



# Challenge to DNR over wolf seasons raises serious issues of policymaking

By Ron Meador | 09/19/12

The legal challenge filed yesterday raises important issues about how the Minnesota Department of Natural Resources has prepared for the first sport hunting and trapping seasons on wolves in state history. But the most interesting questions lie outside the case itself:

- How could the DNR team not see this one coming?

- And what, exactly, were they thinking when they tried to cast the new wolf rules as “emergency” measures, supposedly exempt from the normal requirements of public participation?

After all, “delisting” of gray wolves from federal protection has been postponed by court challenges at least three times in the last 10 years. The most recent of these, in 2010, grew out of the U.S. Fish and Wildlife Service’s failure to follow the law on public notice and comment – the same basis on which DNR’s new wolf seasons are now in court.

For the moment, DNR is not answering these or any other questions about the action filed yesterday by the Center for Biological Diversity (CBD) – a savvy national advocacy organization, and a player in the three successful challenges mentioned above – along with the Minnesota-based Howling for Wolves. Its no-comment comment is available in this press release.



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It’s possible that DNR has some facts or arguments at its disposal that will enable it to pull its bacon out of this fire, but they are frankly hard to imagine. I am not a lawyer, but I’ve followed environmental litigation a lot, and studied environmental law a little, and this case is not particularly complicated.

Nor is it trivial. The DNR lapses that have gotten it into trouble are not failures to dot an “i” here and cross a “t” there. They seem to reflect strategic decisions to try getting around requirements that are a central, ingrained, business-as-usual part of administrative rulemaking in America.

Based on that, and on CBD’s deep experience litigating species protection generally and wolf protection in particular, I’ll put the chances of DNR holding a wolf hunt this year at roughly zero.

The facts of the matter CBD’s motion to enjoin the wolf hunt can be read online here, and the key facts behind it can be summarized this way:

Minnesota law requires that rule-making agencies follow a formal process for public comment on pending actions. The process is familiar to most everyone.

The agency publishes a notice of the rules it plans to make, and a proposed version of the rules themselves, in the State Register. Then it accepts public comment for a specified period.

The invitation for comment is open-ended: People and organizations can offer thoughts on pretty much any relevant aspect they please. Of course, much of the comment comes from special-interest parties: companies, advocacy groups, trade and professional associations, and so on. Often these are not so much statements of opinion as scientific, legal or economic arguments laid out at some length.

The law also allows exceptions to the public-comment requirements in emergencies where the need for speedy action outweighs the value of public participation. After wolves were finally delisted by the federal government in January 2012 – a move that had been anticipated since at least 1998 – the DNR chose to take the emergency route in hopes of getting hunting and trapping seasons in place for this fall.

In late May, the agency outlined its plans for wolf hunting and trapping seasons in a press release, and opened an online public survey that ran for 30 days, asking for anonymous answers to just 10 questions on the order of:

•Do you support hunting and trapping for wolves in Minnesota? Yes / No

•Which license will you apply for? Early season / Late season hunting / Late season trapping / I don't plan on applying

•The start date of the late season is: Too early / Too late / About right

•Do you have any additional comments?

The survey concluded on June 20. It drew 7,351 responses (nobody knows how many individuals that represents), and these ran nearly 4 to 1 against wolf hunting and trapping (which didn't matter because DNR had made plain the survey wasn't a referendum).

On July 12, DNR put out a press release describing the final rules, and the rules themselves were published in the State Register on Aug. 20.

Public relations, not public participation

Let's be clear: This was not a public-comment process. It was a public-relations exercise.

And what, exactly, was the emergency?

DNR was under considerable pressure from lawmakers, livestock interests, hunting groups and others to get going with the hunt.

But it's not obvious, at least to me, that a full comment process would have necessarily postponed the hunts till next year. Or that, even if they were postponed, anyone besides 6,000 license-seekers would have been terribly sad.

One aspect that I think confuses some people is a notion that these seasons will make a big and im-

mediate difference to farmers who have been losing cattle and sheep to wolves. They will not.

Since the January delisting, farmers throughout most of the state have been legally entitled to shoot wolves to protect livestock, rather than having to call in government agents to do it for them. Any additional benefit from sporting seasons on wolves won't show up for some time.

But this is just one uncertainty among many about the future of wolves in Minnesota. The DNR's wolf management plan, adopted in 2001, called for a five-year moratorium between delisting and the start of sport hunting and trapping to test, among other things, how many wolves would be killed by farmers newly authorized to do so.

The agency still doesn't know the answer to that question, but at the urging of the Legislature – which DNR managers did not resist – the moratorium has been scrapped.

I asked Collette Adkins Giese, the CBD lawyer who prepared this case, if she really felt a formal public comment process would bring any new and important information to the DNR's attention. She said maybe so – for example, evidence of rising wolf mortality from mange and canine parvovirus should be taken into consideration.

Also, she said, the impact of continued illegal wolf-killing deserves more research, as do various non-lethal means of protecting livestock from wolf predation. Most of all, she said, public acceptance of wolves has grown dramatically since the management plan was ad-

opted, and perhaps DNR's policies should be informed by that shift as well as the continuing pressure from pro-hunting quarters.

To these I would add my own view that many Minnesotans may not have been aware until recently that trapping plays such a large role in DNR's 2012 seasons, and many who can accept shooting wolves feel differently about leg-hold traps and snares.

A pain in the butt, but...

I will say, in DNR's behalf, that a public comment process can be a pain in the butt.

Not long ago, for a short while, it was part of my job to be a pain in the butt of the U.S. Forest Service over management issues on the Superior National Forest and the Boundary Waters Canoe Area. This I did by helping to prepare long and legalistic documents during comment periods.

I never imagined that we were going to inform the Forest Service of something it didn't know. Rather, we were creating a record that would make it difficult for the Forest Service to ignore the law or the facts or the science on points we felt were important.

Fundamentally, this is the purpose of public notice and comment – holding an agency accountable for the quality of its policy-making before new rules take effect, rather than suing over the consequences afterward (although, OK, sometimes we did both).

And this is a preferable outcome not only for the advocates but for

the taxpaying public, the public resources being managed and, not least, the agency itself. By accepting some constraints in the policy-making phase, it gains more certainty and autonomy in the implementation phase.

In at least some offices over at DNR, I'll bet that's looking like a better trade today than it did last May.