STATE OF MINNESOTA | DISTRICT COURT
COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

Lynn Rogers and Wildlife Research Institute,

Plaintiffs,

v.

Minnesota Department of Natural Resources and Tom Landwehr, Commissioner of the Minnesota Department of Natural Resources,

Defendants.

Case Type: Other Civil
Court File No. 62-CV-13-5408

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

ISSUES

Based on the parties' submissions, the following issues are before the Court:

I. Does the District Court have subject matter jurisdiction over the issues in this case?

Suggested answer: Yes.

II. In light of the DNR's concession that Dr. Rogers' permit is a property interest, and that Dr. Rogers must be provided with due process prior to the DNR denying the permit, is Dr. Rogers entitled to a "contested case" under the APA?

Suggested answer: Yes.

A. If Dr. Rogers is entitled to a contested case under the APA, must the DNR follow the contested case procedures prior to issuing a final decision on Dr. Rogers' permit?

Suggested answer: Yes.

III. If Dr. Rogers is not entitled to a contested case, is he entitled to litigate his § 1983 claim in the District Court?

Suggested answer: Yes.

IV. Is Dr. Rogers entitled to a TRO?

Suggested answer: Yes.

ARGUMENT

I. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION.

Defendants argue that this Court does not have subject matter jurisdiction and that Dr. Rogers must pursue his remedies in the Court of Appeals. Defendants' argument fails. First, the DNR is governed by the rules and procedures set forth in the Administrative Procedure Act ("APA"). The APA provisions regarding judicial review by the Court of Appeals are not triggered here. Second, the "quasi-judicial decision" rule cited by the DNR does not apply in this case. Third, as a practical matter, review by the Court of Appeals is inappropriate where the agency made no record or findings for the Court of Appeals to review.

A. The APA does not provide for review by the Court of Appeals in this case.

Agencies with statewide jurisdiction are governed by the APA. See Minn. Stat. § 14.02, subd. 2; Dietz v. Dodge Cnty., 487 N.W.2d 237, 239 (Minn. 1992).[1] The APA's purpose is "to ensure a uniform minimum procedure" for administrative agencies. Minn. Stat. § 14.001. Pursuant to the APA, "a final decision in a contested case" is reviewable by certiorari in the Court of Appeals:

> Any person aggrieved by a final decision in a contested case is entitled to judicial review of the decision under the provisions of Sections 14.63 to 14.68, but nothing in Section 14.63 to 14.68 shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo provided by law.

Minn. Stat. § 14.63 (emphasis added).

> Proceedings for review under Sections 14.63 to 14.68 shall be instituted by serving a petition for a writ of certiorari . . . in the Office of the Clerk of the Appellate Courts . . .

Minn. Stat. § 14.68.

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[1] The DNR has conceded that the APA applies here. (See Def. Mem. 14 (" . . . DNR has provided him with the opportunity to make his case through the Administrative Procedures Act, Minn. Stat. Ch. 14 (2012).")

Here, there has not been a contested case proceeding. Therefore, there is no "final decision in a contested case." As a result, according to the explicit language of the APA, the DNR's decision is not reviewable by certiorari to the Court of Appeals.

B. The rule relating to review of a "quasi-judicial decision" does not apply here.

Instead of analyzing this case under the applicable APA rules, Defendants rely upon Micius v. St. Paul City Council, 524 N.W.2d 521 (Minn. Ct. App. 1994), for the proposition that, "[u]nless otherwise provided by statute or appellate rule, to obtain judicial review of an administrative agency's quasi-judicial decision, a party must petition the court of appeals for a writ of certiorari." (Def. Mem. 10.) Defendants' argument fails.

1. The DNR's position would require the District Court to rewrite Minn. Stat. § 14.63.

As set forth above, the APA applies here. Therefore, review is governed by § 14.63. That provision states that a "final decision in a contested case" is reviewed by the Court of Appeals. Defendants' argument would require this Court to interpret Minn. Stat. § 14.63 to require that the Court of Appeals review a final decision in a contested case and all other quasi-judicial decisions. If the Minnesota Legislature had intended that all quasi-judicial decisions by agencies governed by the APA must be appealed to the Court of Appeals, it would have said so. The Legislature did not, and this Court may not rewrite the statute.

2. The "Quasi-Judicial Decision" Rule does not apply to decisions made by a statewide agency like the DNR.

The APA governs statewide agencies. The "quasi-judicial decision" rule stated in Micius applies only to decisions made by non-statewide agencies. Tischer v. Hous. & Redev. Auth. of Cambridge, 693 N.W.2d 426, 429 n.3 (Minn. 2005) ("this general rule is stated as being applied to executive bodies that do not have statewide jurisdiction because executive bodies with statewide jurisdiction are subject to the [APA], which specifies the procedure for obtaining

judicial review of their decisions."); see also, e.g., Willis v. Cnty. of Sherburne, 555 N.W.2d 277, 281 (Minn. 1996) (noting one reason this rule governs review of quasi-judicial decisions of non-statewide agencies is such agencies are not subject to the APA); Bahr v. Litchfield, 420 N.W.2d 604, 606 (Minn. 1988) (noting APA does not apply to city police commission and stating "[i]it is therefore well established that the proper vehicle for obtaining judicial review of the commission's actions is a writ of certiorari"); Pierce v. Otter Tail Cnty., 524 N.W.2d 308, 309 (Minn. Ct. App. 1994) (finding sole means of review of a county's decision was by certiorari, because review was not governed by the APA).

The DNR is a statewide agency. Therefore, the "quasi-judicial decision" rule does not apply to the decision made by the DNR.

3. The DNR's decision was not "quasi-judicial."

"Certiorari is an 'extraordinary remedy' only available to review judicial or quasi-judicial proceedings and actions." Minn. Ctr. for Envtl. Advocacy v. Metro. Council, 587 N.W.2d 838, 842 (Minn. 1999). Decisions are quasi-judicial under Minnesota law if they involve: (1) investigation into a disputed claim and a weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim." Id. Stated differently, an act is quasi-judicial "when the [agency] hears the view of opposing sides presented in the form of written and oral testimony, examines the record and makes findings of fact." In re Signal Delivery Serv., Inc., 288 N.W.2d 707, 710 (Minn. 1980); see also Meath v. Harmful Substance Comp. Bd., 550 N.W.2d 275, 279 (Minn. 1996) (noting courts should "apply the term [quasi-judicial] only to those administrative decisions which are based on evidentiary facts and which resolve disputed claims of rights").

A mere "gathering and consideration of information" is "vastly different from the judicial process" and thus not quasi-judicial. Minn. Ctr. for Envtl. Advocacy, 587 N.W.2d at 843.

Although proceedings need not be as formal as a trial to be deemed quasi-judicial, see Handicraft Block Ltd. P'ship. v. City of Minneapolis, 611 N.W.2d 16, 21 (Minn. 2000), Minnesota courts routinely note that holding hearings and taking evidence are key factors in determining whether an administrative act is "quasi-judicial." E.g., Minn. Ctr. for Envtl. Advocacy, 587 N.W.2d at 82-43 (finding proceedings not quasi-judicial; noting the council "takes no evidence in accordance with formal or informal evidentiary rules, testimony is not given under oath, and there are no formally identified parties to the proceeding offering evidence to support a legal claim"); Gebremeskel, 2002 Minn. App. LEXIS 870, at *6 (finding proceeding quasi-judicial where individual was given formal hearing at which he could present witnesses and cross-examine the other side's witnesses, facts were found and applied to a standard, and the board issued a decision following the hearing); In re Application of Dak. Telecomms. Grp., 590 N.W.2d 644, 646-47 (Minn. Ct. App. 1999) (finding cable franchise decision quasi-judicial where Cable Act requires a "public hearing" and a procedure involving "testimonial and documentary evidence").

Here, it is undisputed that the DNR did not conduct a hearing. Plaintiffs did not have notice, or any opportunity to offer evidence, present witnesses, cross-examine, or respond to any of the DNR's arguments or information. It is unclear whether the DNR engaged in any information-gathering, as it did not request any information from Plaintiffs. To the extent that the DNR engaged in informal consideration of information, it did so behind closed doors. Its conduct therefore was not quasi-judicial, and the rule it relies upon does not limit this Court's jurisdiction.

4. Section 1983 provides a cause of action.

The rule stated in Micius applies only in the absence of another statute or appellate rule. Where another statute "provid[es] explicitly for a cause of action in the district court," then the

rule Defendants rely upon does not apply. Manteuffel v. City of N. St. Paul, 538 N.W.2d 727, 730 (Minn. Ct. App. 1995) (finding writ of certiorari to the Court of Appeals was not the method for review where plaintiff asserted civil rights claim, because such claim was authorized by the Whistleblower Act); see also Larson v. New Richland Care Ctr., 538 N.W.2d 915, 919 (same). Here, Plaintiffs' due process claim is specifically authorized by § 1983, which creates a cause of action for any citizen to challenge a state action that deprives him of constitutionally protected rights. See 42 U.S.C. § 1983. Accordingly, § 1983 specifically provides for a cause of action in district court, and the Court has jurisdiction over the claim. LeBlanc v. Morrison Cnty., No. C8-94-1343, 1994 Minn. App. LEXIS 1308, at *4-7 (Minn. Ct. App. Dec. 27, 1994) ("[Plaintiff]'s section 1983 claims are not barred by operation of Minnesota's procedural rule requiring plaintiffs challenging administrative decisions to proceed by petition for writ of certiorari. The district court therefore had subject matter jurisdiction to hear [the] claims."); see also Gebremeskel v. Univ. of Minn., No. C9-02-183, 2002 Minn. App. LEXIS 870, at *6, 8-9 (Minn. Ct. App. July 23, 2002) (finding certiorari was the sole method of review to challenge university's decision, but separately analyzing due process claim without questioning district court's jurisdiction over claim).

C. There is no record or findings for an Appellate Court to review.

The rule Defendants rely upon is based on the concept of primary jurisdiction, which is inapplicable where (as here) "there is either no administrative process to which this court can defer primary jurisdiction or the process is ineffective." AAA Striping Serv. Co. v. Minn. Dep't of Transp., 681 N.W.2d 706, 714 (Minn. Ct. App. 2004) (finding that where plaintiff did not have an opportunity to participate in an administrative proceeding, it was entitled to seek review by a declaratory judgment action, and concepts of primary jurisdiction or exhaustion of administrative remedies did not apply).

Additionally, where the Court is being asked to determine whether or not the agency violated the law, a certiorari standard of review simply is not appropriate. Manteuffel, 538 N.W.2d at 729. The standard of review on a writ of certiorari places the burden on the petitioner to show that the agency's order was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." Id. (citing Dietz, 487 N.W.2d 237, 239 (Minn. 1992)). In Manteuffel, the plaintiff had no hearing and no opportunity to develop a record, and the Court found that "[g]iven the fact that [plaintiff] had no opportunity to develop a factual record, his task of proving the unreasonableness of the [agency]'s decision would be a virtual impossibility." Id. The same is true here.

II. IN LIGHT OF THE DNR'S CONCESSION THAT DR. ROGERS' PERMIT IS A PROPERTY INTEREST, AND THAT DR. ROGERS MUST BE PROVIDED WITH DUE PROCESS PRIOR TO THE DNR DENYING THE PERMIT, DR. ROGERS IS ENTITLED TO A "CONTESTED CASE" PROCEEDING UNDER THE APA.

The DNR originally took the position that Dr. Rogers is not entitled to a contested case proceeding under the APA. After the DNR learned that Dr. Rogers intended to challenge the DNR's decision, the DNR stated that, while Dr. Rogers is not "entitled" to a contested case, the DNR would "offer" to participate in a contested case proceeding.

In response, counsel for Dr. Rogers cited Minnesota Statute § 14.61 and Minnesota Rule 1400.8200, which provides that, in a contested case, an agency's "final decision" "shall not be made" until after the administrative law judge's report is made available to the parties and they are given an opportunity to respond:

> In all contested cases the decision of the officials of the agency who are to render the final decision shall not be made until the report of the administrative law judge as required by sections 14.48 to 14.56, has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision.

Minn. Stat. § 14.61, subd. 1 (emphasis added). Similarly, Minnesota Rule 1400.8200 provides that an agency "shall" make its final decision "[f]ollowing receipt of the judge's report."

The DNR responded that it would not comply with Minn. Stat. § 14.61. Rather, the DNR asserted that Dr. Rogers had to comply with the DNR's decision that collars must be removed by July 31. Therefore, Dr. Rogers rejected the DNR's offer.[2]

The DNR has now acknowledged that Dr. Rogers is <u>entitled</u> to a contested case. (<u>See</u> Def. Mem. 14 ("His relief is therefore limited to an administrative appeal through the contested case process.").) The DNR has agreed that Dr. Rogers has a property interest in his permit. (Def. Mem. 15.) Because the permit is a property right, Dr. Rogers has a constitutional right to due process. (<u>See</u> Pl. Mem. in Supp. 25-26.) "Contested case" is defined as "a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Minn. Stat. § 14.02, subd. 3. Because Dr. Rogers is entitled to a contested case proceeding, Dr. Rogers must be provided with process and the administrative law judge must issue a report <u>before</u> the DNR can render a final decision. Minn. Stat. § 14.61, subd. 1.

Therefore, based on the DNR's own arguments, Dr. Rogers is entitled to an order directing the DNR to comply with the contested case statutes and rules, including Minn. Stat. § 14.61 and Minnesota Rule 1400.820. Dr. Rogers is also entitled an order directing that the DNR may not issue a final decision until after the administrative law judge issues a report, and that Dr. Rogers is not required to comply with the July 31 deadline set by the DNR.

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[2] The DNR's argument that Dr. Rogers had an obligation to exhaust the DNR's "offer" of an administrative remedy, which did not comply with the rules that apply to that remedy is not supported by <u>any</u> authority.

III. IF DR. ROGERS IS NOT ENTITLED TO A CONTESTED CASE, HE IS ENTITLED TO LITIGATE HIS § 1983 CLAIM IN THE DISTRICT COURT.

If Dr. Rogers is entitled to a contested case, a contested case proceeding must take place. In that event, the DNR's argument that Dr. Rogers "has been provided with due process" is moot. (Def. Mem. 14-17.) However, if the Court determines that Dr. Rogers is not entitled to a contested case, because Dr. Rogers has not been provided with due process, the Court should find that he is entitled to litigate his § 1983 claim in the District Court.

A central purpose of due process is "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." State v. LeDoux, 770 N.W.2d 504, 514 (Minn. 2009). Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." Heddan v. Dirkswager, 336 N.W.2d 54, 58-59 (Minn. 1983). Minnesota courts have interpreted this to mean that a party must be given an opportunity to present reasons why the government's proposed action should not be taken before the action is taken. E.g., Conlin v. St. Paul, 418 N.W.2d 741, 744 (Minn. Ct. App. 1988). Whether process is adequate is determined by looking at three factors: (1) the nature of the private interest; (2) the risk of erroneous deprivation or protected interest through the procedures used; and (3) the nature of the government interest. Mathews v. Eldridge, 424 U.S. 319,334 (1976).

It is undisputed that the DNR did not conduct a hearing prior to issuing its June 28, 2013 letter. Moreover, the June 28 letter does not provide Dr. Rogers with an opportunity to seek review of the decision. Rather, the DNR argues that its exchange of correspondence with Dr. Rogers during a several year period constituted sufficient due process.

This purported "process" is inadequate under the three-factor test. First, the nature of the private interest weighs in Dr. Rogers' favor because his livelihood is at stake. E.g., Martin v.

Itasca Cnty., 448 N.W.2d 368, 370 (Minn. 1989) ("[B]ecause his livelihood is at stake, there can be no doubt of the importance of Martin's private interest."); Mertins v. Comm'r of Natural Res., 755 N.W.2d 329, 338 (Minn. Ct. App. 2008) (same, in context of fishing license). Second, the procedures in place (or, more accurately, the lack of clear procedures) create a high risk of erroneous deprivation. In Mertins, the Court found the procedures in place adequately reduced the risk of erroneous deprivation of plaintiffs property interest where a statute specified how he could challenge a license seizure, and there was "an opportunity for prompt, if not immediate, review and reinstatement of the commercial license pending' the outcome" of the proceedings. 755 N.W.2d at 339-40. Here, on the other hand, Chapter 97A is silent about how Dr. Rogers may challenge this permit decision, the DNR has refused to follow the procedures provided for by the APA, and the DNR has refused to reinstate Dr. Rogers' permit pending the outcome of any administrative process to which he may be entitled. Finally, although the government has an interest in managing wildlife and protecting public safety, the DNR has identified no imminent threat to the public safety justifying its refusal to give Dr. Rogers an opportunity to be heard before it enforces its decision.[3]

IV. DR. ROGERS HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

Dr. Rogers is likely to succeed on the merits of his claim that his permit was terminated without cause. As set forth below, the "evidence" submitted by the DNR does not support its position.

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[3] According to the DNR, Dr. Rogers was provided with constitutional due process because ". . . DNR staff and two Commissioners have repeatedly raised concerns with Rogers regarding public safety, including his propensity to allow participants in his field study course to physically interact with bears, as well as his lack of publication of the results of his lengthy study." (Def. Mem. 14.) However, "raising concerns" with Dr. Rogers is not due process. After the DNR raised concerns about students interacting with bears, that practice ended. Moreover, based on the DNR's argument, it is unclear how and when Dr. Rogers got his due process. It is unclear which DNR letters and conversations count as due process and which do not. It is also unclear when Dr. Rogers' due process rights were exhausted.

A. Dr. Rogers did not violate any condition of his permit.

The DNR has not alleged that Dr. Rogers has violated any condition of his permit. In fact, at least two of the DNR's criticisms of Dr. Rogers involve actions that (a) are explicitly allowed by the permit, or (b) were former conditions of the permit that have been removed.

The DNR's main criticism of Dr. Rogers is the Field Study Course's practice of allowing students to feed bears. However, the Research Institute no longer allows students to hand feed bears and has not allowed hand feeding since 2011. In fact, the DNR was aware of hand feeding at least as early as November 17, 2011 (EKB Ex. 7). In response, in February 2012—for the first time—the DNR included a restriction on the Research Institute's hand feeding of bears in the permit. The restriction allows Dr. Rogers, Mansfield, and four additional associates to hand feed bears. The Research Institute has abided by this condition. The DNR has not alleged—much less presented evidence—to the contrary.

The DNR criticizes Dr. Rogers, alleging that the Research Institute has a "monetary emphasis." As support for its position, the DNR cites to correspondence from 2000, and Dr. Rogers' February 2000 permit, which contained a condition limiting Dr. Rogers' right to raise money. However, beginning in February 2002, the DNR decided to omit any condition relating to Dr. Rogers or the Research Institute raising money from the permit. Accordingly, while the DNR could include such a condition, it has elected not to do so since 2002. Finally, the DNR's position is directly contrary to the evidence (see Rogers Aff. ¶ 61, Mansfield Aff. ¶ 8).

B. The DNR has not shown a public safety issue.

The DNR has not submitted any evidence that a collared bear has caused an injury to any person. Rather the DNR states—without citation—that it has "documented numerous injuries to

neighbors, course participants, and others." (Mem. in Opp'n at 7.) The "evidence" that has been submitted by the DNR does not support the DNR's position that there is a public safety issue.

The DNR submitted the Affidavit of Louis Cornicelli. Cornicelli relies upon the 69 complaints that the DNR has received about bears since 2009. However, the complaints do not support the DNR's position. First, the DNR's own records show that complaints have not increased materially during 2009-2012, and show that 2013 is on track to have fewer complaints than in past years. (Cornicelli Aff. ¶ 9). Second, the vast majority of the complaints do not contain any reference to collared bears. (LJC Ex. 8). Rather, the DNR apparently recorded in conclusory fashion that a given complaint is about a "habituated" bear without any basis to conclude that the bear is the subject of Dr. Rogers' research. In fact, Cornicelli admits that "it cannot be definitively determined that the bear in question [in a given complaint] is associated with the research." (Cornicelli Aff. ¶ 7.) Third, several of the complaints explicitly reference the fact that the complainant's neighbor (not the Research Institute) is feeding bears. However, the DNR attempts to fault Dr. Rogers' research for nuisance activity associated with such complaints.

The Soderberg Affidavit is the only evidence submitted by the DNR from a resident of the Ely area. However, Soderberg does not cite to any facts to show that bears are causing a public safety issue. Moreover, there are no facts in the Affidavit that connect her experiences to Dr. Rogers' research activities. In contrast, Dr. Rogers submitted evidence that the bears in the Ely area are not posing a public safety issue from (a) the former Chairman of the Eagle Nest Township Board, and the Eagles Nest Community Bear Committee; (b) the Mayor of Ely, who also resides in Ely; (c) the Ely City Council; and (d) a neighbor living two miles from the Research Institute.

The Garshelis Affidavit does not support the DNR's position that there is a risk to public safety. Rather, the Garshelis Affidavit simply stands for the proposition that Garshelis personally believes that feeding bears may create a public safety issue. However, this is contradicted by the scientific field studies of Charles Russell and Stephen Stringham, and Dr. Rogers' own research. In fact, Garshelis confirms that black bear attacks throughout the country and Canada are infrequent, and that there is no evidence of any public safety issues in northern Minnesota, let alone in Eagle's Nest Township. (Garshelis Aff. ¶11.) Moreover, Garshelis' conclusions are contradicted by the fact that the DNR itself had Dr. Rogers' research methods peer-reviewed in 2008, and that peer-review process led to the conclusion that the research methods did not create a public safety issue.

The Boggess Affidavit states that the "DNR has expressed concerns with the study design and habituation of bears by Wildlife Research Institute representatives since at least 2007." (Boggess Aff. ¶ 5.) However, Boggess fails to acknowledge that, in 2008, the DNR subjected the Research Institute's methods to a third-party peer-review process. In June 2008, as a result of that peer-review process, the DNR concluded that the research did not pose a risk to public safety.

The DNR issued a permit on December 21, 2012. Therefore, in December 2012, the DNR's public safety concerns were not significant enough to warrant the denial of a permit. The DNR issued its decision to terminate the permit on June 28, 2013. However, the DNR has not submitted any evidence to support the position that circumstances changed between December 2012 and June 2013 to justify the decision to deny the permit.[4]

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[4] Moreover, on page 7 of Defendants' Memorandum in Opposition, the DNR states that it engaged in a "weighing" process to determine whether the quality of Dr. Rogers' scholarship

Finally, in his moving papers, Dr. Rogers cited to an email from Commissioner Landwehr to an unidentified individual stating that the DNR was continuing to "build our case" against Dr. Rogers without giving Dr. Rogers a chance to respond. The DNR has not contested the accuracy of that email, or the fact that it has been engaged in "building a case" against Dr. Rogers. Moreover, Landwehr—the individual who made the decision to revoke Dr. Rogers' permit—did not submit an Affidavit to explain the email, the reasons for his decision, or the evidence he considered in making his decision.

It is unclear why the DNR has failed to provide Dr. Rogers with due process. However, former DNR Commissioner Allen Garber has provided a possible answer:

> After the August 3, 1999 permit was issued, DNR management would periodically object to Dr. Rogers having permits, and would advocate for revoking Dr. Rogers' permits. DNR management suggested that Dr. Rogers' research methods, which included him interacting with bears and feeding bears, caused a potential public safety issue. However, I was not presented with any evidence that Dr. Rogers' research methods caused a public safety issue. It seemed to me that DNR management was competing with Dr. Rogers and they felt threatened by Dr. Rogers and his research. I personally met with Dr. Rogers to discuss the public safety issue. In addition, I went into the field with Dr. Rogers to observe his research methods. Based on my personal observations, I did not believe that Dr. Rogers' research methods created a public safety issue.

(Garber Aff. ¶ 4.) At the very least, Dr. Rogers should be given the opportunity to present his case.

"outweighed" the "risks to public safety." The fact that the DNR was applying a balancing test belies the DNR's statement that it was addressing a substantial public safety issue.

Respectfully submitted,

Dated: July 27, 2013

s/ David R. Marshall

David R. Marshall (#0184457)
Leah C. Janus (#0337365)
Jessica L. Edwards (#0391117)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612.492.7000

Attorneys for Plaintiffs

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