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December 12, 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 the original and two copies of the Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Judgment on the Merits and in Opposition to Defendants' and Intervenors' Motions. By copy of this letter, we are serving all counsel of record by e-mail with same.

Sincerely,

AXLEY BRYNELSON, LLP

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CAS:mj
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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

Classification Code: 30701

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

Defendants,

and

WISCONSIN BEAR HUNTERS ASSOCIATION, *et al.*,

Intervenors.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR JUDGMENT ON THE MERITS AND IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' MOTIONS

INTRODUCTION

Wisconsin is on the verge of completing the first wolf hunt in living memory, a hunt for which there is no regulatory precedent or actual experience. The hunt has reached or nearly reached its quotas in all zones, in less than one-half of the designated hunting season. The Bear Hunters' assertions that the use of dogs to hunt wolves – unprecedented and unpermitted anywhere else in the United States – is necessary for a successful season, have proven to be no more than false speculation. The quotas were nearly met in late November, accomplished through trapping and hunting without the use of dogs. Nevertheless, the defendants (collectively "DNR") intend to ignore the previous orders and comments of this Court and continue to elevate

political influence over science, by proposing permanent rules that essentially duplicate the emergency rules; *i.e.*, providing virtually no restrictions that would prevent violent, deadly confrontations between wolves and hunting dogs that jeopardize both canids and other users of the forests.[1]

The issues before this Court remain the same as when the Court determined that plaintiffs are likely to succeed on the merits: whether DNR acted in excess of its statutory authority because a) it failed to satisfy its statutory responsibility to adopt emergency rules that are "necessary" to "implement" 2012 Wisconsin Act 169, including the limitation on the use of dogs to "track" or "trail" wolves; and b) the rules as they relate to the use of dogs to hunt or train to hunt wolves are unreasonable, *i.e.*, arbitrary and capricious.

DNR's brief, stripped of its *ad hominem* accusations and vitriol, makes two substantive arguments, each of which is legally flawed: 1) the "reasonableness" standard and need for a discernible, rational basis, embodied in the "arbitrary and capricious" standard, does not apply to rulemaking; and 2) the Court must affirm the rule if there are any asserted facts in the record that support the agency's decision, irrespective of their veracity, rationality, or whether they were in fact considered and relied upon by DNR. DNR continues to ignore plaintiffs' principal argument, that the rules as adopted do not satisfy the requirements of Act 169. DNR applies a standard so narrow and deferential that the Court would be reduced to a rubber stamp, affirming

[1] Under Act 169, Section 21(1), the emergency rules will remain in effect until the permanent rules are finally promulgated, which may take a year or more. These emergency rules will continue in effect for year-round training and perhaps one or more hunting season. Moreover, DNR administration's draft permanent rules virtually mirror the emergency rules, reflecting its indifference to the Court's decisions and comments to date. In fact, the proposed rules would allow training dogs on wolves during the winter and into March, during the very sensitive and volatile mating and breeding seasons.

a rule based on anyone saying anything that arguably could support the rule.[2] This is not the standard by which courts scrutinize agency rulemaking, and would set a harmful precedent. Indeed, it contravenes the greater level of scrutiny that this Court has recognized is required for rulemaking, which constitutes a delegation of legislative authority to the executive branch.

DNR identifies information submitted to the Natural Resources Board by hunter advocates that, it argues, could support the NRB's do-nothing decision. DNR does not aver – nor could it – that the NRB actually relied upon any of that information. Although it accuses plaintiffs of misstating the facts, DNR cannot dispute the direct quotations from NRB members, flailing around for what to do and, in the process, not adopting the reasoning proffered by their own attorney. Indeed, DNR ignores statements by NRB members, including the proponent of deferring action, indicating that additional restrictions were in fact necessary to satisfy Act 169.

The Bear Hunters take a different approach, reiterating procedural arguments previously made and rejected, including a stilted interpretation of Wis. Stat. § 227.10(2m) regarding rulemaking authority, and an unduly narrow application of the rules of standing. On the merits, they essentially adopt and reiterate DNR's arguments. The Bear Hunters' arguments are no more correct now than they were when previously made.

The DNR/Bear Hunter efforts to raise procedural barricades to evade the rules' substantive deficiencies are unavailing. The record is clear on the following dispositive points: 1) the NRB adopted a set of wolf hunting regulations in July 2012 that imposed virtually no meaningful and necessary restrictions on the use of dogs, without any consideration or explanation for not adopting restrictions proposed by wolf and dog behavioral experts; 2) the

[2] DNR also mischaracterizes plaintiffs' argument as proposing a "preponderance of the evidence" test. The issue here is not the credibility or weight to be attached to competing evidence, but the absence of any competing evidence relating to the issue of wolves or wolf packs' responses when confronted by hunting dogs.

NRB's September 2012 meeting, by notice and content, focused on training and not the hunt; 3) the NRB offered no explanation, supported by reliable facts, for not adopting either hunting or training-related restrictions at its September 2012 meeting; and 4) comments of NRB members indicate that additional restrictions were necessary, but would be deferred until permanent rulemaking.

On this record, the Court must conclude that DNR's rules, as they relate to the use of dogs to hunt or train to hunt wolves, do not satisfy Act 169 and lack any rational basis.

ARGUMENT

I. DNR'S REGULATIONS EXCEED ITS AUTHORITY, BECAUSE DNR GAVE NO RATIONALE FOR NOT IMPOSING REASONABLE RESTRICTIONS ON HUNTING AND TRAINING TO HUNT WOLVES; AND BECAUSE THE RECORD DEMONSTRATES THAT SUCH RESTRICTIONS ARE NECESSARY TO COMPLY WITH ACT 169.

A. DNR Was Required to Consider the Matter, Exercise Its Judgment, Explain Its Reasoning, and Factually Support its Reasoning.

DNR argues that the arbitrary and capricious standard (a/k/a, "reasonableness" or "rational basis") does not apply, and that an agency need not explain the reasons for its rulemaking decisions. They make two inconsistent arguments: a) that an explanation of reasons is not required under *Liberty Homes, Inc. v. DILHR*, 136 Wis. 2d 368, 401 N.W.2d 805 (1985); and b) that an explanation is required under *Liberty Homes*, but the express duty to make findings of fact was removed when the legislature created Wis. Stat. 227.19(3). *Cf.* DNR Reply Br. at 6 and n. 2. They further argue that the reasonableness standard, to the extent adopted in Wisconsin law, is uniquely related to rules subject to federal law, because federal law was at issue in *Preston v. Meriter Hospital, Inc.*, 2005 WI 122, ¶¶ 30-32, 284 Wis. 2d 264, 700 N.W.2d 158 ("*Preston I*"). DNR Reply Br. at 4.

DNR misreads *Liberty Homes* in several ways. First, the Court unequivocally held that the reasonableness standard applies. Indeed, Section II of the opinion is entitled "Applying the Reasonableness Standard of Review." *Liberty Homes*, 136 Wis. 2d at 381. The Court also referenced the applicability of the "arbitrary and capricious" standard as a basis for invalidity. *Id.* at 382. Furthermore, the Court commented that a claim of invalidity based on this standard can be framed as either a constitutional claim or a claim that the agency exceeded its statutory authority. *Id.* at 374, n. 6, citing *Aetna Life Ins. Co. v. Mitchell*, 101 Wis. 2d 90, 303 N.W.2d 639 (1981).

The changes to chapter 227 that removed the specific requirement to make findings of fact are irrelevant to the applicability of the reasonableness standard in *Liberty Homes*. First, the Court only mentions Wis. Stat. § 227.018 (1979-80) in passing, noting that the statute required the agency to both make findings and explain the need for the rule. *Id.*, 136 Wis. 2d at 380. Additionally, the Court acknowledged that the statute had already been modified at the time of the decision, but did not suggest that the change had any effect on its analysis. *Id.*, n. 11.

Liberty Homes makes clear that the requirement for reasonableness is a matter of constitutional or statutory authority, and the Court addressed how the lower courts should evaluate whether the agency has developed a record evidencing and articulating a rational basis for its decision. That is, the primary focus of the Court's application of the reasonableness standard was the establishment of requirements for the agency to articulate reasons, and for the courts to search the record for both the reasons and whether it is supported by facts of record. The Court formulated this analytical process as follows:

> What then 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. *E.g., Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 850 (D.C. Cir. 1970). In other words, the court must engage in a review process which allows it to determine whether, in light of the governmental objective, there is rational connection between the facts in the record and the rule adopted by the agency.

Id. at 385-86 (emphasis added).

The Court in *Liberty Homes* also emphasized the important, hands-on role of the reviewing court. While cautioning that a reviewing court does not weigh evidence or substitute its judgment for the agency, it must "assure itself that the agency rule is based, not on emotion or intuition, but rather on **reasonable and reliable evidence** ... to determine whether the facts rationally support the rule chosen by the agency to effectuate the public policy it must implement...." 136 Wis. 2d at 386-87 (emphasis added).

These quotes also undermine DNR's efforts to distinguish *Preston I.* As noted, the scope of review articulated in *Liberty Homes* adopts the arbitrary and capricious test, relies upon federal case law, and requires a searching inquiry into the relationship between the "reasonable and reliable evidence" and the agency's choices. The decision in *Preston I*, decided more than 18 years after *Liberty Homes*, is entirely consistent with *Liberty Homes*. DNR does not dispute that *Preston I* requires the court to determine whether "there is 'a rational connection between the facts found and the choice made,' ...." *Preston I*, 284 Wis. 2d 264, ¶ 32 (quoted source omitted); *see also*, *Preston v. Meriter Hospital, Inc.*, 2008 WI App 25, ¶ 36, 307 Wis. 2d 704, 747 N.W.2d 173, *rev. den.* 2008 WI 40 ("*Preston II*").

DNR would dismiss this important role of the courts. It would relegate the courts to a rubber stamp, searching the record for any statement that arguably would support the rule, regardless of whether the statement was reliable, truthful, or adopted by the agency as a predicate for its decision. However, this Court, like the appellate courts, has recognized that rulemaking is

a delegation of legislative authority to the executive branch and, as such, requires a greater level of judicial scrutiny. DNR's diminished role of the courts is inconsistent with *Liberty Homes*, *Preston I*, *Preston II*, and the wealth of cases that underlie those decisions.

B. The Record Does Not Reflect a Reasoned Choice by the NRB Based on Reliable Evidence; but Demonstrates a Failure to Satisfy the Requirements of Act 169.

On the merits, DNR's and the Bear Hunters' arguments are based on a mischaracterization of plaintiffs' argument as imposing a "preponderance of the evidence" test, suggesting that plaintiffs are asking the Court to weigh the competing evidence. That is not the case. As plaintiffs observed in their principal brief, with citation, and DNR has not disputed, there is no conventional evidentiary burden of proof here. *See* Plaintiffs' Principal Br. at 14, citing *Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 11, 270 Wis. 2d 318, 677 N.W.2d 612 ("neither party bears any burden when the issue before this court is whether an administrative agency exceed the scope of its powers in promulgating a rule"). Rather, the issues center on whether DNR has articulated a reason for its action, and whether that reasoning is supported by reliable facts in the record.

DNR ignores both this legal principle and *Citizens Concerned for Cranes and Doves*. The Bear Hunters argue, without explanation, that the case does not apply, but do not contest the application of this rule of law. Bear Hunters Reply Br. at 5-6. Rather, they cite to an isolated statement in a federal case stating that a reviewing court should be "most deferential" to an agency's predictions based on scientific evidence. *Id.*, citing *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983).[3] Their reference is misguided for the following reasons:

[3] The other case cited by the Bear Hunters only provides that in reviewing a workers compensation adjudication involving future earning capacity, the agency's judges are entitled to more discretion. *Beecher v. LIRC*, 2004 WI 88, ¶ 30, 273 Wis. 2d 136, 682 N.W.2d 29.

1. Federal law does not supersede Wisconsin law on this issue, as articulated in *Citizens Concerned for Cranes and Doves* and elsewhere.

2. The case upon which *Baltimore Gas & Electric* relies only states that the Occupational Safety and Health Act "requires the reviewing court to give OSHA some leeway where its findings must be made on the frontiers of scientific knowledge" and that,

> so long as they are **supported by a body of reputable scientific thought**, the Agency is free to make conservative assumptions in interpreting the data with respect to carcinogens, **risking error on the side of overprotection** rather than underprotection.

   Industrial Union v. American Petrol. Inst., 448 U.S. 607, 656 (1980) (emphasis added).

3. Federal law therefore requires the reviewing court to determine what information the agency relied upon, and whether it was "a body of reputable scientific thought." Here, the statements in the record cited by DNR and the Bear Hunters, if they had been relied upon by the NRB, plainly do not constitute reputable scientific thought.

Both DNR and the Bear Hunters cite statements submitted to the NRB by bear hunters in support of the use of dogs.[4] They argue that the NRB, and hence DNR, could have relied upon this information to reach the decision to impose no restrictions, and that no further inquiry by this Court is necessary or even permitted. As discussed above, that argument is incorrect as a matter of law. It is also incorrect as a matter of fact.

By law, the focus of the Court's attention must be the reasoning and decision-making by the regulatory agency, here the NRB.[5] The pertinent factual inquiry starts with the reasoning

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[4] DNR also references a letter from several legislators, who stated their views that Act 169 was not intended to cover training. If this Court were to conclude that the scope of Act 169 was ambiguous, such statements by legislators as to legislative intent may not be considered in interpreting the act. *See, e.g.*, *RURAL v. PSC*, 2000 WI 129, ¶ 43, n. 23, 239 Wis. 2d 660, 619 N.W.2d 888, quoting *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 739, 242 N.W.2d 192 (1976).

[5] DNR tries to blur the distinction between the NRB and DNR's secretary and staff, arguing that they "combined" to adopt the rules at issue, and thereby tries to bootstrap a memo by Secretary Stepp as the reasoning of the agency promulgating the rule. DNR Reply Br. at 7 and 14-15. However, the NRB both "directs" the DNR under Wis. Stat. § 15.05(1), and it is the "body with policy-making powers" that has

adopted – or not adopted – by the NRB for its choice to impose no emergency rule restrictions on dog training and no additional restrictions on wolf hunting with dogs.

Plaintiffs' principal brief quoted extensively from statements by NRB members. *See* Plaintiffs' Principal Br. at 9-10, 16-19. While DNR and the Bear Hunters cite examples of hunters supporting the use of dogs, the only reference either party makes to NRB statements is to note a motion by Ms. Wiley to prohibit the use of dogs for any purpose, which never received a second. DNR Reply Br. at 16; Bear Hunters Reply Br. at 12. That is, they largely ignore the reasoning and rationales articulated by Board members for the decisions they actually voted on and made.

As discussed in Plaintiffs' Principal Brief, the questions, statements and rationales suggested by Board members are revealing, and demonstrate the following:

1. Several potential rationales were articulated by Board members and their attorney; none was specifically adopted.

2. The Board did not adopt the rationale proposed by DNR's attorney – that no additional restrictions were necessary – which he believed would withstand court scrutiny.

3. None of the Board members specifically adopted or agreed with the assessment of the bear hunters who offered their views in favor of the use of dogs.

4. One proponent of the motion to defer, Mr. Kazmierski, appears to have agreed with Professor Adrian Treves, who believed that additional restrictions were necessary but perhaps could not be adequately developed in time for the current season's hunt.

5. Another Board member, Dr. Thomas, thought that this year's hunt would provide better evidence on dog-wolf interactions during the hunt.[6]

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the rulemaking authority under ch. 227. *See, e.g.*, Wis. Stat. § 227.11(2). Secretary Stepp advocated for but did not promulgate the rule.

[6] Dr. Thomas also highlighted this lack of clarify and agreement by posing the question whether it even matters to the judge which reason underlies the NRB's decision, as long as it was discussed; *i.e.*, it is given lip-service. Transcript at 10-11.

The rationale offered by Mr. Bruins, who moved to defer the training rules until Spring, warrants repeating, as his motion prevailed:

> 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.

Transcript (9/26/12) at 15. Thus, the record indicates that the NRB's decision to defer action was not based on a conclusion that such restrictions were not needed to comply with Act 169, or in reliance on any of the statements made by the hunter-advocates. To the contrary, the decision to include such evaluation in a subsequent rulemaking under Act 169 indicates that the NRB recognized the need for such restrictions. It necessarily follows that the failure to adopt such rules violates the requirement in Act 169, Section 21(1), to adopt rules that are necessary to implement Act 169's limitation on the use of dogs to track or trail wolves.

C. The NRB Was Prevented from Considering DNR's Most Reliable Source of Information on Wolf-Related Issues.

The Bear Hunters argue that the Court should not give any credence to the fact that DNR did not make its one wolf expert, Adrian Wydevan, available to the NRB as the decision-making body, arguing that the agency is entitled to decide which experts it will rely upon. Bear Hunters Reply Br. at 9-10, citing *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 378 (1989). In the cited reference to *Marsh*, the Supreme Court observed that when determining whether the agency's decision was arbitrary and capricious, the reviewing court first "must consider whether the decision was based on a consideration of the relevant factors ...." *Id.* (quoted source omitted). It then concluded that the agency has the discretion to rely upon its own experts, in the face of conflicting evidence. *Id.*

The issue here is not whether the NRB accepted or rejected Mr. Wydevan's information or opinions. Rather, the NRB was denied access to Mr. Wydevan, and it never had the

opportunity to consider the information of DNR's only wolf expert. One never reaches the legal principle in *Marsh*, *i.e.*, exercise of the agency's discretion to weigh competing evidence among its experts. Moreover, the Court may consider that DNR's action declining to make Mr. Wydevan available to decision-makers – including the legislature, NRB and this Court – renders the NRB's decision inherently unreasoned and therefore invalid.

D. It Would Have Been Unreasonable for the NRB to Merely Rely Upon Enforcement of the "Track" or "Trail" Language in the Statute.

Finally, the Bear Hunters argue that merely reiterating Act 169's "track and trail" language was sufficient to comply with the legislature's directive, and that DNR had the authority to administer the statute through enforcement rather than adopting rules. Bear Hunters Reply Br. at 21-22. They cite cases for the boilerplate proposition that agencies generally have discretion to administer statutes through case-by-case determinations or rulemaking.

The Bear Hunters' argument and cited cases are unavailing for several reasons. First, the legislature in Act 169 expressly directed DNR to promulgate emergency and then permanent rules that are "necessary" to "implement" § 29.185, which includes the use of dogs to hunt wolves. That is, DNR had no discretion to decline to adopt necessary rules. The appropriate inquiry is not whether DNR had discretion to adopt or not adopt, but the extent to which it exercised its judgment in deciding what rules were necessary.

The NRB never decided that the restrictions proposed by plaintiffs and the wolf experts either were not necessary. As discussed above, comments by NRB members suggest that they agreed that additional restrictions were necessary.

Finally, on this record, reliance on enforcement would be unreasonable. DNR and the NRB are well aware that the warden force has been substantially depleted due to budget cuts,

and that each warden covers literally hundreds of square miles of territory.[7] Additionally, when asked, Warden Dryja testified that he has "never" issued a citation for illegally killing game with a dog. DNR Exh. M at 401. The concept of relying upon case-by-case enforcement, if it had been adopted by the NRB, would be ludicrous.

II. THE BEAR HUNTERS CANNOT RELY UPON PROCEDURAL DEFENSES.

The Bear Hunters reiterate a variety of arguments previously made by DNR and rejected by the Court. They are no more persuasive now.

A. DNR's Authority and Duty to Adopt Restrictions for Both Hunting and Training to Hunt Wolves with Dogs Are Not Constrained by Act 21.

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. They argue that DNR lacks authority to adopt restrictions not expressly included in Act 169, including any leash requirement or training rules. Bear Hunters Reply Br. at 2-4.

This argument must be rejected again for at least the following reasons:

1. Under the Bear Hunters' rationale, an agency cannot issue rules that do more than mirror the statute, which effectively makes rulemaking redundant and meaningless.

2. The Bear Hunters ignore the actual language of Wis. Stat. § 227.10(2m), which permits an agency to promulgate rules if "explicitly permitted by statute ...."

3. Act 169, Section 21(1), expressly permits and requires DNR to promulgate rules that are necessary to implement Wis. Stat. § 29.185, which includes the limitation on the use of dogs to "track" or "trail" wolves.

[7] Wisconsin has 205 wardens, not all of whom serve as conservation wardens in the field. *See, e.g.*, http://dnr/wi.gov/about/division/enforcementandscience.html. The land surface area is 54,310 square miles. *See* http://www.infoplease.com/ipa/A0108291.html.

4. Neither DNR nor any other agency has applied this statute as argued by the Bear Hunters. All parties acknowledge that the rule at issue includes provisions that are not expressly included in Act 169, including night restrictions and identification markings on dogs.

5. The Bear Hunters also continue to ignore Wis. Stat. § 227.11(2)(a) (intro.), which specifically authorizes agencies to promulgate rules if "the agency considers it necessary to effectuate the purpose of the statute ...."

B. There Is No Reason to Revisit Standing.

The Bear Hunters argue that plaintiffs cannot obtain judgment on the merits at this point in time, because they have not made an evidentiary showing that they have standing. Bear Hunters Reply Br. at 16, *et seq.* They acknowledge that Jane Belsky, one of the plaintiffs, submitted an affidavit, but argue that her affidavit is insufficient because she has not identified herself as a "humane officer." *Id.* at 18. They also argue that plaintiffs should not be allowed to make the requisite showing in their reply.[8] Finally, they argue that plaintiffs misapply *State v. Kuenzi*, 2011 WI App 30, 332 Wis. 2d 297, 796 N.W.2d 222.

At the outset, it is noteworthy that the Bear Hunters' procedural argument contravenes DNR's position in this matter. DNR has consistently maintained that the Court cannot and should not consider any evidence outside the administrative record. The Bear Hunters now argue that the Court cannot decide the merits without considering evidence outside the record; to wit, evidence of plaintiffs' standing.

The Bear Hunters are wrong procedurally. They partially quote *Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 8-9, 230 N.W.2d 243 (1975) ("*WED I*"), for the proposition that "in later stages of the case court must consider 'the ability of the petitioner to prove the facts alleged')." Bear Hunters Reply Br. at 15. While the Bear Hunters' partial

[8] Under the Bear Hunters theory, the Court would have to have a trial on plaintiffs' standing, even after it has ruled against DNR on the merits.

quotation from *WED I* is accurate as far as it goes, they grossly distort its context and meaning. All that *WED I* states in this regard is that in a motion to dismiss a judicial review proceeding, "this court is not concerned with the ability of the petitioner to prove the facts alleged at trial." *Id.* at 8-9. Neither *WED I* nor any other cases requires a petitioner in a chapter 227 judicial review proceeding to produce evidence outside the record to establish standing. Indeed, chapter 227 does not contemplate a trial at all.

The Bear Hunters' characterization of plaintiffs' standing is also distorted. Ms. Belsky's standing is not based on being a member of a humane society or "humane officer." As reflected in her affidavit, her standing is based on the facts, *inter alia*, that: a) she resides in wolf territory; and b) as a wolf tracker, she is actively in the woods in wolf territory, collecting data for DNR, at the same time as DNR would allow the use of unrestrained dogs to chase and be chased by wolves, either while hunting or training. That is, she is personally at risk of physical injury because of the way that DNR has decided to regulate (or not) the use of dogs. It is hard to imagine how one could have any greater standing then an adverse impact to personal safety.

The Bear Hunters next argue that the animal cruelty laws in chapter 951 do not create a private cause of action, and attempt to distinguish or diminish plaintiffs' prior citation to *State v. Kuenzi*. Plaintiffs do not claim that either chapter 951 or *Kuenzi* creates a private cause of action. Rather, chapter 951 articulates the public policy of the State of Wisconsin that abhors animal cruelty, and *Kuenzi* clarifies that conduct otherwise permitted by chapter 29 can be performed in a manner that violates chapter 951. Both chapter 951 and *Kuenzi* reinforce the humane societies' position that their specific missions and activities to address cruel treatment of animals is recognized by and reflected in Wisconsin public policy.

Finally, DNR has not disputed the plaintiffs' allegations of standing. In fact, DNR has never served any Answer or Statement of Position contesting any of plaintiffs' allegations. Accordingly, no further evidentiary support is required.

C. The Court Should Issue a Permanent Injunction.

The Bear Hunters similarly argue that plaintiffs bear the burden of demonstrating their entitlement to a permanent injunction. Bear Hunters Reply Br. at 12-13. In the typical civil case, they would be correct. However, this is an action to declare a rule invalid. Should the plaintiffs prevail on the merits, the rule would be "a mere nullity." *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W. 2d 47 (1955).

The Bear Hunters acknowledge, as they must, that under *Pure Milk Prod. Coop. v. National Farmers Organ.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979), plaintiffs are only required to show that "a sufficient probability that future conduct of the defendant will violate a right of and will injure the plaintiff." However, they wrongly suggest that the only alleged harm would be to canids, and they argue that under federal law in other jurisdictions, one must prove an impact to the well-being of the entire population. Bear Hunters Reply Br. at 13-14.

As discussed immediately above, the risk of harm to plaintiffs is not merely to the wolf or dog population. There is a risk of personal injury to those who reside in wolf country, who use the forests to collect data on wolves, or who use the forests for other purposes. *See also*, Amicus Brief of Mainstream Hunters.

Additionally, their cited federal cases are inapplicable. In both cases, the plaintiffs challenged and sought to enjoin an entire hunt, based on alleged failure to satisfy the National Environmental Policy Act ("NEPA"). *See Fund for Animals v. Frizzell*, 530 F.2d 982, 983-84 (D.C. Cir. 1976); *Fund for Animals v. Mainella*, 294 F.Supp.2d 46, 48 (D.D.C. 2003). In each

case, the alleged harm was the impact that the hunt would have on the target animal population, *i.e.*, that the hunts would significantly diminish the populations (geese and bear, respectively). *Frizzell* at 986; *Mainella* at 57-58. In that context, the courts held that to prove irreparable harm, the plaintiffs would have to prove their allegations that the hunts would decimate the affected populations. *Frizzell* at 987; *Mainella* at 58. Since the case at bar does not seek to enjoin the hunt and is not based on alleged decimation of the wolf population, these cases simply are irrelevant. Moreover, there is nothing in either case that supporting the Bear Hunters broad assertion that irreparable harm in any hunting-related case requires proof that an entire population would be harmed.

Finally, the equities strongly favor issuance of an injunction. While the risk of harm to plaintiffs, other users of the forest, and both dogs and wolves are great, this season's wolf hunt demonstrates 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 is about to be closed less than half way through its scheduled duration. The defendants will suffer no 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

This case presents a compelling need for judicial guidance. Both state and compatible federal law require this Court to scrutinize the record for the NRB's reasons for its actions, and the reasonable and rational evidence that it relied upon. The Court must conclude that the rules implementing the wolf hunt are beyond DNR's statutory authority if: a) the Court is unable to satisfy itself that the NRB's rationale is reasonable, based upon the underlying scientific

evidence; or b) the rules do not include those provisions that are necessary to limit the use of dogs to tracking and trailing wolves.

The NRB still has not articulated any reasons why it did not address the issues relating to hunting with wolves raised in May and July 2012. Based on comments by the Court, it scheduled a meeting to address training, decided not to adopt any restrictions at this time, and again did not articulate its reasoning. Moreover, the NRB declined to adopt a rationale for taking no action that its attorney represented would satisfy this Court.

Scrutiny of this record reveals that the evidence submitted by wolf and dog behavioral experts consistently demonstrates the need for additional restrictions for the use of dogs while hunting and training to hunt wolves. They also are the only individuals who have provided any information under oath and available for cross-examination. DNR administration offered warden-hunters to speak at the most recent NRB meeting, together with anecdotal information from bear hunter advocates, but again declined to provide its one wolf expert.

This record does not require the Court to weigh competing scientific evidence. Plaintiffs are entitled to judgment because of the absence of either a rationale or evidence supporting the rules. The defendants have failed to satisfy the minimum requirements for rational rulemaking, failing to articulate a reason for their actions or the information upon which they based their actions. The only reasonable, scientifically credible evidence demonstrates that defendants did not satisfy Act 169's directive to adopt rules necessary to implement, *inter alia*, the limited permissible use of dogs to track or trail wolves.

Finally, the Court should 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. Uncontroverted evidence demonstrates that without further restrictions, violent wolf-dog

confrontations, grievous injuries, and deaths are virtually certain. On the other hand, this hunting season has demonstrated that the use of dogs and exposure to these risks are not necessary for a successful hunt. Furthermore, DNR administration has now proposed permanent rules that reflect an indifference to this Court's decisions to date, proposing no further restrictions on the use of dogs in hunting and allowing training during the sensitive and volatile mating and breeding seasons.

Dated this 12th day of December 2012.

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