WISCONSIN COURT OF APPEALS
DISTRICT IV

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

Plaintiffs-Appellants-Cross-Respondents,

v.

Appeal No. 2013AP000902
Case No. 2012CV003188

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

Defendants-Respondents-Cross-Appellants,

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

Intervenors-Respondents-Cross-Appellants,

ASPCA,

Other Party.

COMBINED REPLY AND RESPONSE BRIEF OF PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS, WISCONSIN FEDERATED HUMANE SOCIETIES, *et al.*

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

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September 23, 2013

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INTRODUCTION

Appellants have asserted a claim for declaratory judgment challenging the validity of Department of Natural Resources ("DNR") rules relating to hunting and training to hunt wolves with dogs. The essence of their complaint is that the rules adopted by DNR were inadequate and contravened Act 169 because they merely mirrored 2011 Wisconsin Act 169, the enabling statute – a point echoed by DNR – instead of including provisions that are "necessary to implement" Act 169. DNR elected to craft no training rules whatsoever and to promulgate hunting rules lacking those restrictions necessary to limit dogs to non-confrontational, non-combative uses.

The responses by DNR and Intervenors ("Bear Hunters") attempt to impose procedural roadblocks, generally without any legal authority. DNR asserts that, because the legislature authorized the use of dogs to "track or trail" wolves,[1] appellants' criticize Act 169, not DNR. DNR Br. at 3. Its argument reflects a profound misunderstanding or misdirection. Appellants do not dispute the use of dogs to track or trail wolves; rather, they contest DNR's failure to adopt provisions necessary to appropriately limit the use of dogs.

DNR further argues, without citing any authority, that one cannot challenge a rule under Wis. Stat. § 227.40 for what it fails to include. DNR Br. at 13-15. It

[1] As discussed in Appellants' Principal Brief at 20, "track or trail" means to follow but not confront. By contrast, DNR's rules allow six-dog packs (hunt) and unlimited dogs (year-round training) to be loose in the woods, chasing wolves miles from their owners.

suggests that this action should have been brought as a challenge to a decision under Wis. Stat. § 227.52 or a mandamus action. This argument is wrong as a matter of law. *See* Section I, below

Respondents then twist the law to assert an entitlement to deference, contrary to DNR's acknowledgement that when challenged for exceeding one's authority, agency rulemaking is reviewed *de novo* without deference to the agency. DNR Br. at 11-12. They similarly reject the application of the "arbitrary and capricious" standard, feigning ignorance of the cases adopting that standard – several of which were cited to the circuit court.

On the merits, DNR misses the applicable law and the focus of Appellants' challenge. It argues that its wolf hunting rules, as they relate to dogs, must satisfy the statute because they mirror the statute. DNR Br. at 20-21. This argument, of course, begs the question why the legislature mandated rulemaking at all. Its subsequent arguments on the merits, similarly predicated on erroneous premises, are discussed in Section II, below.

Finally, and importantly, the Circuit Court failed to fulfill its critical role to scrutinize the rationale behind DNR's failure to adopt necessary rules, instead adopting a novel, inconsistent and legally flawed rule that a court cannot review rules for what they fail to include. Consequently, the fringe Bear Hunters are now free to hunt wolves with unleashed, unprotected dogs, a practice deemed too risky for dog training. The Circuit Court illogically made a bad situation even worse.

Under Act 169, DNR was required to adopt rules "necessary to implement" the new, unprecedented use of dogs to track or trail wolves. It declined to do so, ignoring: (a) undisputed historical data on violent wolf-dog confrontations; (b) testimony and undisputed evidence from both wolf and dog behavioral experts, including former DNR wolf managers; and (c) the Circuit Court's recommendation that DNR reconsider its rules that are essentially no more than a duplication of the statute. Consequently, DNR's current rules do not contain those restrictions necessary to limit the use of dogs to tracking or trailing wolves, as mandated by Act 169.

ARGUMENT

I. LEGAL STANDARDS APPLICABLE TO THIS APPEAL.

A. The Court Must Apply a *De Novo* Standard of Review.

The principal issue on appeal is whether DNR exceeded its statutory authority. DNR initially acknowledges that this issue is reviewed *de novo*. DNR Br. at 11-12, citing *Wis. Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, 270 Wis. 2d 318, 677 N.W.2d 612. Respondents nevertheless argue that the Court should accord deference to DNR, ignoring the contradictory statement in the case DNR cites, that a court "will not defer to an agency's interpretation on questions concerning the scope of the agency's power." *Id.*, ¶ 13 (citations and footnote omitted).

Respondents' claim for deference is further flawed because DNR conflates deference with the principle that rules promulgated under Wis. Stat. § 29.014(2)(b) are prima facie valid until shown otherwise. Section 29.014(2)(b) on its face is a codification of common law. Administrative regulations, when challenged on constitutional grounds, are always presumed valid, *i.e.*, there is always a presumption of validity until a court decides otherwise. *LeClair v Natural Res. Bd.*, 168 Wis. 2d 227, 236, 483 N.W.2d 278 (Ct. App. 1992).[2] They also are wrong because the challenged rules were promulgated under the express mandate in Act 169, Section 21(1), not § 29.014(2)(b).[3] Respondents' efforts to invoke judicial deference are predicated on misstatements and distortions of the applicable law, which unequivocally holds otherwise.

B. Wis. Stat. § 227.40 Is the Proper Basis for this Action.

DNR next argues that Appellants' action was not authorized by § 227.40 because that statute only allows a challenge to existing rules, and not the inadequacy of rules. DNR Br. at 13-14. It then suggests that this action challenging the failure to adopt a rule should be brought under § 227.52, or perhaps as a mandamus action. *Id.* at 14-15. DNR offers no authority for this argument.

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[2] Where, as here, the issue is whether the agency exceeded its statutory authority, neither party bears the burden of proof. *Cranes and Doves*, 2004 WI 40, ¶ 10.

[3] Even if this Court were to consider a level of deference, DNR would be entitled to no deference in this unprecedented venture into hunting wolves with dogs. *See* Appellants' Principal Brief at 15-16.

This argument should be rejected for two reasons. First, it was not raised before the Circuit Court and therefore should not be considered on appeal. *See, e.g., Lamar Co., LLC v. Country Side Rest., Inc.*, 2012 WI 46, ¶ 31 n. 15, 340 Wis. 2d 335, 814 N.W.2d 159.

DNR's argument also is preposterous. Section 227.40(1) states that except as provided in sub. (2) (which does not apply), "the **exclusive means of judicial review** of the validity of a rule shall be an action for declaratory judgment as to the validity of the rule …." (Emphasis added.) Section 227.52 is available only to challenge "administrative decisions," *i.e.*, "final orders" of an agency. *See, e.g., Pasch v. Department of Revenue*, 58 Wis.2d 346, 353, 206 N.W.2d 157 (1973). DNR's argument that a rule should be subject to review under § 227.52 ignores the fundamental distinction between rules and decisions.

DNR also misconstrues Appellants' challenge. Appellants acknowledge that DNR adopted rules relating to wolf hunting. Appellants assert that the rules, as adopted by DNR, do not satisfy its statutory directive and exceed its authority. This type of challenge falls squarely within § 227.40.

For this same reason, DNR's reference to mandamus is misguided. Mandamus is used to compel a governmental entity to perform a required action. *See, e.g., State ex rel. Robins v. Madden*, 2009 WI 46, ¶ 10, 317 Wis. 2d 364, 766 N.W.2d 542. Here, DNR adopted rules; *i.e.*, Appellants do not seek to compel rulemaking. The gravamen of the complaint is that the rules do not satisfy the

directive in Act 169. Once again, DNR relies upon erroneous procedural machinations to avoid the merits.

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

DNR argues that the only standard that applies to rules challenges is the "elemental" standard, *i.e.*, whether the rule matches all the elements of the statute; and that the arbitrary and capricious standard does not apply. DNR Br. at 13, 15-19. DNR also argues that it cannot "exceed" its authority by "simply incorporating the language of the statute …." *Id*. at 27. DNR is wrong; and its description of the elemental analysis is incomplete.

The elemental analysis is described in *Cranes and Doves,* 2004 WI 40, ¶ 14. DNR correctly observes that part of that analysis is whether the rule matches the elements of the statute. However, that question only addresses whether the rule is statutorily authorized. The determination of its validity requires more:

> Wisconsin has adopted the elemental approach to determining the validity of an administrative rule, comparing the elements of the rule to the elements of the enabling statute, such that the statute need not supply every detail of the rule. If the rule matches the elements contained in the statute, then the statute express authorizes the rule. **However, if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid**.

(Citations omitted; emphasis added.)

The validity of a rule is not based merely on whether it mirrors the statute: that would defeat the purpose of rulemaking. Rather, the Court must consider whether the substance of the rule conflicts with the legislature's intent in conferring rulemaking authority. Additionally, an agency can exceed its authority

by failing to include what the legislature requires. *See, e.g., Calvert Cliffs' Coordinating Comm. v. U.S. Atomic Energy Com'n,* 449 F.2d 1109 (D.C. Cir. 1971) (remanding rule for failure to satisfy NEPA).

DNR also errs by running from the arbitrary and capricious standard. While that standard is derived from federal law, it has been applied routinely by the Wisconsin courts, in challenges to both rules and agency decisions. *See, e.g.*, *Preston v. Meriter Hospital, Inc.*, 2005 WI 122, ¶¶ 30-32, 284 Wis. 2d 264, 700 N.W.2d 158; *Preston v. Meriter Hospital, Inc.*, 2008 WI App 25, ¶ 36, 307 Wis. 2d 704, 747 N.W.2d 173, *rev. den.* 2008 WI 40; *Wis. Tel. Ass'n v. Public Service Comm.*, 105 Wis. 2d 601, 610-11, 314 N.W.2d 873 (1981); *Westring v. James*, 71 Wis. 2d 462, 238 N.W.2d 695 (1976); *McMorrow v. Benson*, 2000 WI App 173, 238 Wis. 2d 329, 617 N.W.2d 247. Additionally, our Supreme Court frequently relies upon federal law in applying chapter 227. *See, e.g., Wisconsin's Environmental Decade, Inc. v. PSC,* 69 Wis.2d 1, 11, 290 N.W.2d 243 (1975); *Wis. Tel. Ass'n,* 105 Wis.2d at 611; *Mortensen v. Pyramid Savings & Loan Assoc.*, 53 Wis. 2d 81, 84 n. 2, 191 N.W.2d 846 (1971). It is axiomatic that an agency action that is arbitrary and capricious also exceeds its authority.

The arbitrary and capricious standard requires the agency to provide a satisfactory explanation based on a rational connection with the facts found. This is essentially the same test applied in a case repeatedly relied upon by DNR. *See*

Liberty Homes, Inc. v. DILHR, 136 Wis. 2d 368, 385, 401 N.W.2d 805 (1985), which requires that a court must

> 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….

DNR argues that in emergency rulemaking, it is not statutorily required to submit a report to the legislature summarizing public responses and comments, and that the statutory requirement for fact finding that existed at the time of *Liberty Homes* has since been repealed. DNR Br. at 18. These points are irrelevant. *Liberty Homes* requires a judicial inquiry focusing on the reasonableness and rationale for the rule, which is not predicated on a statutory notice requirement.

Finally, DNR argues that its rule is insulated from review because it involves the exercise of discretion. If that were the case, no rule would ever be reviewable, since it is in the very nature of rulemaking that an agency exercises some level of discretion and makes choices about how to implement its statutory directives.

Additionally, the exercise of discretion is not free from scrutiny. Indeed, the arbitrary and capricious standard applies to an agency's exercise of discretion:

> An agency's exercise of discretion will be upheld if it was made "based upon the relevant facts by applying a proper standard of law and represents a determination that a reasonable person could reach."

Aurora Consolidated Health Care v. LIRC, 2012 WI 49, ¶ 46, 340 Wis. 2d 367, 814 N.W.2d 824 (quoted source omitted).

II. DNR'S RULES EXCEED ITS AUTHORITY AND ARE ARBITRARY AND CAPRICIOUS.

A. The Rules Do Not Satisfy the Elemental Analysis.

On the merits, DNR argues that its hunting rules satisfy Act 169 because they are "the near mirror image of the statute." DNR Br. at 20. As discussed above, that argument only addresses whether the statute authorizes the rules, and not whether they are valid. DNR's simplistic argument undermines the purpose of rulemaking, which is to embellish and address the issues raised by the skeletal framework of the statute.

The core of the elemental analysis is whether the rule conflicts with the language of the statute or expression of legislative intent. The language of the statute and legislature's intent in Act 169 is clear: Wisconsin will allow the use of dogs only to "track or trail" wolves, and DNR must issue both emergency and permanent rules that are necessary to implement that limited use.

On this issue, DNR is not merely silent. By acknowledging that its rule "mirrors" the statute, it concedes that it has not adopted any rules to ensure that dogs are used only to track or trail wolves.[4] On its face, the new rule does not satisfy the express legislative requirement and intent that DNR adopt rules to ensure that the use of dogs is restricted.

[4] DNR's rules extend beyond the statutory restrictions in only two ways, each of which is insufficient or irrelevant to protecting against wolf-dog confrontations. These additional restrictions are: 1) no use of dogs at night; and 2) dogs must be tattooed or otherwise tagged for identification. Wis. Admin. Code § NR 10.07(4)(a)3, (b)4.

B. DNR's Rules Allow and Enable Violations of Animal Cruelty Laws.

The legislature's directive that DNR adopt rules to implement this restricted use of dogs was well-taken. Both DNR and the legislature were well aware that there is a substantial history of violent wolf-dog confrontations during hunting and training on other animals in wolf habitat, *i.e.*, without purposely placing dogs in pursuit of wolves. DNR has operated a wolf depredation compensation program for over twenty-five years, during which DNR has paid hundreds of thousands of dollars to hunting dog owners when their dogs have been mangled or killed by wolves. R.14, Exh. RJ-2. The legislature understood that allowing dogs to chase wolves without constraint would be little more than blood sport – violent and deadly animal fighting – violating both the letter and spirit of Wis. Stat. ch. 951: hence the need for regulations.

In addition to its own depredation records, DNR and its Natural Resources Board ("NRB") learned of the gruesome consequences of canid battles before and at the NRB hearing on the proposed rules in July 2011. Undisputed evidence of horrific, brutal confrontations and their behavioral reasons were presented by retired DNR wolf managers, DNR's former wildlife veterinarian, and the foremost wolf and dog behavioral experts in the state. R.5, 7, 8, 14, 15. It is undisputable in the record that the NRB ignored this information.

Even after the Circuit Court issued a temporary injunction and suggested that the NRB consider this evidence, the NRB continued to turn a blind eye. At its

next board meeting, it noticed a session related exclusively to dog training regulations, *i.e.*, no notice of any potential action or solicited further information on the hunting regulations. R.87, ¶ C.1, A-Ap. 139. Even then, it imposed no restrictions at all on training with dogs. That is, while hunting with dogs is statutorily limited to six-dogs packs during a defined hunting season, dog owners can train dogs to hunt wolves by letting unlimited numbers loose in our woods throughout the year, including dangerous wolf mating, breeding and rendezvous times.[5]

DNR correctly states that nothing in the hunting regulations expressly authorizes violations of animal cruelty laws. Rather, the record demonstrates that DNR chose not to include any restrictions to prevent or minimize the risk of violations, knowing that in the absence of such restrictions, violations are inevitable. By ignoring the historical and biological evidence, DNR knowingly has enabled and facilitated violations of animal cruelty laws.

Finally, DNR cannot avail itself of the alleged exemption in Wis. Stat. ch. 951 for hunting. The court made clear in *State v. Kuenzi*, a case involving killing deer with snowmobiles, that violations of the animal cruelty statutes are "assessed based on the backdrop of common hunting practices …." 2011 WI App 30, ¶ 34,

[5] There is a restriction on any form of dog training in the northernmost part of the state in May and June. Wis. Admin. Code § NR 17.04(2)(b).

332 Wis. 2d 297, 796 N.W.2d 222.[6] Moreover, DNR's quotation from *Kuenzi* deletes language to give it the opposite meaning. What the court actually characterized as "absurd" was "Kuenzi's assertion that it is the State's view that 'all hunting intentional causes unnecessary pain or suffering or unjustifiable injury or death' and, therefore, that all hunting violates the cruel mistreatment statute." *Id*. Once again, DNR provides a less-than-candid, inaccurate recitation of the law.

C. DNR Failed to Explain Its Decision Not to Include Reasonable Restrictions on the Use of Dogs to Hunt or Train to Hunt Wolves.

Respondents offer examples of several individuals who provided statements to the NRB in support of the hunting rules. However, the following record facts have not been and cannot be disputed:

1. The NRB did not consider the evidence of wolf-dog confrontations and certain animal cruelty that was submitted prior to adoption of the rules in July 2012.

2. The NRB did not notice or hold a subsequent hearing on hunting wolves with dogs. Its September 2012 hearing was noticed for emergency training regulations, which it declined to consider.

3. The DNR did not allow its sole wolf expert to present information to the NRB, and the NRB did not have the benefit of his expertise and opinions.

4. The only witnesses offered by DNR to the NRB were two warden-bear hunters, who had never hunted wolves with or without dogs. In fact, none of the witnesses before the NRB had ever hunted wolves with dogs.

[6] For common hunting and training practices with dogs, the Court can look to existing regulations pertaining to other animals, *e.g.*, bears, which detail species-specific restrictions deemed necessary to limit confrontations, and which are missing from the regulations for the even more confrontational wolves. Wis. Admin. Code §§ NR 17.04 and 17.08.

5. The NRB did not explain the reasons for not adopting additional restrictions on either hunting or training to hunt wolves with dogs.

While there may be facts in the record that would support a course of conduct by the NRB, it is plain that the NRB did not rely on such facts. To the contrary, and as quoted extensively in Appellant's Principal Brief at 32-34, the NRB was confused regarding the law, whether they should act at all, or how to justify any action. This is the essence of arbitrary and capricious conduct, which exceeds the agency's authority.

The DNR argues no further. The Bear Hunters argue that the deficiencies in the process were rectified by the NRB hearing in February 2013, after the Circuit Court's decision, when the NRB was presented with a proposal by its attorney to reaffirm the previously adopted emergency rule. *See* Int-Ap. 143. However, that reaffirmation was just as confusing and without rational basis. Dr. Clausen considered this use of dogs to be "dog fighting" but questioned whether there were any effective restrictions. Int-App. 155-56. Dr. Thomas suggested that they need more evidence to decide what to do. Int-App. 156. Mr. Hilgenberg stated that he "does not see any alternative." *Id*. Ms. Wiley wanted to "let the process continue." *Id.* In short, the decision to do nothing was just as arbitrary and unexplained as past inaction.

D. The Circuit Court Erred by Not Addressing the NRB's Failure to Articulate Reasons for Doing Nothing.

DNR, through its NRB, erred by not providing any rationale for its determinations: (a) not to address the issues raised by the experts; and (b) to defer to permanent rulemaking restrictions that at least a majority of its members agreed were necessary. The Circuit Court compounded this error by not fulfilling its duty, articulated in *Liberty Homes*, "to penetrate to the reasons underlying agency decisions …." 136 Wis.2d at 385. As discussed in Appellants' principal brief, and not directly addressed by Respondents, it made this error by adopting a novel and erroneous distinction between challenges to what is or is not adopted in a rule.

III. THE CIRCUIT COURT SHOULD HAVE ISSUED AN INJUNCTION.

DNR argues that Appellants were not entitled to an injunction because: a) the rules are valid; b) a court cannot enjoin the legislative decision to authorize the use of dogs; and c) as a corollary, an injunction would effectively be legislating. The first point merely reiterates DNR's argument on its merits; and DNR offers no authority for the latter propositions.

The Bear Hunters similarly argue that plaintiffs' requested injunction would be legislating, and further argue that Appellants did not meet their burden of demonstrating their entitlement to a permanent injunction. BH Br. at 31-37.

DNR misstates both the statute and Appellants' requested relief. Act 169 authorized hunting with dogs only with DNR licenses, through § 29.185(2)(a). It also required DNR to issue emergency rules implementing the statute before the

hunting season. That is, DNR cannot issue licenses authorizing the use of dogs until it has fulfilled its rulemaking directive. Moreover, Appellants have not sought to enjoin the use of dogs forever, in violation of the statute. Appellants sought an injunction prohibiting the use of dogs until DNR complies with Act 169 rulemaking requirements: precisely what the legislature required. Appellants seek an injunction to require compliance with Act 169, not to defeat it.

The Bear Hunters' burden of proof argument, generally applicable to civil actions, is inapplicable here. If Appellants prevail on the merits, the rule is "a mere nullity." *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W. 2d 47 (1955). The rule cannot be administered and DNR cannot issue licenses authorizing the use of dogs as a matter of law.

Moreover, Appellants have met the general civil standard for an injunction. The Bear Hunters acknowledge that Appellants 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." *Pure Milk Prod. Coop. v. National Farmers Organ.*, 90 Wis.2d 781, 800, 280 N.W.2d 691 (1979). What is "sufficient" necessarily is a case-by-case determination. The Circuit Court here failed to address that issue.

Appellants are the only parties that offered any **evidence** on harm, *i.e.*, their affidavits and exhibits. There was no countervailing evidence from the Bear Hunters or DNR. The Bear Hunters' argument that the risk of harm to dogs and humans is speculative is defeated by the undisputed evidence of hunting dog

depredation by wolves, as well as the evidence of risk to those who reside, recreate, or monitor wolf activity in wolf territory. *See* R.14, Exh. RJ-2.[7]

Finally, the equities strongly favor an injunction. While the risks of harm to Appellants, other forest users, dogs, and wolves are great, last season's wolf hunt demonstrates that dogs are not necessary to achieve the legislative goal of establishing a hunt as a tool to manage the wolf population. Trappers and hunters without dogs killed virtually the entire quota of wolves before dogs would have been permitted under Act 169 and DNR rules; and the season was closed less than half-way through its scheduled duration. Wolf hunters will suffer no harm from an injunction prohibiting the use of dogs to hunt or train to hunt wolves until rules satisfying Act 169 are adopted.

IV. THE NEED FOR TRAINING WAS PROPERLY RAISED IN THIS CASE.

Finally, the Bear Hunters argue that Appellants did not preserve their argument regarding the need for training as a prerequisite to hunting with dogs. Their reasoning is unclear, although they argue that Appellants allegedly did not address training issues at a post-judgment NRB meeting. This issue was not raised in the Circuit Court and should not be considered on appeal. *Country Side Rest.*, n. 15.

They also are wrong. They mislead the Court by arguing that the record does not reflect a challenge to the adequacy of training regulations. Their

[7] The Bear Hunters' argument that using dogs is not animal cruelty as a matter of law is dispelled in Section II.B, above.

argument that Appellants never asserted the need for training as a "prerequisite" makes no sense. If training is not going to precede the hunt, why would it be necessary at all? The only reason to train is for the hunt.

The record is replete with discussion about the need for effective training. Both the submittals to DNR and the affidavits of Appellants' expert witnesses expressed the need for training rules in conjunction with the restrictions on the use of dogs for hunting. *See, e.g.*, R. 7 (McConnell Aff., ¶ 4, 5, 7, 8.c.; Exh. PM-2) (specifically discussing the need for prescribed training of dogs with hunters and certification to obtain a license to hunt); R. 8 (Treves Aff., ¶ 11.b, 12, 13; Exh. AT-2) ("stringent training of hunters and their hounds …"). At the February 2013 NRB meeting (after issuance of the Judgment on appeal), Dr. McConnell again discussed the inadequacy of the training rules. Int-App.150-52. Other speakers also raised problems with training. *See, e.g.*, Int-App.147 (testimony of Patricia Randolf regarding, *inter alia*, bear cubs that "are torn apart and killed on the ground in training …"). Additionally, the Amended Complaint specifically asserted the need for training. R. 25, ¶ 17; A-Ap. 138 ("it is necessary for DNR's rules to include reasonable restrictions relating to the requirements for dog training …"). The Bear Hunters' have grossly misrepresented the record.

CONCLUSION

DNR failed to consider evidence from the only experts in wolf and dog behavior and without explanation deferred necessary restrictions on both hunting

and training with dogs to permanent rulemaking, particularly since there is literally no precedent for this type of hunting in the United States. The Circuit Court compounded this error by adopting an erroneous analytical methodology and then ignoring DNR's failure to provide any coherent or consistent explanation for its inaction. Now and for at least 2013-14, there will be unnecessary canid fighting, injuries and deaths, even though such harm could have been mitigated by the Circuit Court. Only this Court can now rectify that situation.

Dated this 26th day of September, 2013.

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FORM AND LENGTH CERTIFICATION

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

The length of this Brief is 18 pages and 4,453 words.

Dated: September 26, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

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INTRODUCTION AND SUPPLEMENTAL STATEMENT ON ISSUES

Respondents-Cross-Appellants ("DNR" and the "Bear Hunters") have framed the issues differently, but they essentially raise two issues:

1. Whether the Plaintiffs-Appellants had standing to bring this action; and
2. Whether the Circuit Court appropriately determined that Wis. Admin. Code § NR 17.04 was invalid to the extent it allowed training dogs to hunt wolves, and therefore enjoined operation of the rule to that extent.[1]

The DNR/Bear Hunters' arguments on standing defy the case law, which consistently adopts a liberal approach to standing, especially in environmental cases. Their hyper-technical arguments, which would effectively insulate DNR's rules from challenge by anyone except the wolf hunters who benefit from the rules, are wrong as a matter of law. Further, they contravene the overriding principle that standing is a judicial policy to ensure that the parties' interests are sufficiently adversarial.

The DNR/Bear Hunters' challenge to the Circuit Court's ruling on training with dogs also is misguided. Having concluded that DNR was authorized to develop rules for training dogs to hunt wolves – a conclusion that DNR has conceded, as it is now in the process of developing permanent rules for training –

[1] DNR also makes a separate argument that Appellants failed to state a claim because the new rules relating to hunting wolves with dogs, in Wis. Admin. Code § NR 10.07(4), is valid. This is no more than an effort to bootstrap its responses to Appellant's brief into its principal brief, a transparent and improper attempt to have the "last kick at the cat." The Court should reject and strike any argument in DNR's reply brief that addresses the validity of § NR 10.07.

the Circuit Court correctly observed that DNR and its NRB decided not to adopt an emergency rule on training, without providing any coherent explanation or reason. The result is that there are restrictions on the number of dogs that can chase rabbits throughout the year, but there is no limit or any other restriction on the number of dogs that a hunter can set after wolves. *See* A-Ap. 180-182. The Court also correctly determined that this untenable situation was a consequence of the NRB's failure to take up the issue of training "in a good faith way." A-Ap. 183.

Having correctly concluded that DNR and its NRB failed to satisfy its directive to develop emergency rules necessary to implement the limited use of dogs authorized by Act 169, the Circuit Court determined that the mechanism to prohibit the training of dogs to hunt wolves would be to enjoin the operation of Wis. Admin. Code § NR 17.04, *i.e.*, the rules that otherwise would allow training dogs to hunt wolves. As discussed below, the Circuit Court had broad discretion to fashion this remedy, and the structure of the remedy does not constitute an abuse of discretion. The DNR/BH's arguments therefore should be rejected in their entirety.

ARGUMENT

I. STANDARD OF REVIEW

There are separate standards of review for the two sets of issues on review. The issue of standing is reviewed *de novo* by this Court, based on the allegations in the pleadings. *See, e.g.*, *Wisconsin's Environmental Decade, Inc. v. PSC*, 69

Wis. 2d 1, 8, 13, 290 N.W.2d 243 (1975) ("*WED I*"); *State Public Intervenor v. DNR*, 184 Wis. 2d 407, 415, 515 N.W.2d 897 (1994). The issue of whether DNR's failure to address training to hunt wolves violates Act 169 also is subject to a *de novo* standard of review. *Wis. Citizens Concerned for Cranes and Doves v. DNR*, 2004 WI 40, ¶ 13, 270 Wis. 2d 318, 677 N.W.2d 612. While the Court does not accord any deference to the Circuit Court, it reviews and is informed by that decision. *Id.*, ¶ 12.

Cross-Appellants' challenge to the injunction against training dogs to hunt wolves is subject to a highly deferential standard. A court has substantial discretion in how it crafts equitable relief, including injunctions; and appellate courts defer to that judicial discretion unless abused by arbitrary and unreasonable conduct.

> The grant or denial of injunctive relief is within the sound discretion of the trial court and will not be upset absent a showing of an abuse of discretion. To find an abuse of discretion we must determine either that discretion was not exercised or that there was no reasonable basis for the trial court's decision.

Bubolz v. Dane County, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990) (citations omitted); *see also*, *State v. Siegel*, 163 Wis. 2d 871, 889, 472 N.W.2d 584 (Ct. App. 1991).

II. THE AMENDED COMPLAINT ESTABLISHES APPELLANTS' STANDING.

The seminal case on standing under chapter 227, which has been applied to challenges to both decisions and rules, is *WED I.* The Court there adopted the two-step process, comparable to the federal rule: a) whether the decision (or rule)

directly causes injury to an interest of the petitioner; and b) whether that interest is recognized by law. *Id*., at 10. In applying that test to the environmental issues in that case, the Court observed:

> In the area of environmental law particularly, the new federal test has been viewed as **a substantial liberalization of the standing requirements**. An allegation of injury in fact to aesthetic, conservational and recreational interests has been readily accepted as sufficient to confer standing. Moreover, the federal courts have shown a willingness to find that **environmental interests are arguably within the zone of interest protected by virtually any statute relating to environmental matters**…. The federal law of standing is not binding on Wisconsin, but recent federal cases are certainly persuasive as to what the rule should be.

Id. at 10-11 (footnote and citations omitted; emphasis added). In adopting this approach, the Court continued:

> We conclude that the law of standing in Wisconsin should not be construed narrowly or restrictively. This court has held that **the review provisions of ch. 227, Stats., are to be liberally construed**. As Professor Kenneth Culp Davis has commented:
>
> "The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury. **Whether interests deserve legal protection depends upon whether they are sufficiently significant and whether good policy calls for protecting them or for denying them protection**."

Id. at 13 (footnote citations omitted; emphasis added).

In *Norquist v. Zueske*, 211 Wis. 2d 241, ¶ 7, 564 N.W.2d 748 (1997), the Supreme Court characterized the test as "whether 'a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" (Quoted source omitted.) In the case relied upon by the Cross-Appellants, the Court has framed the test as follows:

> Upon careful analysis of the case law, It is clear that the essence of the determination of standing is: (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law

> as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) **whether judicial policy calls for protecting the interest of the party whose standing has been challenged**.

Foley-Ciccantelli v. Bishop's Grove Condo., 2011 WI 36, ¶ 5, 333 Wis. 2d 402, 797 N.W.2d 780 (emphasis added). To this day, the Court construes the standing test "liberally" in favor of access to the courts. *Id.*, ¶¶ 38, 121.

DNR misleads this Court by citing older cases for the proposition that standing is jurisdictional. DNR Br. at 71. The Court in *Foley-Ciccantelli* stated unequivocally that "in Wisconsin the law of standing does not have a jurisdictional component, but is rather a matter of 'judicial policy' …." *Id.*, ¶ 130. DNR's argument is outdated and inaccurate.

The notice pleadings in this case plainly substantiate Plaintiffs-Appellants' standing. The humane societies' missions and business activities focus on preventing animal cruelty and protecting and caring for wild and domestic animals. The expected increase in wolf and dog injuries, as unleashed dogs are released in pursuit of fiercely territorial wolves, will increase the financial and resource burden on their work and is anathema to their core missions and business. R. 25 (Amended Complaint), ¶¶ 1-4; DNR-App. 131-34. The Northwood Alliance is dedicated to the protection of Wisconsin land, water and habitat. Most of its members reside and recreate – hike, hunt, snowshoe and ski – in wolf territory, and some of its members collect wolf data, activities that place them at physical risk should their paths cross packs of dogs pursuing wolves or, conversely, packs

of wolves defending their pups. *Id.*, ¶ 5. The National Wolfwatcher Coalition faces similar risks and disruptions, with over 400 Wisconsin members who, as DNR-trained wolf trackers, monitor wolf activity and collect data. *Id.*, ¶ 6. Similarly situated are the individual plaintiffs, Mr. and Mrs. Belsky and Dr. Onstott, who reside in wolf territory, are wolf trackers, and collect wolf monitoring data used by DNR. They, too, are at risk of physical injury from deadly confrontations between unleashed hounds and wolves during both hunting and training seasons, which essentially encompasses the entire year. *Id.*, ¶ 7-8.

Cross-Appellants characterize the interests of the humane societies as too hypothetical or speculative to confer standing. They offer no reason why these very tangible mission-related and financial impacts are hypothetical or speculative, and they are wrong. For example, consistent with its core mission to prevent animal cruelty and promote animal welfare, Plaintiff Wisconsin Federated Humane Societies, has a membership encompassing over forty humane societies across Wisconsin a number of whom have staff appointed as state humane officers.[2] As such, they are charged with broad statutory authority and the duty to investigate animal related crimes and abuses, including incidents involving animal fighting. Wis. Stat. §§ 173.07, *et seq*. Moreover, DNR completely ignores the interests of the Plaintiffs-Appellants who reside, or whose members reside, in wolf

[2] Member humane societies with certified humane officers on staff include, *inter alia*, the Humane Society of Marathon County, Eau Claire County Humane Association, Humane Society of Portage County, Coulee Region Humane Society (LaCrosse), Arnell Memorial Humane Society (Amery). *See* http://www.wisconsinfedratedhs.org/2013-wfhs-members.html; in conjunction with http://datcp.wi.gov/Animals/Humane_Officers/Finding_a_Humane_Officer/index.aspx.

territory, who use the forests in a manner that puts them in close proximity to wolves, and whose personal safety is at risk from fierce hunting hounds chasing even fiercer wolves. This is sufficient to confer both organizational and individual standing. *WED I*, 69 Wis. 2d at 20:

> We are of the opinion, however, that an organization devoted to the protection and preservation of the environment has standing to sue in its own name if it alleges facts sufficient to show that a member of the organization would have had standing to bring the action in his own name.

(Footnote citations omitted.)

Cross-Appellants' argument that Plaintiffs-Appellants' interests are not protected also is unavailing. In addition to alleging environmental interests, for which the standing threshold is extremely low (*Id.* at 10), the interest here is one that is protected by Wisconsin criminal statutes in Wis. Stat. ch. 951. Cross-Appellants' argument that Plaintiffs-Appellants do not have the right to enforce criminal statutes is irrelevant to standing. The issue in standing is whether the interests "deserve legal protection." *WED I*, 69 Wis. 2d at 13. It is hard to fathom that the Attorney General would argue that citizens of Wisconsin, particularly those whose business is animal protection, do not have an interest in protecting against animal cruelty that is prohibited by criminal law.

The other Plaintiffs-Appellants similarly have alleged interests protected by law. The Northwoods Alliance is devoted to conservation and environmental protection, plainly the type of interest that is protected under *WED I*. The National Wolfwatcher Coalition, with over 400 Wisconsin members, is dedicated to

supporting wolf recovery, which relies significantly upon the ability of trained wolf trackers to provide monitoring and census information to DNR, a vital function that is compromised and disrupted by DNR's action. Additionally, members of the National Wolfwatcher Coalition and Northwoods Alliance, as well as the individual Plaintiffs-Appellants are wolf trackers. Plainly, one who is in the woods tracking wolves is at personal risk of physical injury and disruption by free-roaming, untethered dogs running through the forests in pursuit of wolves.

DNR further argues that the Plaintiffs-Appellants' interests are not protected by Act 169, which authorizes wolf hunting. DNR Br. at 79-80. It offers a very narrow, unsubstantiated view of Act 169 as only protecting the interests of the hunters, thereby effectively insulating its rules from any challenge. However, if Act 169 were only protecting the interests of hunters, there would be no reason for the statute to include any limitation on the number of dogs or time of year; and there would be no reason for DNR's imposition of a nighttime curfew on the use of dogs. It is absurd to think, let alone argue, that the legislature was wholly indifferent to the interests of citizens who reside in or use our forests for purposes other than hunting wolves.

The Bear Hunters argue that Plaintiffs-Appellants were required to submit evidence of their standing. BH Br. at 11-12. However, they cite no authority for this proposition, and none exists in the multitude of chapter 227 cases in which standing was disputed. On the contrary, the very nature of review of either a rule or decision under ch. 227 is based on the agency record, in which standing is

decided on the basis of the allegations in the pleadings. *See, e.g.*, *WED I*, 69 Wis. 2d at 13 ("The first question to be determined … is whether the petition alleges injuries …"); *City of Appleton v. Transportation Commission*, 116 Wis. 2d 352, 356, 342 N.W.2d 68 (1983) ("a petition for review, if otherwise without defect, will not be dismissed if it states facts sufficient to show that the petitioner is a 'person aggrieved.'").

Finally, the Bear Hunters argue that standing cannot be grounded in the allegations in the Amended Complaint because: a) those who use the forests in wolf territory are putting themselves in harm's way; and b) the allegations of risk of harm are factually inaccurate, based on information submitted by bear hunters to the NRB. BH Br. at 17-20. However, there was substantial evidence that the allegations in the Amended Complaint are accurate. Indeed, the only **evidence** submitted under oath was the expert testimony of Plaintiffs-Appellants' witnesses, who testified by affidavit to the allegations in the Amended Complaint. *See* R. 5-8. Additionally, even if BH were correct that there was information contrary to the allegations, it would not undermine standing, as standing is based on the nature of the alleged interests and not whether they are proven at trial.

The requirement for standing is to ensure that the courts only consider real controversies that are ripe for resolution, between parties with adverse interests. DNR and the Bear Hunters would convert this principle into a barrier that insulates them from any judicial scrutiny.

III. THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF.

DNR argues that the Amended Complaint fails to state a claim for relief, premised on the notion that the alleged invalidity of Wis. Admin. Code § NR 10.07(4)(b) is wrong, *i.e.*, that DNR's rules are valid. DNR Br. at 86-90. This is no more than a regurgitation of DNR's arguments in its brief in response to Appellants' brief on the merits. Indeed, DNR's Cross-Appeal brief cross-references and relies on those arguments. Accordingly, it has no place in a Cross-Appeal brief, and Appellants rely on their principal and reply briefs on this issue.

IV. THE CIRCUIT COURT CORRECTLY DETERMINED THAT DNR'S FAILURE TO ADOPT RULES TO ADDRESS THE TRAINING OF DOGS TO HUNT WOLVES VIOLATED ACT 169.

A. The Circuit Court Had the Authority to Consider DNR's Failure to Address Training Dogs to Hunt Wolves.

Cross-Appellants raise different arguments regarding the jurisdiction of the Circuit Court to consider the adequacy of the rules relating to the training of dogs to hunt wolves. DNR apparently argues that the Amended Complaint focused exclusively on Wis. Admin. Code ch. NR 10, and that ch. NR 10 does not address training at all. DNR Br. at 91-92, 94-96. Both Cross-Appellants argue that the Amended Complaint did not specifically challenge ch. NR 17, which generally governs training with dogs. The Bear Hunters also assert that the Circuit Court could not address ch. NR 17 because the record of that 2003 rulemaking was not before the court.

The Amended Complaint unequivocally challenged DNR's rulemaking for failure to include reasonable restrictions on training to hunt with dogs. R. 25, ¶ 17, 25-26. The Amended Complaint also did not limit its scope to ch. NR 10. *Id.*, ¶¶ 24 and 25 ("Defendants' wolf hunting regulations, in particular Wisconsin Admin. Code § NR 10.07(4)(b) …"); ¶ 26 ("Defendants action in promulgating Wis. Admin. Code § NR 10.07(4)(b) and related wolf hunting regulations …"); Request for Relief ¶ 2 ("For Judgment declaring the defendants' wolf hunting regulations, including amendments to Wis. Admin. Code ch. NR 10 …").

DNR's attempt to distinguish between "hunting" and "training" (DNR Br. at 95-96) verges on the absurd. The training requirements in ch. NR 17 are part of the overall hunting regulations promulgated by DNR under Wis. Stat. § 29.014, which authorizes regulation of fishing, hunting and trapping, *i.e.*, they exist only to support hunting. Furthermore, the legislature has defined "hunt" and "hunting" to include "pursuing" any wild animal, *i.e.*, the conduct that takes place when training on free roaming wild animals. Wis. Stat. § 29.001(42).

Additionally, the focus of the Plaintiffs-Appellants' claim is not dependent on whether the appropriate restrictions are included in ch. NR 10 or 17. The point is that Act 169 requires DNR to promulgate those rules "necessary" to limit the use of dogs to "track or trail" wolves; there was substantial evidence by experts in dog and wolf behavior that training regulations were necessary; and the NRB did not explain its failure to adopt them. DNR could have included those restrictions in ch. NR 10, ch. NR 17, or elsewhere.

The Bear Hunters' separate argument regarding the absence of the 2003 rulemaking record for ch. NR 17 also is unavailing. Wolf hunting was absolutely prohibited when the training rules were established in 2003, and DNR stipulated in open court that wolf hunting was not considered in developing them. Indeed, the Circuit Court made that inquiry of DNR to determine whether it needed the record from that rulemaking proceeding. The judge correctly concluded that no purpose would have been served by directing DNR to submit the record of that rulemaking proceeding.

Finally, the application of ch. NR 17 to wolves was triggered by DNR's adoption of changes to ch. NR 10 in this rulemaking. Prior to this rulemaking, wolves were listed as a "protected" wild animal under § NR 10.02(1). That protected status precluded training dogs on wolves under ch. NR 17 because it prohibits an "attempt to take" a protected wild animal.[3]

DNR likely will argue that wolves were removed from protection by the federal government, as a result of de-listing wolves under the Endangered Species Act, or by the legislature in authorizing a wolf hunting season in Act 169. Neither argument would be correct. The federal delisting did not mandate removal of state protections on hunting wolves. Act 169 authorized a hunting season with a very limited, non-confrontational use of dogs. It did not authorize and certainly did not require DNR to allow the unrestricted use of an unlimited number of dogs to chase wolves throughout the year as a "training" exercise.

[3] "Take" is defined in DNR regulations to include "pursuing." Wis. Admin. Code § NR 27.01(8).

B. DNR's Determination Not to Address Training of Dogs to Hunt Wolves Violates Act 169.

As discussed in Appellant's principal and reply briefs, Act 169 authorized a very limited use of dogs to track or trail, and directed DNR to adopt both emergency and final rules that are necessary to implement that limited authorization. Wolf and dog experts offered scientific information and training recommendations at the NRB's July 2012 meeting regarding the need for training, which were literally ignored. They offered further information and training recommendations at the NRB's meeting in September 2012, which the NRB declined to adopt as a result of a colloquy reflecting confusion over the NRB's authority and obligations. *See* Appellants' Principal Brief, Section III.B., at 30-34; A-Ap. 161-64. In the Circuit Court proceeding, the only evidence that was presented was the affidavits of the experts regarding the need for training restrictions to satisfy the limited statutory authorization.

The Circuit Court correctly concluded that DNR had the authority to adopt revisions to ch. NR 10 (or 17) to regulate training dogs to hunt wolves, under both Act 169 and its general rulemaking authority. A-Ap. 180, 182. DNR has acknowledged this authority: it noticed a NRB meeting to consider an emergency training rule, and its NRB has decided to develop a permanent training rule. A-Ap. 137, 164.

The Circuit Court also correctly concluded that DNR's failure to consider a training rule, or to explain its reasoning for not adopting such rules, exceeded its

authority. In that regard, the Circuit Court made the following unassailable observations:

> … And don't forget: This rule, 17.04, it places limits on training dogs to hunt rabbits and says you can only use two.
>
> What I'm hearing today is, well actually, under this law, you can have 2,000 dogs chasing wolves throughout the north woods in the middle of summer when it's most dangerous in the middle of the night….

A-Ap. 180-181.

> But I'm saying I believe that when a rule has been adopted by an agency that, due to intervening changes in the law, results in a very serious risk arising and it's not dealt with by that agency and the agency has authority, in my view, as well under an authorizing statute to take it up but, even without that, under its general emergency and rulemaking authority has the authority to take it up, it is not sufficient for the agency to disregard all the evidence on this issue or, more specifically, to do nothing.

A-Ap. 182.

> I do not believe I can agree with the State's view that, following my decision last summer, the Board took this matter up in a good-faith way.

A-Ap. 182-83.

In support of this conclusion, the Circuit Court discussed in detail conflicting statements by NRB members and DNR counsel in the record, regarding whether the NRB had the authority to adopt training rules. A-Ap. 186-88. He then discussed the pertinent information in the record:

> And there was no evidence supporting the continued existence of 17.04(1) without any restrictions, at least as to numbers of dogs, time of day, time of year and possibly other things, with the possible exception of this argument that they appeared not to rely on that hunters can figure this out for themselves.
>
> * * *
>
> There certainly was evidence before them. There's really no contrary evidence that there was some safe way to undertake the training of dogs without restrictions absent real good luck that everybody that did was going to be smart.

A-Ap. 190.

Although the Circuit Court did not specifically address this point, it knew that DNR's failure to adopt emergency training rules also meant that these dogs would be untethered, potentially miles from their owners.[4] Additionally, the Circuit Court alluded to evidence indicating that the dogs that would be used to hunt wolves would include large, trained-to-kill borzois and similarly aggressive breeds. *See, e.g.*, R. 7 (McConnell Affidavit), ¶ 8.b, Exh. PM-2 at 2.[5]

The Circuit Court's decision to prohibit training dogs to hunt wolves was therefore based on a reasoned decision that: a) DNR had the authority and duty to consider training rules; b) there was substantial, undisputed evidence that the absence of training rules would not satisfy DNR's duties under Act 169; c) DNR failed to consider such rules in good faith, arguably concluding (incorrectly) that it did not have the authority.

C. The Circuit Court's Order for Relief Was Appropriate.

The Bear Hunters argue that the Circuit Court should not have invalidated and enjoined the rule, but should have simply remanded. They offer no Wisconsin authority for this proposition. The only state law that they rely upon is Wis. Stat. § 227.57, which applies to challenges to decisions and not to rules. Nevertheless, if that statute applies, the Circuit Court had ample authority to order equitable relief under § 227.57(9), which authorizes a court "to provide whatever relief is

[4] See, e.g., DNR's website notifying hunters of dog depredations in 2013 and Caution Area Maps, http://dnr.wi.gov/topic/wildlifehabitat/wolf/dogdeps.html. As the chart reveals, this year alone, hunters have submitted reimbursement claims for 23 dogs killed by wolves while training in core wolf habitat, many in the same caution area.

[5] Dr. McConnell and others discussed this issue in the context of the need to limit breeds to "scent" hounds that track but do not confront, as opposed to "sight" hounds that have been bred to attack.

appropriate …", including setting aside the agency action and making interlocutory orders. Moreover, the Circuit Court noted that the Bear Hunters had not offered any evidence of substantial harm if the injunction were to continue. A-Ap. 171.

The core of the Circuit Court's decision was that the NRB's failure to include training requirements and restrictions in the emergency rule violated Act 169. In crafting its equitable relief, the Circuit Court could have merely enjoined the training of dogs to hunt wolves, without reference to a specific regulation; and the Cross-Appellants would have no argument. Instead, the Circuit Court elected to focus on the regulation which, by operation of law, authorized the unconstrained use of dogs for training: Wis. Admin. Code § NR 17.04.

As discussed in Section I above, a circuit court has substantial discretion in how it crafts equitable relief, including injunctions; and this Court will defer to that exercise of judicial discretion unless Respondents-Cross-Appellants show that there was an abuse of discretion, *i.e.*, no reasonable basis for the Circuit Court's decision. *Bubolz*, 159 Wis. 2d at 296; *Siegel*, 163 Wis. 2d at 889.

DNR could have created a limited exception to the wolf's protected status within § NR 10.02. It could have imposed the necessary training requirements and restrictions in a separate section in ch. NR 10. It could have modified ch. NR 17 to include restrictions unique to wolves, as it has for training to hunt bears. *See* Wis. Admin. Code § NR 17.04(3)(c). Instead, it elected to craft no training rule,

thereby authorizing the use of unrestricted, unlimited numbers of dogs throughout the year to chase wolves, in direct contravention of the legislature's directive.

Here, the modification of Wis. Admin. Code § NR 10.02 made training on wolves subject to § NR 17.04, and it is § NR 17.04 that allows the unconstrained use of dogs for training. Therefore, it was entirely appropriate and certainly not unreasonable for the Circuit Court to focus on that regulation in issuing and explaining its decision.

CONCLUSION

For the reasons set forth herein, Appellants request that this Court affirm the Circuit Court's decision declaring that DNR violated Act 169 by failing to address the training of dogs to hunt wolves in its emergency rules, and to enjoin the use of dogs to train to hunt wolves until DNR adopts rules that comply with state law.

Dated this 26th day of September, 2013.

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CERTIFICATION OF SERVICE

I hereby certify that an original and nine copies of this Combined Reply and Response Brief were hand delivered to the Clerk of the Court of Appeals on September 26, 2013. I further certify that copies of the Brief were served on all parties of record by First Class Mail on September 26, 2013. I further certify that the Brief was correctly addressed and postage was prepaid.

Dated: September 26, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

CERTIFICATION OF COMPLIANCE WITH § 809.19(12)

I hereby certify that:

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

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

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

Dated: September 26, 2013.

/s/ Carl A. Sinderbrand
Carl A. Sinderbrand

FORM AND LENGTH CERTIFICATION

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

The length of this Brief is 17 pages and 4,511 words.

Dated: September 26, 2013.

/s/ Carl A. Sinderbrand
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