STATE OF MINNESOTA
IN SUPREME COURT

Center for Biological Diversity, Howling for Wolves, Petitioners, vs. Minnesota Department of Natural Resources, and Tom Landwehr, in his official capacity as the Commissioner of the Minnesota Department of Natural Resources, Respondents.	)	**PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS** COURT OF APPEALS NO.: A12-1680 DATE OF FILING OF COURT OF APPEALS DECISION: October 10, 2012

Petitioners Center for Biological Diversity and Howling for Wolves (collectively, "Petitioners") respectfully request Supreme Court review of the above-entitled decision of the Court of Appeals upon the following grounds:

I. Statement of legal issues and their resolution by the Court of Appeals.

The legislature authorized – but did not require – the Minnesota Department of Natural Resources ("DNR") to issue rules opening wolf hunting and trapping seasons but required that the agency first provide opportunity for public comment. Minn. Stat. § 97B.645, subd. 9. Refusing to provide for public comment as required by law, the agency issued the "Adopted Expedited Emergency Game and Fish Rules: 2012 Wolf Season" ("Rules"), which provide that 400 wolves will be hunted and trapped starting on November 3, 2012. (Rules, App. 74.) The Court of Appeals denied Petitioners' motion for a preliminary injunction, holding that any irreparable harm is attributable to the legislature's authorization, rather than the actual Rules opening wolf hunting and setting a quota of 400 wolves. (Order, App. 3.) Because Petitioners will suffer irreparable harm from the killing of wolves that is directly caused by the Rules, Petitioners ask the Supreme Court to review the injunction denial by the Court of Appeals.

II. Statement of the case.

With the recent removal of federal Endangered Species Act protections from Minnesota wolves, the state now bears the responsibility of deciding under what circumstances wolves can be killed. Although Minnesota's wolf management plan provides that wolves will not be hunted for five years after

removal of federal protections, the Minnesota Legislature last summer lifted the five-year moratorium and provided that "the [DNR] commissioner may prescribe open seasons and restrictions for taking wolves but must provide opportunity for public comment." Minn. Stat. § 97B.645, subd. 9 (emphasis added).

Similarly, the Game and Fish Omnibus Bill that passed in May of 2012 authorized – but again, did not require – the DNR to issue rules to open wolf hunting and trapping seasons. 2012 Minn. Laws ch. 277, art. 1, § 65 (Game and Fish Omnibus Bill, App. 82). The law provides that "[t]he commissioner may by rule prescribe the open seasons for wolves according to this subdivision." *Id*. (emphasis added). The law also provides that the DNR "may" set quotas, zones, and provide for licenses. *Id*.

Amidst tremendous public controversy surrounding the sport hunting and trapping of Minnesota wolves – and despite specific statutory language directing the DNR to provide an opportunity for public comment – the DNR issued wolf hunting and trapping rules, without providing formal notice or opportunity for public comment. Instead, the DNR merely opened an anonymous 30-day "online survey" (App. 85). Nearly 80 percent of survey respondents opposed the hunt. (Survey Results, App. 95).

To challenge the DNR's violation of statutory rulemaking requirements, the Center for Biological Diversity and Howling for Wolves filed a Petition for Declaratory Judgment (App. 5) before the Court of Appeals pursuant to Minnesota Statutes § 14.44. Petitioners asked the Court of Appeals to preliminary enjoin the Rules. The Motion for Preliminary Injunction (App. 6) and the attached declarations from Petitioners' members (App. 97-138) demonstrate that the Rules – because they were issued without providing Petitioners notice and opportunity for comment and because they open a hunt that will kill 400 wolves – will cause irreparable harm to Petitioners and their members, who live and recreate in wolf habitat and have recreational, spiritual, aesthetic, and other interests in seeing and hearing wolves. Despite these circumstances, the Court of Appeals denied the injunction, holding that Petitioners could not show "irreparable harm attributable to the DNR rules, rather than the legislature's decision to authorize wolf hunting and trapping and determine when the firearms season will open." (Order, App. 3.)

Because the Court of Appeals clearly erred in denying the injunction and because Petitioners cannot obtain effective relief absent an injunction or other order preserving the status quo, Petitioners hereby file this Petition for Review, along with an Emergency Motion for Injunction or Stay of Rules.

III. Statement of the criteria of the rule relied upon to support the petition.

The Court of Appeals' denial of the injunction stems from its misconception that the legislature mandated that the DNR provide a wolf hunt. This clear error should be corrected by the Supreme Court. To begin, the question presented in this Petition is an important one. The injunction denial allows full implementation of unlawful Rules that were not informed by meaningful public comment. Such a result is contrary to the public interest. Public participation in agency rulemaking serves an important function in democratic society, ensuring "that unelected administrators, who are not directly accountable to the populace, are forced to justify their quasi-legislative rulemaking before an informed and skeptical public." *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985). Public comment also provides "the opportunity to bring to the agency's attention all relevant aspects of the proposed action and thereby enhance the quality of agency decisions," and it serves the "statutory goal of increasing public accountability of administrative agencies." *Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604, 610 (Minn. Ct. App. 2003).

Here, in the absence of an injunction, the courts would be powerless to remedy the DNR's illegal refusal to provide for meaningful public comment. By the time this case is decided on the merits, the wolf hunt will be over and the illegal Rules fully implemented. The public interest is harmed if administrative agencies are allowed to escape meaningful judicial review of their illegal actions.

In addition, a decision by the Supreme Court will help develop the law on injunctive relief. The appellate courts have never before been asked to issue an injunction in connection with a Petition for Declaratory Judgment (DNR Response, App. 47-48), and the DNR argues that the Court of Appeals lacks the power to ever issue an injunction (DNR Response, App. 45-48). The Court of Appeals assumed but did not decide this threshold issue. (Order, App. 2.) A decision by the Supreme Court would clarify the power of the appellate courts to issue injunctive relief, a question that is likely to recur unless resolved here. The question presented also concerns the causal link required between the claimed irreparable harm and the illegal action, which is an issue never before directly addressed by the Minnesota courts.

Moreover, the resolution of the question presented has statewide impact. Again, the injunction denial implicates important public policy matters of government accountability and accessibility that

affect all citizens of Minnesota. In addition, the unlawful Rules affect Minnesota wolves, a public natural resource whose management has generated statewide public controversy.

IV. A brief argument in support of the petition.

In denying the injunction, the Court of Appeals did not dispute that Petitioners proved irreparable harm but held that Petitioners could not show "irreparable harm attributable to the DNR rules, rather than the legislature's decision to authorize wolf hunting and trapping and determine when the firearms season will open." (Order, App. 3.) The Court of Appeals is likely to be reversed because the claimed irreparable harm is directly caused by the DNR's Rules. The Supreme Court's review is *de novo* because the Court of Appeals based its decision on statutory interpretation. *Williams v. NFL*, 794 N.W.2d 391, 395 (Minn. Ct. App. 2011).

Critically, contrary to the Court of Appeals' interpretation, the legislature did not mandate a wolf hunt. It used permissive language that merely authorized the DNR to prescribe open seasons. Minnesota Statutes § 97B.645 provides that "the commissioner may prescribe open seasons and restrictions for taking wolves . . . ." Minn. Stat. § 97B.645, subd. 9 (emphasis added). And the Game and Fish Omnibus Bill provides that "[t]he commissioner may by rule prescribe the open seasons for wolves according to this subdivision." 2012 Minn. Laws ch. 277, art. 1, § 65 (App. 83).

The DNR could not have opened the hunt without the legislature's authorization, but even with the authorization, no wolf hunt could occur without the DNR's issuance of the Rules, which are therefore a "but-for" cause of the hunt. But because any event can have several "but-for" causes, Minnesota courts in the analogous context of tort liability ask whether the challenged action is a "substantial factor" bringing about the harm. *See George v. Estate of Baker*, 724 N.W.2d 1, 10-11 (Minn. 2006) ("Minnesota applies the substantial factor test for causation. The negligent act is a direct, or proximate, cause of harm if the act was a substantial factor in the harm's occurrence. . . . Factual, or but-for, causation is insufficient to establish liability in Minnesota because '[i]n a philosophical sense, the causes of an accident go back to the birth of the parties and the discovery of America.'").

Here, the Rules are the most substantial factor bringing about irreparable harm. Petitioners' harms flow directly from the DNR's refusal to provide formal notice and opportunity for public comment and

the DNR's decisions about the hunt that are codified in the Rules and not mandated by the legislature. The Rules provide that 400 wolves will be hunted and trapped, and the Rules create open zones across the near entirety of the wolf's occupied range in Minnesota. The death of these wolves in these areas will cause the harms asserted by Petitioners, which are directly caused by the Rules.

In denying the injunction, the Court of Appeals stated that "the statute, rather than the DNR rules, mandates that there be a firearms season that begins on November 3." (Order, App. 3.) While the legislature mandated that any wolf season that the DNR might choose to open would begin on the opening of the firearms deer season, the legislature did not require that the DNR open the wolf seasons this year or ever. The legislature left this key decision to the discretion of the wildlife agency. In exercising that discretion, the DNR could have followed the wolf management plan and delayed hunting for five years after delisting. DNR could have set a lower quota or restricted hunting to a small area of the wolf's range. *Compare Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 373-74 (Minn. 2008) (explaining that an intervening voluntary act severs the chain of causation). Indeed, the DNR had many choices that could have prevented the asserted harms. Therefore, the irreparable harm facing Petitioners is directly attributable to the DNR's voluntary decision to go forward with the hunt, set the quota of 400 wolves, and issue the unlawful Rules in violation of statutory rulemaking requirements.

For these reasons, Petitioners seek an order granting review of the decision of the Court of Appeals.

Dated: October 15, 2012

Respectfully submitted,

_____

Collette L. Adkins Giese (MN Bar No. 035059x)
Staff Attorney, Center for Biological Diversity
P.O. Box 339
Circle Pines, MN 55014-0339
Telephone: (651) 955-3821
Email: cadkinsgiese@biologicaldiversity.org

Attorney for Petitioners