Okay.
>
> MR. ANDRYK: The judge basically said that under Act 169 we have authority to promulgate emergency rules on wolves and **told us to go back to the Board and consider it**. And the judge said we'd be entitled to deference if the Board decides to make no additional changes or if they make changes, but the Board and the department need to adequately consider it.
>
> CHAIR CLAUSEN: So **basically, we have created a record here by the fact that we've discussed this, and regardless of what we do on this, we have created that record**.
>
> MR. ANDRYK: Yes.

Transcript at 2-3 (emphasis added).

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. Rather, the NRB viewed this as a perfunctory exercise designed solely to satisfy its lawyer's understanding of what would satisfy this Court.

2. <u>DNR Did Not Explain Its Decision or Articulate a Rational Basis for Not Including Necessary Restrictions on Training</u>.

Finally, the record demonstrates that the NRB neither developed nor articulated any reason for its actions. Moreover, among the menu of potential reasons discussed by the Board,

the one which may have come closest to a consensus indicates that the absence of emergency training rules violates Act 169; *i.e.*, that restrictions on training are necessary, by virtue of the NRB's decision to include them in the Spring permanent rulemaking.

As discussed in the Statement of Facts, Section B.1, above, 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. Transcript at 2.[11] Mr. Kazmierski apparently thought that rules were necessary, but that the matter should be deferred until the permanent rulemaking. *Id.* at 7-8. 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 isn't – is very fluid. It isn't totally through the court process yet. So in my estimation we're still under the directive of the Legislature, and that's why I made this motion.
>
> I'm fully supportive of developing a permanent rule as to how dogs can be utilized in the hunt, but to put something in an emergency status with how fluid the situation is, I think is foolish for us to do.

Id. at 15. It therefore appears that the author of the motion also agreed that training rules were necessary, but he was perplexed by the effect of this lawsuit. Mr. Andryk seemed to agree to 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 6. Unfortunately, Mr. Andryk did not articulate or list what he considered to be those "best

[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.

management practices" or how such practices would be consistently followed or enforceable without being documented in rules.[12]

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

> DR. THOMAS: But if you – I'm going back to Kaz's question. Have we actually considered this, and if we've considered it and decided that there's no point in going forward right now because there's not enough time to do an adequate job of going forward, that's 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's 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. 10-11. In his response, Mr. Andryk strongly suggested which response he believed would be viewed more favorably by this Court:

> MR. ANDRYK: Well, I think the judge would look at your decision on whether additional restrictions in the use of dogs are needed right now, and if they're not needed in the future, a follow-up permanent rule will be appropriate. If you feel they're needed now but you don't go forward with it now, that would probably be not viewed very favorably by the judge.
>
> But if you decide they're not needed now based on the record before you, and adequate consideration of that record, I think the Judge would be more inclined to give deference to that decision.

Id. at 11.

Plaintiffs partially concur with Mr. Andryk's advice. Plaintiffs do not agree that the scope or content of this exercise would satisfy the commentary in the Court's oral decision, and certainly not the applicable law. However, Mr. Andryk is correct that delaying regulations needed now to implement Act 169 would be contrary to the legislature's directive to DNR, and therefore would exceed its authority.

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[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 this Court, the NRB did not adopt that reasoning … or any reasoning. Implicit in the NRB's action is the Board's agreement that while regulation of dog training was necessary, it would punt that issue down the road. This is because the NRB specifically approved a Scope Statement to regulate training of dogs to hunt wolves, pursuant to Act 169, as a permanent rule. *Id.* at 026-027. That is, 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 this season while necessary in subsequent years.

3. The Factual Information before the NRB Would Not Support a Conclusion that Training Regulations Were Unnecessary.

If the NRB had truly considered the facts, made factual findings, and developed and articulated a reason for its choice, this Court's next step in the analysis would be to determine whether that agency action was supported by the facts found. The Court need not engage in that analysis, as DNR's action is unlawful and invalid irrespective of the information offered at the meeting. However, as discussed in Section II.B.2, below, the information that was submitted to the NRB would not have supported its "do nothing" action.

II. DNR Failed to Adopt Emergency Rules that Are Necessary to Implement Wis. Stat. § 29.185 and Chapter 951, Including those Reasonable Restrictions that Are Necessary to Limit the Use of Dogs to "Track" or "Trail" Wolves.

DNR's and the Bear Hunters' motions for judgment on the merits rely entirely on the procedural argument that all DNR is required to do to prevail on the merits of this action is to create a record indicating that the NRB "considered" additional restrictions on the use of dogs.

The source of this assumption is unclear but apparently focuses on a part of the Court's oral decision granting a stay, in which the Court observed that the record does not indicate that DNR ever considered such restrictions. DNR's motion must fail because it ignores the grounds for Plaintiffs' claim, much of the applicable law, and the information in the record before this Court. Each of these factors warrants judgment in favor of Plaintiffs.

A. It Is Undisputed that DNR Must Adopt Rules Necessary to Implement Wis. Stat. § 29.185.

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 Mgmt. Dist, v. State*, 2011 WI 54, ¶ 23, 335 Wis. 2d 47, 799 N.W.2d 73, 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).

A core issue in this case is whether DNR acted in excess of its authority by failing to adopt rules as directed by the legislature. 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*, in which the Court stated the following pertinent points:

1. The issue is a legal issue, for which neither party bears any burden of proof. 2004 WI 40, ¶ 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.

The issue of whether a regulation satisfies or exceeds statutory authority does not depend on whether it merely mirrors or duplicates the statute, as argued by DNR. If a rule merely duplicated the statute, it would have no purpose at all. As the court stated in *Wis. Hosp. Ass'n v. Natural Resources Bd.*, 156 Wis. 2d 688, 705-06, 457 N.W.2d 879 (1989):

> To "expressly" authorize a rule, the enabling statute need not spell out every detail of the rule. If it did, no rule would be necessary. Accordingly, whether the exact words used in an administrative rule appear in the statute is not the question. Rather, the reviewing court should identify the elements of the enabling statute and match the rule against those elements. If the rule matches the statutory elements, then the statute expressly authorizes the rule....

The test of whether a rule "matches the statutory elements" is whether it "conflicts with an unambiguous statute or a clear expression of legislative intent ...." *Citizens Concerned for Cranes and Doves*, 2004 WI 40, ¶ 15. Similarly, a rule may exceed the agency's statutory authority under the "arbitrary and capricious test," *i.e.*, that it is unreasonable. *See, e.g.*, *Liberty Homes*, 136 Wis. 2d at 374-75, fn. 6, citing *Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 303 N.W.2d 639 (1981) (whether the agency's selected means of regulation in fact reasonably advances the purpose of the statute).[13]

DNR has raised no dispute to Plaintiffs' contention, in their Complaint and in earlier briefs, that 2012 Wisconsin Act 169, creating Wis. Stat. § 29.185(6)(a), only authorizes the use of dogs for limited purposes in the wolf hunt, *i.e.*, to "track or trail wolves ...." DNR also does

[13] It is also well settled that an agency may exceed its statutory authority by inaction. In one of the most renowned environmental cases, the federal court of appeals remanded a rule back to the Atomic Energy Commission (now the Nuclear Regulatory Commission) for failure to satisfy the requirements of the National Environmental Policy Act of 1969 ("NEPA"). *Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Com'n*, 449 F.2d 1109 (D.C. Cir. 1971).

not dispute that Act 169, Sec. 21(1) requires DNR to promulgate emergency rules (and permanent rules) that are "necessary to implement or interpret sections 29.185 and 29.188 of the statutes ...." Finally, DNR does not dispute that causing unnecessary and excessive pain or suffering or unjustifiable injury or death is a violation of animal cruelty or mistreatment statutes, irrespective of whether hunting that animal is otherwise authorized under ch. 29. *See* Wis. Stat. §§ 951.01(2) and 951.02; *see also*, *State v. Kuenzi*, 2011 WI App 30, ¶¶ 33-34, 332 Wis. 2d 297, 796 N.W.2d 222. Plaintiffs also believe that the Court accepted these legal propositions, when it determined that Plaintiffs demonstrated a likelihood of success on the merits.

B. The Record Demonstrates that DNR's Rules for Both Hunting and Training to Hunt Wolves Do Not Include those Reasonable Restrictions that Are Necessary to Implement Act 169's Limitation on the Use of Dogs to Track or Trail, and to Prevent Violations of Animal Cruelty Laws in Chapter 951.

At the time of the motion for summary judgment, Plaintiffs submitted substantial testimony regarding the need for additional restrictions on the use of dogs for both hunting and training to hunt wolves. That evidence included affidavits and other information from the top wolf and dog experts in the state, including University of Wisconsin professors in wolf and dog behavior, retired DNR wolf experts, DNR's former wildlife veterinarian, and an experienced wolf tracker and hunter. *See* Affidavits of Adrian Treves, Patricia McConnell, Richard Thiel, Randle Jurewicz, Julia Langenberg, and Jayne Belsky. DNR chose to submit no evidence. Not surprisingly, the Court concluded that Plaintiffs had shown a likelihood of success on the merits, *i.e.*, additional restrictions were necessary to satisfy Act 169, Sec. 21(1).

1. The Evidence Demonstrates that Additional Restrictions Are Required for Wolf Hunting with Dogs.

With respect to hunting with dogs, nothing has changed since August. DNR purposely limited the pertinent scope of the September NRB meeting agenda to whether the NRB should

approve a Statement of Scope for both permanent and emergency rules for dogs being trained for wolf hunting. DNR Exh. I at 003. The meeting itself did not address additional restrictions on hunting with dogs.

DNR's brief at 19 attempts to bootstrap hunting into the training discussion, making the unsubstantiated assertions that hunting and training "are not clearly separate" because they "[b]oth involve the pursuit of wolves by dogs …." This argument is both ironic and readily dismissed, given DNR's efforts over time to distinguish its legal authority to regulate hunting and training, whether Plaintiffs are really challenging any training regulations, and of course the different regulatory standards governing hunting in ch. NR 10 and training in ch. NR 17. For example, DNR Secretary Stepp opposes the use of leashes to hunt, but it is required for training at certain times on DNR lands. *See* DNR Exh. I at 294; Wis. Admin. Code § NR 17.04(2)(a).

The Bear Hunters quote extensively from their constituents who made statements at the NRB hearing. BH Br. at 4-8. However, all of those statements focused on training to hunt, and not the hunt itself.

2. The Evidence Demonstrates that Additional Restrictions Are Required for Training Dogs to Hunt Wolves.

a. The Bear Hunters rely on inapplicable law.

At the outset, it is important to recognize the difference between "testimony" and "statements," as the Bear Hunters' arguments rely on cases and statutes applicable to evidence in adjudicatory proceedings. The only evidence to which such cases and statutes could apply is the affidavit testimony and exhibits of Plaintiffs' expert witnesses, none of which has been disputed through similarly reliable, sworn testimony. The statements relied upon by the Bear Hunters are solely unsworn, unsubstantiated statements in a public forum.

This distinction is important, as the Bear Hunters rely primarily on state statutes and cases that relate to evidentiary proceedings. For example, they cite the rules of evidence with reference to qualifications of an expert. BH Br. at 13, quoting Wis. Stat. § 902.07. They also argue that DNR is entitled to an undefined "special level of deference," citing *Beecher v. LIRC*, 2004 WI 88, 273 Wis. 2d 136, 682 N.W.2d 29. BH Br. at 11. However, the language that they partially quote is not a general rule of deference, as suggested by their selective quotation. Moreover, it only applies to adjudications in contested case hearings. The actual language, which refers solely to worker's compensation cases, reads as follows:

> Given the highly individualized nature of such injuries, and a job market that is constantly transformed by economic and technological change, predicting how an injury will affect future earning capacity is not an exact science. For this reason, **worker's compensation law has evolved** to give claimants in this type of case more flexibility to build a case for total permanent disability, and to give **agency judges** more discretion to rule on the merits of such claims.

Id., ¶ 30 (emphasis added).

The Bear Hunters' also cannot rely on *Sterlingworth Condominium Ass'n v. DNR*, 205 Wis. 2d 710, 730, 556 N.W.2d 791 (Ct. App. 1996). In the cited language, the court of appeals only confirmed that the DNR's decision was supported by substantial evidence, one of the standards for judicial review of decisions in contested cases. *See* Wis. Stat. § 227.57(6).

Adjudicatory proceedings, in which deference is accorded the agency decision, is vastly different than this rulemaking proceeding. Testimony in an adjudication is taken under oath, with opportunity for cross-examination, generally following the rules of evidence. Even when there is no contested case hearing, DNR's decisions are made by agency staff with specific expertise in the subject matter. By contrast, DNR rules are adopted by a governor-appointed citizen board without relevant expertise, based on information that anyone can submit, regardless of its accuracy or veracity. The potential for irrational or misguided decisions based on

erroneous information elevates the importance of judicial scrutiny. This need for judicial scrutiny is reflected not only in *Liberty Homes*, but in cases like *Citizens Concerned for Cranes and Doves*, which held that there is no deference accorded the agency in a declaratory judgment challenging a rule, especially on matters of agency authority. 270 Wis. 2d 318, ¶¶ 10-13.[14]

b. The information offered by Bear Hunters is misleading, speculative, and inconsistent with actual data and evidence.

Irrespective of this distinction, to this day, the evidence presented by University of Wisconsin and former DNR wolf experts regarding the need for restrictions on training has not been challenged by any wolf-related experts at DNR.[15] In the NRB's September meeting regarding additional training restrictions, however, several hunters and DNR warden-hunters offered statements in support of no additional restrictions. Most striking in these statements are the following:

a. None of those individuals had ever hunted wolves, with or without dogs.[16] Their expectations of how dogs and wolves would interact were pure speculation.

b. None of those individuals had any training or expertise relating to wolves.

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[14] The Bear Hunters' references to federal cases are unavailing. In addition to being inconsistent with state law, the cited cases relate to analysis under the National Environmental Policy Act (NEPA), and then only in connection with the arbitrary and capricious standard. Even then, the federal courts have made clear that the agency "must supply a convincing statement of reasons to explain why a project's impacts are insignificant." *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 711 (9th Cir. 2009) (quoted sources omitted).

[15] Defendant-Secretary Stepp submitted a memo to the NRB opposing certain restrictions, such as the use of leashes, notwithstanding the fact that DNR requires the use of leashes at certain times of the year on DNR lands. *See* DNR Exh. I at 294.

[16] The Bear Hunters quote their own written statement to the NRB, in which they assert that "as many of our members will testify today, a wolf pursued by a pack of dogs will always and anywhere do only one thing – run away. " BH Br. at 4. In fact, the only commenter whose statement approached that point was Mr. Helgeson, whose pertinent testimony is quoted in BH Br. at 4. Mr. Helgeson, whose statement is referenced at BH Br. at 4, only stated that when his dogs have accidentally tracked a wolf (about five times), the hunters "catch the dogs as quick as they can catch them." DNR Exh. I at 013.

c. As noted above, DNR again failed to produce its one wolf expert, Mr. Wydeven, shielding the NRB members and this Court from his analysis and opinions.

Contrary to the Bear Hunters' argument, the information provided at the hearing on behalf of the use of dogs also was largely anecdotal, speculative, and at times inconsistent. For example, they quote Al Lobner, president of the Bear Hunters' Association, stating that he had never encountered wolves stopping to fight a pack of dogs, or a wolf turn to fight dogs while being chased. BH Br. at 3. However, he also did not state that he had seen wolves run from dogs. He did state that he had seen and heard of dogs being attacked by wolves, which he euphemistically called "being ambushed." *See* DNR Exh. M at 385.

Mr. Lobner also stated his belief that all the hunting dog depredations over the years (nearly 200 such claims for depredation compensation) were while the dogs were treeing bears, in backyards, or chasing rabbits or birds. *Id.* at 005. Yet he offered no personal knowledge or supporting information. Moreover, his story is inconsistent with the actual depredation claims, some of which have previously been presented to the Court, and all of which were available to DNR and the NRB. *See, e.g.,* Jurewicz Affidavit, Exhs. RJ-3 and RJ-4. He similarly believed that dogs are ambushed by hungry wolves and eaten for food. DNR Exh. I at 005. Again, this is inconsistent with many of the depredation claims, which include photos of killed but uneaten dogs. *See, e.g.,* Langenberg Affidavit, Exh. JAL-2.B; Thiel Affidavit, Exh. RPT-6.

Mr. Lobner also stated that hounds pursuing game run at about 7 miles per hour, while wolves can easily run at 20 miles per hour. DNR Exh. I at 005; *see also*, BH Br. at 3. If that is true, it is hard to imagine how a dog would be effective in chasing a wolf, or how the hunter monitoring his dogs remotely could intercept the wolf before it was miles away. However, it readily explains why so many hunting dogs have been killed by wolves.

Another hunter quoted by the Bear Hunters, Greg Brzezinski, stated that prior cases of wolves killing dogs have been situations in which hunters were unaware of dogs in the area. *See* BH Br. at 6-7. To the contrary, there have been repeated depredation claims in which hunters have run their dogs in areas that are posted by DNR because of prior instances of dogs killed by wolves. *See* Jurewicz Affidavit, Exh. JR-1.

The Bear Hunters also quote members' statements for the proposition that hunters would only train when there is snow on the ground, and that the wolf experts have testified that wolves are only very aggressive in the summer, thereby suggesting that training season and the high-risk times do not overlap. BH Br. at 7-8. This argument, based on selective quotations, is erroneous for the following reasons:

1. Mr. Durham, questioned extensively by a NRB member as an expert on dogs, stated that training "is basically a year-round activity. Probably 200 days a year." DNR Exh. I at 011.

2. The actual testimony from the wolf experts is that the "times of heightened intolerance and aggressiveness on the part of wolves" includes both the summer pup-rearing and the breeding season in late December to mid-March. Jurewicz Affidavit, ¶ 16, at DNR Exh. I at 309; *see also*, Thiel Affidavit, ¶ 17.f, at DNR Exh. I at 303.

Even if one accepted as undisputed the statements of certain hound hunters that training would only occur in the snow, Mr. Lobner stated that this would begin during deer hunting season and maybe earlier. *See* BH Br. at 7, quoting Mr. Lobner's written comments.[17] Thus, the undisputed evidence is that under the current regulatory regimen, wolf hunting without dogs, training to hunt wolves with dogs, and deer and bird hunting, would all occur at the same time.

The statements from the two warden-hunters also were revealing. Warden Dryja, when asked about the risks in dog-wolf encounters, correctly observed that in hunting, "animals are

[17] This representation also is belied by the Bear Hunters opposition to any restrictions, including restrictions that would limit training to when there is snow on the ground.

unpredictable." *Id.* at 018. He later stated, with no apparent factual basis, that when chased by dogs, wolves will either run or "stop and get bayed up." *Id.* Of course, this speculation is contrary to the consistent literature and testimony of experts in wolf behavior, all of whom have emphasized the territoriality and pack protectiveness of wolves; as well as the depredation claims for hunting dogs attacked and injured or killed by wolves. When asked whether disallowing dogs would affect reaching the wolf harvesting quota, Warden Dryja did confess his ignorance, stating that "he did not want to speculate. He did not know." *Id.* at 020.[18]

When asked about the need for training, which was the subject of the NRB meeting, he was somewhat more candid. His comments included:

> "Their training seasons have been questioned by law enforcement."
>
> "if we do not establish a training season then it is basically a wide open training season without any restrictions …."
>
> "The training, either we have to figure out we need additional rules on it or do we just allow it like bobcat season training where you can go out and train your dog year round except for the leash law when in closure at certain times of the year."

Id. at 021.

Warden Novesky also critiqued the lack of training requirements, and not just for wolves:

> "When he reads some of these things with training, there has always been loopholes in their dog training system. There are people that take advantage of those.
>
> "when he reads some of the training laws he can see where some of those loopholes are going to pop up. He thought you need to regulate that somewhat. He did not have the magic answer for hunting with hounds.

Id.

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[18] His reluctance to comment was well-taken. In fact, hunters and trappers have already reached approximately 75% of the quota. *See* http://dnr.wi.gov/topic/hunt/wolf.html.

Finally, when discussing the fact that dogs killing any game, including wolves, is already illegal, Chair Clausen asked Warden Dryja: "How often have you ever written a citation for that?" The answer was "never." *Id.* at 022.

c. Witnesses for Plaintiffs provided the only scientific, peer-reviewed, and defensible information.

Although DNR and the Bear Hunters do not inform the Court of this information cited and quoted immediately above, they do criticize Richard Thiel, the retired DNR wolf manager and educator. DNR Br. at 22; BH Br. at 8-10. Their briefs are misleading and error-filled.

First, Mr. Kazmierski did not say that he "regarded experienced hunters as more expert than some self-described experts ...," as asserted by DNR. Rather, he stated to a hound hunter presenter "that the Board has had expert witnesses testify that are experts on wolves. He is considering you guys the experts on dogs." DNR Exh. I at 011.

Additionally, both DNR and the Bear Hunters ignore Mr. Thiel's expertise and the subject matter of his testimony, which focused on wolves and wolf behavior. Mr. Thiel stated that he "has spent 40 years of his life working with wolves in the state of Wisconsin." *Id.* at 017. His affidavit testimony describes his education and expertise as a DNR wolf manager, tracker, wolf handler in the field, co-author of DNR's wolf management plan, regulator, author of numerous peer-reviewed publications, and educator on wolf habitat and behavior in Wisconsin. *Id.* at 299-301. He then provided undisputed evidence regarding what happens in canid fights, which he characterized as "unbelievable," "violent conflicts," and "ferocious." *Id.* at 017.

Mr. Thiel's most recent statement is compatible with the affidavit testimony and prior submittals to DNR, also ignored by DNR and the Bear Hunters, by Adrian Treves, a nationally renowned wolf behavioral scientist at UW-Madison; Randle Jurewicz, who created and ran DNR's wolf management program until his recent retirement, and who was one of the authors of

DNR's existing wolf management plan; and Julia Langenberg, DNR's former wildlife veterinarian. *See, e.g., id.* at 306-312; *see also*, Section III.B, below.

The fact that Mr. Thiel does not train hounds is immaterial to his testimony or the issue at bar. The fact of the matter is that, between a dog that can run 7 mph and a wolf that can run 20 mph through the woods, the more pertinent question is not what the dog will do, but what the wolf will do. In that regard, just as before this Court, the evidence before DNR was unequivocal and compelling.

III. THE COURT CORRECTLY GRANTED THE STAY AND SHOULD NOW ISSUE A DECLARATION OF LAW AND PERMANENT INJUNCTION IN FAVOR OF PLAINTIFFS.

A. The NRB Had the Authority and Duty to Adopt Restrictions For Both Hunting and Training to Hunt Wolves.

The Bear Hunters resurrect an argument previously made by DNR, *i.e.*, that DNR does not have the authority to issue training or additional hunting rules because such rules are not expressly authorized by the legislature and governor. They rely on Wis. Stat. § 227.10(2m), as created by 2012 Wisconsin Act 21, for the proposition that an agency does not have authority to adopt a rule unless the specific, detailed scope of the rule is expressly authorized by statute. Specifically, they argue that DNR lacks authority to adopt additional hunting or training rules because Act 169 does not expressly authorize additional hunting or training rules relating to the use of dogs. This Court has previously rejected that argument when proffered by DNR, and it should do so again.

Wisconsin Stat. § 227.10(2m) provides in pertinent part:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter....

From this section, coupled with Wis. Stat. § 227.11, DNR argues that Act 169 does not explicitly authorize regulation of the use of dogs to either hunt or train for hunting wolves.

There are at least two problems with DNR's application of this statute. First, Act 169 expressly authorizes and requires DNR to promulgate both emergency and permanent rules that are "necessary" to "implement" § 29.185, *i.e.*, to limit the use of dogs to tracking and trailing. The Court has previously received evidence that restrictions relating to both hunting and training are necessary to limit the use of dogs in the hunt to tracking or trailing.

The Bear Hunter's interpretation of § 227.10(2m), though previously argued by DNR, is actually inconsistent with DNR's emergency rule regarding the use of dogs. DNR's emergency rule prohibits the use of dogs at night and requires that dogs be tattooed or wear an identification collar, despite the fact that there is nothing in Act 169 that "explicitly required or explicitly permitted" the imposition of those requirements. *See* Wis. Admin. Code § NR 10.07(4)(a) and (b)4. The NRB also has authorized a Scope Statement for promulgation of a permanent rule for training dogs to hunt wolves, pursuant to Act 169. DNR Exh. I at 027. Moreover, under the Bear Hunters' argument, DNR cannot promulgate any dog training rules for any purpose. DNR's previously stated authority to regulating dog training for hunting is Wis. Stat. § 29.014; yet there is nothing in that statute that explicitly requires or permits any regulation of dog training.

The deficiencies in the Bear Hunters' argument include their failure to address the express rulemaking requirements in Act 169, as well as Wis. Stat. § 227.11(2)(a) (intro.), which states:

> Each agency may promulgate rules interpreting the provision of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.

Section 227.11(2)(a) has existed for many years, and remains in effect. The Supreme Court in *Seider v. O'Connell* specifically relied on that statute to conclude that the Commissioner of Insurance had ample rulemaking authority. 2000 WI 76, ¶ 21, 236 Wis. 2d 211, 612 N.W.2d 659. *Seider* remains good law.

The Bear Hunters' extremely narrow interpretation of § 227.10(2m), beyond being inconsistent with DNR's conduct, would lead to the absurd conclusion that an agency rule can do no more than duplicate the substantive standards in the enabling statute. Their interpretation would reduce administrative rules to no more than permitting procedures, would hamstring agencies' ability to address evolving science and other conditions, and would force the legislature to list all the substantive requirements contemplated by a statute delegating authority to an agency.

Act 169 specifically requires DNR to adopt whatever regulations are necessary to limit the use of dogs to tracking and trailing wolves. That directive is all that is required under §227.10(2m).

B. The Court Correctly Concluded that Plaintiffs Had Satisfied the Criteria for Issuance of a Stay or Temporary Injunction.

The Bear Hunters finally argue that Plaintiffs have not established the irreparable harm required for issuance of a temporary injunction. While they argue that Plaintiffs have not demonstrated that they are likely to suffer irreparable harm, their assertion is no more than a conclusory statement. Additionally, they rely on Wisconsin cases on permanent injunctions, a federal case decided under federal law, and an unpublished appellate order from Minnesota, which plainly is not applicable.[19] None of the Bear Hunters' supporting cases are even

[19] The Bear Hunters also cite Wis. Stat. § 951.015(1), arguing that wolf-dog confrontations are exempt from chapter 951 because § 29.185 authorizes the wolf hunt, *i.e.*, that any hunt under chapter 29 is

applicable to a Wisconsin temporary injunction. Additionally, the Bear Hunters ignore Wis. Stat. § 227.54, which gives the Court broad authority to fashion a stay "as it deems proper" during the pendency of the case.

Even if one were to rely on permanent injunction cases, the Bear Hunters' argument is misguided for several reasons. The seminal case on permanent injunctions is *Pure Milk Prod. Coop. v. National Farmers Organ.*, 90 Wis.2 d 781, 280 N.W.2d 691 (1979), which states in pertinent part:

> The injunction is a preventive order looking to the future conduct of the parties. To obtain an injunction a plaintiff must show **a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff**. To invoke the remedy of injunction the plaintiff must moreover establish that **the injury is irreparable, *i.e.*, not adequately compensated in damages**. Finally, injunctive relief is addressed to the **sound discretion of the trial court**; competing interests must be reconciled and the plaintiff must satisfy the trial court that on balance **equity favors issuing the injunction**.

Id. at 800 (emphasis added; footnote and citations omitted).

Several of the highlighted phrases are significant to this discussion. First, the required "likelihood" of future injury discussed by the Bear Hunters is a "sufficient probability" of violation of or injury to the movants' rights. Secondly, the requirement of "irreparable" injury means only that it is injury that cannot be compensated in damages. Finally, the decision generally is discretionary, based on the Court's evaluation of competing interests and equities.

The Bear Hunters also ignore the cases uniquely related to temporary injunctions, in particular *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 259 N.W.2d 310 (1977). There, the court stated that "at the temporary injunction stage the requirement of irreparable

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exempt. This argument was soundly rejected in *State v. Kuenzi*, 2011 WI App 30, ¶ 34, which distinguished between "common hunting practices" and those acts that cause unnecessary and excessive pain or suffering. The evidence is clear that unleashing packs of dogs on wolves is unprecedented and unauthorized anywhere else in the United States, and surely does not qualify as a "common hunting practice.

injury is met by a showing that, without it to preserve the status quo pendente lite, the permanent injunction sought would be rendered futile." *Id.* at 520.

This Court has already considered these standards in the context of the temporary injunction. All the evidence presented in conjunction with the motion for temporary injunction demonstrated, without contradiction or dispute, that Plaintiffs were at substantial risk associated with the unrestricted release of dogs for both training and hunting wolves during the winter months, at the same time that wolves are particularly aggressive and when individual Plaintiffs and others are in the woods hunting, tracking wolves, and engaging in other winter outdoor activities.

Other uncontroverted evidence germane to training established that, during the summer months of June, July and August, the unrestricted release of dogs to pursue wolves for training purposes raises substantial risks of death and severe injuries to dogs and wolves, as these months encompass the period known as "rendezvous," when wolf pups are most vulnerable to lethal attacks by unrestrained dog packs and when adult wolves are most protective and intolerant of dogs entering pack territory. Wolves are similarly aggressive during the January-March time frame, when they are breeding. Examples of the evidence presented by individual Plaintiffs and scientists, in affidavits to this Court and/or in statements and submittals to the NRB, include the following:

1. Professor Adrian Treves, Nelson Institute for Environmental Studies, University of Wisconsin-Madison, an expert in wolf habitat and behavior:

    - "Modern scientific evidence is abundantly clear that dogs will be injured or killed during tracking, trailing, pursuit, or engagement with wolves in the absence of reasonable restrictions that prevent or adequately minimize the risk of direct physical encounters between dogs and wolves …." Treves Affidavit, ¶ 5.

- "Average-sized or larger packs of wolves will aggressively meet hounds to defend space or pups, judging from past encounters ...." Report to NRB, attached to Treves Affidavit as Exh. AT-2.

- "Wolves will not flee perpetually because their territorial defense is a pervasive aspect of their behavior and the loss of territory (i.e., from fleeing from it) might entail permanent loss of breeding and hunting grounds." *Id.*

- "Most hounds will be killed because of the larger size of individual wolves than hounds – at least in the breeds used in Wisconsin currently – and the ferocity of a wolf defending its territory and used to killing its competitors and prey." *Id.*

2. 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:

   - "In my professional opinion, to a reasonable degree of scientific certainty, because conflicts with wolves and dogs are inherently violent and dangerous, it is critical that any permitted use of dogs for wolf hunting be subject to reasonable restrictions ...." Thiel Affidavit, ¶ 5, at DNR Exh. I at 301.

   - "In my professional experience, dog packs that will be used to chase a wolf or a pack of wolves will be regarded by the wolves as a threat. If the wolves flee (canids do not climb trees as do bears or cats) and are still encroached upon, or if the wolves stand their ground, they will most likely fight the oncoming dog pack." Addendum Testimony of Richard P. Thiel to the NRB, in DNR Exh. D.

   - "When defensive behavior is activated, it is exceedingly difficult to get wild wolves to cease as they tend to be very single-minded and focused in their aggressiveness...." *Id.*

   - "Attacks will be swift and furious. Dogs will be seriously injured and die, and wolves will be injured and die as they both fight by slashing out with their canines and carnassial teeth." *Id.*

3. Randle Jurewicz, retired DNR wolf program manager, wolf depredation claims manager, co-author of DNR's wolf management plan, and wolf tracker, trapper, and educator:

   - "Based upon my review of hundreds of reports and depredation claims between the years 1985 and 2011, wolf attacks on dogs in wolf territories are swift and brutal. Dogs are usually killed as a result of such attacks. Some dogs have survived a wolf attack but were seriously injured. According to the Wisconsin Annual Wolf Damage Payment Summary, compiled by DNR annually, 192 hounds have been killed in Wisconsin by wolves from 1985 to 2012, and 40

hounds have been injured by wolves but survived in the same time span." Jurewicz Affidavit, ¶ 19, at DNR Exh. I at 309.

- "Once dogs are used to pursue wolves, without restrictions to limit their proximity to wolves and to limit their intrusion into wolf territory during such volatile times as mating and rendezvous (*i.e.*, the weeks following pups' removal from the den), deadly conflicts between wolves and dogs will be certain." *Id.* at ¶ 19.

- "Outcome of encounters between wolves and dogs is dependent on a number of variables. Among the most significant factors is the presence of wolf pups and time of year. Specifically, pup rearing (May – October) and breeding (late December – mid-March) are times of heightened intolerance and aggressiveness on the part of wolves. *See* Ruid et al (2009) ...." *Id.*, ¶ 16.

- "In my opinion, based on my professional experiences and knowledge, it is critical that there either be reasonable restrictions imposed on the use of dogs for hunting wolves and for training dogs for wolf hunting, or a prohibition against such uses of dogs. I hold this opinion because confrontations and unrestricted proximity between wolves and dogs are inherently violent and dangerous, and create an unreasonable risk of serious injury and death to dogs, wolves, and others (including humans) who may be close to such encounters." *Id.*, ¶ 14.

4. Dr. Patricia McConnell, an expert in dog behavior:

   - "... high potential for irreparable harm to domestic dogs used in the pursuit of wolves and the fact that this method of hunting with dogs is a completely new and untested activity in the current era." McConnell Affidavit, ¶ 6.

   - "In summary, it is my professional opinion as a Zoologist and Certified Applied Animal Behaviorist that without these regulations, all of which are already being used in some other contexts, irreparable harm will be caused to domestic dogs during the training to hunt wolves and actual hunting of wolves." Report to NRB, dated 7/31/12, attached to McConnell Affidavit as Exh. PM-2.

5. Jane Langenberg, DVM, former DNR wildlife veterinarian:

   - "As established by the reports by licensed veterinarians that are part of the USDA-Wildlife Service reports and photographs, wolves are capable of causing severe, frequently lethal injuries to dogs, including multiple lacerations, extensive deep tissue bruising, bone fractures, and penetrating wounds to body cavities and evisceration of internal organs." Langenberg Affidavit, ¶ 10, at DNR Exh. I at 315

   - "The majority of these dog fatalities took place in the summer months of July and August when wolves have their pups in rendezvous sites (see Ruid et al (2009); this substantiates the aggressive territoriality wolves display while raising pups

which puts both wolves and dogs at high risk for irreparable harm including severe injuries, excessive pain and brutal death if summer training of wolf-hunting dogs is allowed." *Id.*, ¶ 9.

- "The DNR rules promulgated to regulate the use of dogs to hunt wolves are inadequate to meet even minimum accepted standards of animal care and humane treatment as described in federal and state statutes." *Id.*, ¶ 6.

- "In my professional opinion, to a reasonable degree of scientific certainty, because direct encounters between wolves and dogs are inherently violent and dangerous, it is critical that there either be reasonable restrictions imposed on the use of dogs for hunting wolves and for training to hunt wolves, or a prohibition against such hunting." *Id.*, ¶ 4.

6. Jayne Belsky, Plaintiff wolf tracker, hunter, trapper, and wolf-dog sanctuary owner:

- "Anyone who understands wolves knows full well that breeding alphas will be a formidable animal for any canine to confront. This will be a death warrant for most hounds. Not allowing hound hunting in January would also avoid confrontations between trackers and hound hunters." Written comments to NRB, dated July 12, 2012, in DNR Exh. D.

Since intervening in this action, the Bear Hunters have offered literally no evidence to dispute these real and substantial risks. Rather, they have only cited the anecdotal, conjectural information from hound hunters presented at the September 26, 2012 NRB meeting, information that does not even address the issues relating to wolf behavior.

The Bear Hunters' reference to an unpublished order from Minnesota is also unavailing, as well as improperly cited under Wis. Stat. § 809.23(3). Moreover, they rely upon the false premise that Plaintiffs are challenging the legislative determination that dogs may be used to hunt wolves. As discussed several times previously, Plaintiffs do not challenge the use of dogs to track or trail wolves during the hunt. Plaintiffs challenge DNR's rulemaking decision to allow the virtually unrestricted use of dogs in hunting and training to hunt wolves, which is expected to result in an increase in the historical violent canid confrontations.

C. The Court Should Issue a Declaratory Judgment and Permanent Injunction.

The analysis provided here, albeit in response to DNR's and the Bear Hunters' motions, demonstrates that Plaintiffs are entitled to a declaration that DNR's emergency rules are in excess of DNR's statutory authority because they are: a) unreasonable, arbitrary and capricious; and b) violate the requirements of both Act 169 and § 951.02.

DNR and its NRB consistently and to this day have failed to consider and act upon the undisputed evidence from state and national experts in wolf behavior and habitat, and the risks associated with the virtually unrestricted use of hounds for hunting and training to hunt wolves. DNR's September 2012 NRB meeting was, on its face and in context, no more than a transparent, eleventh hour attempt to beef up the record while doing nothing to address these risks.

Should the Court issue that declaration, it should also issue a permanent injunction preventing DNR from authorizing the use of dogs to hunt wolves or train to hunt wolves unless and until DNR promulgates rules that satisfy Act 169 and § 951.02.

The Bear Hunters may turn to *Pure Milk Prod. Coop.*, presumably arguing that Plaintiffs again must satisfy the standards for an injunction. That is not the case. A declaration by this Court that DNR failed to satisfy its statutory duty and acted in excess of its authority means that DNR's emergency rule, as written, is invalid. That is, a rule that exceeds the agency's authority is "a mere nullity." *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W. 2d 47 (1955), quoting *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936); *see also, Mallo v. DOR*, 2002 WI 70, ¶ 15, 253 Wis. 2d 391, 645 N.W.2d 853. In this particular case, the rules' invalidity also means that DNR's dog training and hunting program is insufficiently protective of

Plaintiffs and other members of the public. DNR's program therefore cannot be administered or enforced as a matter of law.

CONCLUSION

In summary, defendants cannot prevail, and plaintiffs must prevail, in this case for the following reasons:

1. The NRB still has not articulated any reasons why it did not address the issues relating to hunting with wolves raised at the May and July 2012 NRB meetings, including the still undisputed evidence of substantial risk of grievous injury and death to dogs, wolves and other users of the forest. There is no more information before the Court now than there was in August 2012, when the Court issued a stay and temporary injunction.

2. The NRB provided no rationale or reasoned judgment for its decision to delay, rather than adopt, rules concerning training of dogs to hunt wolves at its September 2012 meeting. It offered no coherent explanation for its decision to delay rule-making for dog training on wolves. Even when DNR's attorney suggested reasoning for the NRB's decision that he believed would satisfy the Court, the NRB declined to adopt that reasoning. Accordingly, this Court cannot conclude that NRB exercised reasoned judgment based on facts found.

3. To the extent one can discern any reason for no action on emergency training rules, the NRB's discussion suggests that it agreed that training rules were necessary to satisfy Act 169, *i.e.*, that the absence of training rules violates Act 169 (as well as ch. 951). Chief among the reasons for this conclusion is that it decided to include, in the Spring rulemaking, permanent training rules pursuant to Act 169.

4. The law remains as it was before: DNR was required to adopt emergency rules that are necessary to implement § 29.185, including the limitation on the use of dogs only for tracking and trailing wolves, and to comply with statutory proscriptions against animal cruelty.

5. The scientific evidence remains as it was before: undisputed and compelling in its support of the necessity of restrictions to prevent deadly wolf-dog confrontations. DNR has consistently declined to offer the opinions of its one wolf expert to the legislature, NRB, and this Court. The statements of hound hunters and warden/hound hunters are just that: untested, unsubstantiated statements, without any opportunity to test or challenge the validity of their comments. The need for additional restrictions

to satisfy the statutory requirements and prevent animal cruelty remains unchanged, given the innate nature of wolves and their depredation of unleashed hunting hounds in pack territory during volatile times of the year.

6. If the Court were to vacate the injunctions before reasonable restrictions on training and hunting wolves with dogs have been promulgated to ensure "track or trail," and to prevent deadly interactions between wolves and dogs, there is no doubt that unjustifiable bloodshed and animal cruelty will ensue. In contrast, if the Court were to maintain the injunctions, no harm would occur. Rather, a ruling by the Court to enjoin training and hunting wolves with dogs, until such time as reasonable restrictions are promulgated by defendants, would not only prevent violent confrontations between dogs and wolves and attendant violations of Wisconsin law; it would provide essential guidance to the permanent rule-making process.

For these reasons, plaintiffs request that the Court deny DNR's motions, grant Plaintiffs' Motion for Judgment on the Merits, and: a) declare that DNR's emergency rules to implement Act 169 are invalid and void; and/or, at a minimum, b) permanently enjoin DNR from authorizing the use of dogs to hunt wolves or to train to hunt wolves until the agency promulgates rules that satisfy state law.

Dated this 20th day of November 2012.

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