STATE OF WISCONSIN

IN SUPREME COURT

Case Nos. 2016AP1688, 2016AP2502

CLEAN WISCONSIN, INC.,
LYNDA COCHART, AMY COCHART,
ROGER DEJARDIN, SANDRA
WINNEMUELLER and
CHAD COCHART,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

KINNARD FARMS, INC.,

Intervenor-Co-Appellant.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES' RESPONSE TO THE WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

The Wisconsin Legislature has petitioned this Court to allow intervention in this judicial review proceeding, which is governed by Wis. Stat. ch. 227. Because the statutes governing judicial review proceedings set forth a straightforward procedure for intervention that squarely conflicts with the Legislature's petition, intervention should be denied. Allowing intervention at this late stage would require ignoring the plain language of Wis. Stat. ch. 227's intervention procedures, and would allow circumvention of Wis. Stat. ch. 227's rules about who may participate in these

statutorily circumscribed procedures, and how they must do so. To give proper effect to the well defined procedures for judicial review proceedings under Wis. Stat. ch. 227, and to preserve the limited function of judicial review proceedings, the Legislature's petition to intervene in this proceeding must be denied.

The Wisconsin Department of Natural Resources, however, has no objection to the Legislature participating in this appeal as a nonparty, as clearly allowed under Wis. Stat. § 809.19(7), with no conflicting provisions under Wis. Stat. ch. 227.

I. Requests to intervene in judicial review proceedings under Wis. Stat. ch. 227 are governed by the specific provisions of that chapter, not the general civil procedure rules regarding intervention.

Wisconsin's Administrative Procedure Act "was designed to establish a more simple and uniform system of judicial review 'with full definition of the procedure to be followed and specification of the grounds on which the [circuit] court may set aside the administrative determination.'" *Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 640 n.4, 511 N.W.2d 874 (1994) (alteration in original) (quoting Ralph M. Hoyt, *The Wisconsin Administrative Procedure Act*, 1944 Wis. L. Rev. 214, 229). The Act, codified at Wis. Stat. ch. 227, established provisions defining the scope of judicial review of agency decisions. The provisions defining the scope of judicial review, the proper parties to judicial review proceedings, and the procedures applicable are found in Wis. Stat. §§ 227.40–227.60.

In accordance with these specific statutory procedures, judicial review proceedings are highly circumscribed and are to be conducted pursuant to the provisions of that chapter,

rather than generally applicable rules of civil procedure. *State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 724, 482 N.W.2d 899 (1992). Although Wis. Stat. ch. 227 "contemplates the *limited* use of . . . civil procedure statutes" under Wis. Stat. chs. 801 to 847, the rules of civil procedure may apply in Wis. Stat. ch. 227 proceedings only where there is "no conflict" between those procedures and the procedures set forth in Wis. Stat. ch. 227. *Id.* at 724, 727. If any conflict exists between the civil procedure rules and Wis. Stat. ch. 227, "the dictates of ch. 227 must prevail." *State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 18, 380 Wis. 2d 354, 909 N.W.2d 114 (quoting *Wagner*, 181 Wis. 2d at 639).

Wisconsin Stat. ch. 227 includes multiple timing provisions governing service of petitions for judicial review, responses, and requests to intervene in the proceedings for judicial review. *See, e.g.*, Wis. Stat. §§ 227.53, 227.55. These provisions define when acts must be done—for example, requiring a petition for review of an agency's decision to be served within 30 days of the agency's final decision, and that responses must be filed within 20 days. *See* Wis. Stat. § 227.53(1)(a)2. Timing provisions governing judicial review proceedings "are mandatory and not directory." *See Wagner*, 181 Wis. 2d at 642. These strict deadlines are clear in the statutes, and their mandatory application gives effect to the Legislature's purpose for the Administrative Procedure Act, to clearly define a uniform procedure for conducting judicial review of administrative agency decisions. *See Wagner*, 181 Wis. 2d at 643–44; *see also Gomez v. Labor & Indus. Review Comm'n*, 153 Wis. 2d 686, 693, 451 N.W.2d 475 (Ct. App. 1989). The goals of uniformity and specificity evident in Wis. Stat. ch. 227 "would not be met if . . . parties

were not required to comply with the mandatory time provisions." *Wagner*, 181 Wis. 2d at 644.

At issue here, Wis. Stat. § 227.53(1)(d) provides a straightforward procedure for intervenors to participate in proceedings for judicial review. The statute requires that, in addition to parties who participated in administrative proceedings before an agency, "other interested persons" may petition to intervene. Wis. Stat. § 227.53(1)(d). The procedure for doing so is clear: "Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition [for intervention]." *Id.* If there is a petition for intervention, it must be resolved before the circuit court takes up the petition for judicial review; otherwise, "intervention would be moot." *Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wis.*, 2003 WI App 206, ¶ 17, 267 Wis. 2d 414, 671 N.W.2d 11.

The decision on intervention is "discretionary with the circuit court," which will consider the proposed intervenor's standing to participate in the proceeding, and whether the proposed intervenor's interests are already adequately represented in the proceeding. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 415, 466 N.W.2d 227 (Ct. App. 1991). And in judicial review proceedings, standing turns on whether a party was "aggrieved" by the agency decision on review. *See* Wis. Stat. §§ 227.52, 227.53. To show that they are "aggrieved" for purposes of standing, intervenors must show that their "substantial interests are adversely affected" by the agency decision at issue in the

case.[1] *See* Wis. Stat. § 227.01(9); *see also Waste Mgmt. of Wis. v. State of Wis. Dep't of Nat. Res.*, 144 Wis. 2d 499, 503–04, 424 N.W.2d 685 (1988).

The Legislature, however, does not rely on these statutory provisions that govern this proceeding for judicial review. (*See* Pet. to Intervene 2–5.) Instead, the Legislature relies on two generally applicable rules of civil procedure, Wis. Stat. §§ (Rule) 809.13 and 803.09. Wisconsin Stat. § (Rule) 809.13 sets forth a general rule for intervention in appeals: "A person who is not a party to an appeal may file . . . a petition to intervene in the appeal. . . . The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09(1), (2), or (2m)." Wisconsin Stat. § 803.09, in turn provides general rules for intervention in "actions" before the circuit courts:

> Upon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by a federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

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[1] The rule for appellate standing similarly asks whether the party asserting standing is "aggrieved" by the judgment below. *See In re Guardianship of Muriel K.*, 2002 WI 27, ¶ 16, 251 Wis. 2d 10, 640 N.W.2d 773; *see also Liebovich v. Minn. Ins. Co.*, 2008 WI 75, ¶ 36, 310 Wis. 2d 751, 751 N.W.2d 764.

> (2m) When a party to an action challenges in state or federal court the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14.

Wis. Stat. § 803.09(2), (2m).

II. The Legislature has not complied with the procedures for intervention under Wis. Stat. ch. 227, and its petition for intervention in this judicial proceeding must therefore be denied.

The Legislature makes two claims in support of its intervention here: that it has an "absolute right" to intervene pursuant to Wis. Stat. § 803.09(2m), and that it is entitled to permissive intervention because it has "an interest in legislation." (Pet. to Intervene 4.) In light of the straightforward procedure for intervention in Wis. Stat. § 227.53(1)(d), neither of these generally applicable rules of civil procedure allows intervention here.

To begin, there is a plain conflict between Wis. Stat. § 227.53(1)(d) and the civil procedure rules the Legislature relies on. Whereas the intervention provision for judicial review proceedings proscribe strict time limits tied to the schedule of proceedings in the circuit court, and require an inquiry into whether the proposed intervenor has standing to participate, *see In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 410, 415; *Waste Mgmt.*, 144 Wis. 2d at 503–04, the civil procedure rule for legislative intervention includes no such requirements, and in fact

contemplates the Legislature intervening "at any time in the action."[2] Wis. Stat. § 803.09(2m). But any decision on intervention under Wis. Stat. ch. 227 necessarily implicates the Legislature's standing to participate (i.e., it is "aggrieved" by the decision on review), and whether its interests are adequately represented. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 410; *see also Waste Mgmt.*, 144 Wis. 2d at 503–04. The Legislature of course never claimed to have standing to participate in the judicial review proceeding because it did not participate below. And now, it makes no effort to show any aggrievement or explain why its "interest in legislation" is not adequately represented. Indeed, the Legislature fails to acknowledge that skilled counsel for Kinnard Farms has handled this case for years, asserting the same position about the interpretation of 2011 Wis. Act 21. (*See, e.g.*, R. 38; 39 (brief and correspondence in response to petition for judicial review).)

In light of the specific procedures and standards for participation in proceedings for judicial review, and the plain conflict between those procedures and the general provision for legislative intervention, "the dictates of ch. 227 must prevail." *State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (quoting *Wagner*, 181 Wis. 2d at 639). The Legislature has no right to intervene under Wis. Stat. § 803.09(2m) in this proceeding.

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[2] As this Court recently recognized, "[i]n chs. 801 to 847, 'action' includes 'special proceeding' unless a specific provision of procedure in special proceedings exists." *State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (alteration in original) (quoting Wis. Stat. § 801.01(1)). The Legislature does not address why, in light of the "specific provision" for intervention in Wis. Stat. § 227.53(1)(d), these general provisions for intervention in "actions" should apply in this special proceeding.

The Legislature fares no better under the provision for permissive intervention, which requires a "timely motion" to intervene. Wis. Stat. § 803.09(2). For one thing, that provision also conflicts with Wis. Stat. ch. 227 insofar as it contemplates a discretionary procedure that deviates from the strict provision in Wis. Stat. § 227.53(1)(d). And even assuming that Wis. Stat. § 803.09(2) permissive procedure could be applied in a ch. 227 proceeding, it's timeliness requirement *must* be evaluated by reference to the specific procedures contemplated under Wis. Stat. ch. 227. The controlling provision, Wis. Stat. § 227.53(1)(d), requires a petition for intervention to be served five days *before* the circuit court hearing on the petition for intervention, which necessarily precedes the hearing on the petition for judicial review. *See Citizens' Util. Bd.*, 267 Wis. 2d 414, ¶ 17. The hearing in this case was held almost three years ago. (R. 41; 57.) Thus, even assuming that Wis. Stat. § 803.09(2)'s generally applicable rule for permissive intervention could be applied in this Wis. Stat. ch. 227 proceeding, the Legislature failed to satisfy its timeliness requirement.

Finally, recent legislative developments are particularly telling when comparing the Legislature's general right to intervene with the specific provisions of Wis. Stat. ch. 227. In 2017 Wis. Act 369, in which the Legislature created its general right to intervene in "actions," the Legislature also made numerous changes to the Administrative Procedure Act, Wis. Stat. ch. 227. *See generally* 2017 Wis. Act 369, §§ 31–80. If the Legislature sought to alter the procedures for intervention applicable to judicial review proceedings, it could have done so in that legislation. The fact that it did not further illustrates why intervention is prohibited here.

Because the Legislature fails to support its petition to intervene in this judicial review proceeding under Wis. Stat. ch. 227, intervention must be denied.

III. The Legislature may participate in this appeal as a nonparty pursuant to Wis. Stat. § (Rule) 809.19(7).

The Legislature's participation in this proceeding is not foreclosed by its inability to intervene. Rather, the Legislature may participate as a nonparty under Wis. Stat. § (Rule) 809.19(7), with the same ability to file a brief (and potentially present argument) as if it were a party.

Because there is no conflict between the rules of civil procedure and the provisions of Wis. Stat. ch. 227 governing nonparty participation, the generally applicable provision under Wis. Stat. § (Rule) 809.19(7) may apply here. *See Town of Delavan*, 167 Wis. 2d at 724, 727.

CONCLUSION

For the reasons discussed, the Legislature's petition to intervene should be denied. The Department has no objection to the Legislature's participation as a nonparty.

Dated this 6th day of May, 2019.

Respectfully submitted,

JOSHUA L. KAUL
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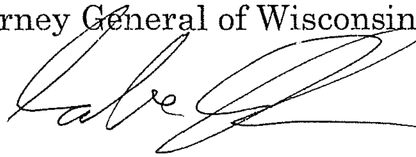

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