STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP0059

CLEAN WISCONSIN, INC.
and PLEASANT LAKE
MANAGEMENT DISTRICT,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent-Appellant,

WISCONSIN MANUFACTURERS
& COMMERCE, DAIRY BUSINESS
ASSOCIATION, MIDWEST FOOD
PROCESSORS ASSOCIATION,
WISCONSIN POTATO & VEGETABLE
GROWERS ASSOCIATION,
WISCONSIN CHEESE MAKERS
ASSOCIATION, WISCONSIN FARM
BUREAU FEDERATION, WISCONSIN
PAPER COUNCIL AND WISCONSIN
CORN GROWERS ASSOCIATION,

Intervenors-Co-Appellants.

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

INTRODUCTION

This case involves petitions for judicial review of eight high-capacity well approvals, which were challenged

under Wis. Stat. ch. 227. That chapter sets forth a straightforward procedure for intervention in Wis. Stat. § 227.53(1)(d), which governs the Legislature's petition to intervene here. Specifically, a proposed intervenor under chapter 227 must meet two requirements: First, the proposed intervenor must establish that she is an "interested party"—i.e., that she has "standing" under the relevant two-part test applicable to judicial review proceedings. That, in turn, requires the proposed intervenor to show that she suffered an injury, and that the injury is within the zone of interests of the relevant substantive laws at issue. Second, intervention under Wis. Stat. § 227.53 must be timely under the statute.

The Legislature's petition to intervene, however, does not refer to chapter 227's intervention procedures. Instead, the Legislature identifies two general provisions related to intervention, but those statutes are inapplicable in this chapter 227 case. Indeed, as a threshold matter, the Legislature's request to intervene does not even come within the language of the general intervention statutes they cite.

Further, putting aside the Legislature's threshold problems, chapter 227's intervention procedure controls here over the conflicting, generally applicable intervention procedures. Under chapter 227's intervention requirements, the Legislature fails to satisfy both the standing and the timing requirements. As to standing, the Legislature fails to point to *any* injury it has suffered, or will suffer, as a result of the Department of Natural Resources' (the "Department") decisions at issue in this judicial review proceeding. Instead, the Legislature asserts that it has an "interest in legislation" that entitles it to intervene. That interest, however, is not an injury, and is therefore insufficient for standing.

And even assuming that the Legislature's interest in legislation *were* an "injury," that injury is not within the zone of interests that the laws at issue here recognize or protect. This case involves high-capacity well approvals issued under Wis. Stat. ch. 281. The zone of interest at issue in this case is therefore defined by those well-approval statutes, and thus implicates only nearby water- and environmentally related interests, not broad legislative or policy goals.

In addition, the Legislature's petition fails to satisfy the timing requirements under Wis. Stat. § 227.53(1)(d) because it was not served "at least 5 days prior to the date set for hearing" in the circuit court. Because the Legislature fails to establish either requirement for intervention under Wis. Stat. § 227.53(1)(d), its petition to intervene must be denied.

On the other hand, the general intervention statutes cited by the Legislature have no application here because this is a chapter 227 action, and its provisions govern. For example, the general legislative intervention provision, Wis. Stat. § 803.09(2m), contemplates intervention "at any time . . . as a matter of right." This squarely conflicts with Wis. Stat. § 227.53(1)(d)'s standing and timing requirements. And the general permissive intervention provision, Wis. Stat. § 803.09(2), also would conflict to the extent it allows intervention beyond what is authorized by Wis. Stat. § 227.53(1)(d). In other words, regardless of those provisions, one must meet chapter 227's standing and timeliness requirements because that chapter governs proceedings for judicial review like this one. Because the Legislature does not meet those requirements, its petition must be denied.

With all that said, the Legislature may participate in this appeal as a nonparty, as is contemplated under Wis. Stat. § 809.19(7). That statute governing nonparties poses no conflict with Wis. Stat. ch. 227 because that chapter imposes no different standard for nonparties.

DISCUSSION

I. As a threshold matter, the Legislature's intervention request does not come within the terms of the general intervention statutes.

Even before turning to chapter 227's procedures, there is a threshold problem with the Legislature's attempt to use the general intervention statutes. Under their plain language, they do not apply here.

The legislative intervention statute, Wis. Stat. § 803.09(2m), applies only to particular circumstances: "When a party to an action [1] challenges in state or federal court the constitutionality of a statute, facially or as applied, [2] challenges a statute as violating or preempted by federal law, or [3] otherwise challenges the construction or validity of a statute, as part of a claim or affirmative defense." This case is about none of these things.[1] No one challenges a statute as unconstitutional, preempted, or otherwise invalid. Instead, this case is about whether, in light of existing statutes, the Department correctly approved eight high-capacity wells. On its face, the legislative intervention provision is inapplicable here.

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[1] This case also is not an "action," as required for legislative intervention under Wis. Stat. § 803.09(2m). Rather, this case is a "special proceeding" for judicial review of an administrative agency decision. *See State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶¶ 17–19, 380 Wis. 2d 354, 909 N.W.2d 114. Under Wis. Stat. chs. 801 to 847, the term "'action' includes 'special proceeding' *unless a specific provision of procedure in special proceedings exists.*" Wis. Stat. § 801.01(1). And here, as addressed below, a specific procedure for intervention *does* exist, under Wis. Stat. § 227.53(1)(d). Thus, the Legislature's use of the term "action" in Wis. Stat. § 803.09(2m) further suggests that that provision does not apply to requests to intervene in judicial review proceedings under chapter 227.

Likewise, the permissive intervention statute also does not apply. That provision only applies to situations in which the proposed intervenor's "claim or defense and the main action have a question of law or fact in common." Wis. Stat. § 803.09(2). But again, this case is simply about the validity of the Department's well-approval decisions. The Legislature simply has no "claim or defense" to assert on that question.

Aspects of these issues have been raised previously by Clean Wisconsin (*see, e.g.*, Clean Wisconsin's Resp. to Pet. to Intervene 5–12 (May 9, 2019)), and the Department anticipates that this issue will be further addressed by the other parties' opening memoranda here. To the extent necessary, the Department will further address these topics in its response brief to the Legislature's opening memorandum. It suffices to say here that, on their faces, these provisions are inapplicable.

II. The Legislature does not meet the requirements for intervention applicable in judicial review proceedings under Wis. Stat. ch. 227.

A. Chapter 227's procedures govern judicial review proceedings.

Wisconsin's Administrative Procedure Act, codified at Wis. Stat. ch. 227, "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). Before the Act was adopted, "seventy-odd separate statutes" prescribed the methods of judicial review of agency actions, and procedures varied widely between agencies and

subject-areas. Hoyt, *supra* at 228–29. The Act then codified specific provisions that were intended to define the scope of judicial review of agency decisions, the proper parties to those proceedings, and the procedures applicable in those proceedings. *See* Wis. Stat. §§ 227.40–227.60; *see also* Hoyt, *supra* at 228–29. The result of the Act is that, "except for those few administrative activities which are expressly exempted from the operation of the act, there is now but a single method and scope of review for all state-wide administrative agencies." Hoyt, *supra* at 230.

Wisconsin courts have consistently reaffirmed the applicability of chapter 227's specific provisions over the generally applicable rules of civil procedure. *See, e.g., State ex rel. Town of Delavan v. Circuit Court for Walworth Cty.*, 167 Wis. 2d 719, 724, 482 N.W.2d 899 (1992); *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. So while chapter 227 "contemplates the *limited* use of . . . civil procedure statutes" under Wis. Stat. chs. 801 to 847, the rules of civil procedure will be applied in chapter 227 proceedings only where there is "no conflict" between those procedures and the procedures set forth in chapter 227. *State ex rel. Town of Delavan*, 167 Wis. 2d at 724, 727 (emphasis added). If any conflict exists between the civil procedure rules and chapter 227, "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).

B. Intervention rules for judicial review proceedings under Wis. Stat. ch. 227.

At issue here, Wis. Stat. § 227.53(1)(d) provides a straightforward procedure for third parties to petition to intervene in proceedings for judicial review. Specifically, the statute provides 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 "interested persons" "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 intervention inquiry for judicial review proceedings therefore includes two requirements: (1) the party seeking intervention must be an "interested person," which requires a showing of standing; and (2) the request to intervene must be filed in the circuit court, at least five days before that court holds a hearing on the intervention request.

1. Standing to intervene under Wis. Stat. § 227.53(1)(d).

Wisconsin Stat. § 227.53's requirements for standing are well-established, and correspond to federal courts' treatment of requests to intervene in proceedings for judicial review of agency decisions.

Wisconsin Stat. § 227.53(1)(d) allows intervention only for "interested persons." The same term ("interest") is used in the rule governing mandatory intervention under Wis. Stat. § 803.09(1), which allows intervention "when the movant claims an *interest* relating to the property or transaction which is the subject of the action." And for intervention in that context, "[t]he interest which entitles one to intervene in a suit between other parties must be an interest of such direct and immediate character that the intervenor will either gain

or lose by the direct operation of the judgment." *City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶ 11 n.9, 234 Wis. 2d 550, 610 N.W.2d 94 (quoting *Lodge 78, Int'l Ass'n of Machinists v. Nickel*, 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963)). Without any indication that the "interested person" under Wis. Stat. § 227.53(1)(d) would be construed differently,[2] a putative intervenor under chapter 227 must demonstrate that he or she "will either gain or lose by the direct operation" of the agency decision at issue and subsequent court judgment on judicial review. *See City of Madison*, 234 Wis. 2d 550, ¶ 11 n.9.

As Wisconsin courts have recognized, this showing corresponds to the two-part standing inquiry,[3] which requires the proponent to show that he or she (1) "has been directly injured by the [agency] decision or that there is a real and immediate threat of direct injury and (2) that the injury is to

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[2] *See State v. Mason*, 2018 WI App 57, ¶ 28, 384 Wis. 2d 111, 125–26, 918 N.W.2d 78 ("In the absence of contrary evidence, language used in related statutes is intended to have the same meaning." (quoting *State v. White*, 2004 WI App 237, ¶ 10, 277 Wis. 2d 580, 690 N.W.2d 880)), *review denied*, 2019 WI 10, 385 Wis. 2d 341, 925 N.W.2d 766.

[3] The two cases to address intervention in chapter 227 proceedings are *Citizens' Util. Bd.*, 267 Wis. 2d 414, ¶ 17, and *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 415, 466 N.W.2d 227 (Ct. App. 1991). Both cases referred to Wis. Stat. § 227.53(1)(d)'s requirement that intervenors establish standing to participate in the proceeding, but neither analyzed the requirement in-depth. As addressed in the text here, the courts' conclusion in those cases is supported by statutory language and other Wisconsin decisions in judicial review proceedings, and also aligns with federal courts' treatment of requests to intervene in judicial review proceedings.

a legally protected interest." *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 526, 334 N.W.2d 532 (1983); *see also Waste Mgmt. of Wis., Inc. v. State of Wis. Dep't of Nat. Res.*, 144 Wis. 2d 499, 503–08, 424 N.W.2d 685 (1988) (discussing requirements of standing in a judicial review proceeding).

First, the proposed intervenor must show that she has suffered or will suffer an "injury in fact" by operation of the agency action at issue. *Id.* at 505 (quoting *Wis.'s Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 10, 230 N.W.2d 243 (1975)). The injury must be "real and immediate" (either present or threatened); hypothetical, conjectural, or abstract suggestions of injury are insufficient to support standing. *Fox*, 112 Wis. 2d at 525 (citation omitted). While "the magnitude of the injury is not determinative of standing, the fact of injury is." *Id.*

Second, the alleged injury must be to an interest "recognized by law," i.e., within the zone of interests to be protected or regulated by the law at issue in the agency's decision. *See id.* The "zone of interests" inquiry hinges on the substantive law the agency was applying when it made the decision that is the subject of judicial review. *See Waste Mgmt.*, 144 Wis. 2d at 507; *see also Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 44, 333 Wis. 2d 402, 797 N.W.2d 789 ("[I]n cases involving review of a rule or decision of an administrative agency, courts have interpreted standing in light of the substantive statutes and regulations at issue and the text of chapter 227.").

To illustrate, in *Waste Management*, 144 Wis. 2d at 504–05, a third-party landfill owner sought to participate in a judicial review proceeding challenging DNR's decision that another landfill owner had satisfied the environmental standards to construct a new landfill. The challenger did not assert that DNR's decision was wrong as a matter of

environmental law; instead, the challenger asserted that allowing the other landfill to operate would damage the challenger's economic interests in its existing landfill business. *See id.*

This Court rejected the notion that those economic interests supported standing in the judicial review proceeding. Economic interests, the Court held, are not within the zone of interests at issue in the DNR's decision about whether the other landfill satisfied the applicable environmental standards. *See id.* at 506–09. On the contrary, the applicable environmental statute "does not recognize, nor does it attempt to regulate or protect an economic interest." *Id.* at 508–09. Because the challenger's alleged economic injury was not within the zone of interests protected by the environmental law at issue, the challenger did not have standing to participate in the judicial review proceeding. *See id.* at 513.

Federal case law is in accord regarding the requirement that proposed intervenors in judicial review proceedings establish standing to participate.[4] *See, e.g., Waterkeeper All., Inc. v. Wheeler*, 330 F.R.D. 1, 6 (D.D.C. 2018);

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[4] Wisconsin courts regularly "look to federal case law as persuasive authority regarding standing questions." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15 n.7, 326 Wis. 2d 1, 783 N.W.2d 855; *accord Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 45; *Fox*, 112 Wis. 2d at 524; *Wis.'s Envtl. Decade, Inc.*, 69 Wis. 2d at 9.

Noel Canning v. N.L.R.B., 705 F.3d 490, 514 (D.C. Cir. 2013); *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941 (7th Cir. 2000); *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 539 (D.C. Cir. 1999).[5]

This can be seen in *Sokaogon Chippewa Community*, which involved an attempt by a tribe (the St. Croix Chippewa) to intervene in a proceeding for judicial review of the Department of the Interior's denial of a different tribe's application to acquire property for a new casino. The court expressed significant doubt that the tribe's economic interest was a "legally protectable interest" cognizable through the Administrative Procedure Act, which concerns agency procedures, not "be[ing] free from economic competition." *See Sokaogon Chippewa Cmty.*, 214 F.3d at 946–47. In any event, the St. Croix's economic interests were far too speculative to support intervention. *See id.* at 947–48.

Particularly relevant here, the court rejected the St. Croix's purported interest in the general "legality of the procedures used by the Department to conduct its review." *Id.* at 948. "As countless cases have held . . . such a generalized interest is insufficient to support standing, let alone intervention." *Id.* If such an interest were sufficient, "courts would be required to allow anyone with an

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[5] The intervention requests in the federal judicial review proceedings arose directly under Fed. R. Civ. P. 24(a)(2), which requires proposed intervenors to make a showing of "an interest relating to the property or transaction that is the subject of the action." Wisconsin courts have recognized that Fed. R. Civ. P. 24(a) is analogous to Wis. Stat. § 803.09(1), and that interpretations of the federal rule are therefore persuasive. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 37, 307 Wis. 2d 1, 745 N.W.2d 1. The federal courts' discussion of the "interest" necessary to intervene in federal judicial review proceedings is therefore instructive on Wis. Stat. § 227.53(1)(d)'s requirement that only "interested persons" may intervene in proceedings under chapter 227.

interest—however broad or universal—to intervene in any lawsuit in which the government is a party." *Id.* Rather, the court held, to claim such an interest, the proposed intervenor must show that the alleged misapplication of the law "would have a detrimental impact" on the interests protected by the relevant laws underlying the agency's decision—for example, that the tribe's water supply would be affected by the Department's failure to follow environmental laws. *See id.*

And in *Rio Grande Pipeline Co.*, the court similarly rejected a request to intervene. The proposed intervenor was a pipeline owner (Longhorn) seeking to participate in another pipeline owner's proceeding for judicial review of a decision by the Federal Energy Regulatory Commission. The court held that Longhorn was not a proper intervenor given that the challenged decision had no direct bearing on it. *See Rio Grande Pipeline Co.*, 178 F.3d at 537–39. Instead, because Longhorn simply sought to "contribute its views to those issues raised by Rio Grande's petition for review," the court concluded that amicus participation was appropriate. *See id.* at 539; *see also Noel Canning*, 705 F.3d at 515 (recognizing requirement of standing for proposed intervenors in judicial review proceedings, and noting that a proposed intervenor's "strained claim of intervenor status" was better suited for amicus participation); Charles Alan Wright et al., 7C Federal Practice and Procedure § 1908.1 nn.47, 49 (3d ed. 2007) (collecting cases in which intervention was denied based on lack of standing).

In sum, Wisconsin statutes and case law, along with persuasive federal cases discussing intervention in judicial review proceedings make clear that an "interested person" under chapter 227 must establish that she stands to suffer an injury by operation of the agency decision at issue, and that the alleged injury is one that the law recognizes and protects.

2. Timeliness under Wis. Stat. § 227.53(1)(d).

The second requirement—timing—is comparable to the other timing provisions in chapter 227, including those governing service of petitions, responses, and the filing of the administrative record. *See, e.g.*, Wis. Stat. §§ 227.53, 227.55. These timing 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. *See* Wis. Stat. § 227.53(1)(a)2.

Wisconsin courts have held that timing requirements under chapter 227 "are mandatory and not directory." *See Wagner*, 181 Wis. 2d at 642 (in context of timing requirements for agency's filing of its response and administrative record). 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 id.* 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.

It follows that chapter 227's timing requirement for intervention—five days before a hearing in the circuit court—also is mandatory.

C. The Legislature does not meet either requirement for intervention under Wis. Stat. § 227.53(1)(d).

The Legislature cannot satisfy either of the requirements for intervention under Wis. Stat. § 227.53(1)(d). First, the Legislature is not an "interested person" in this

proceeding. The Legislature cannot point to *any* injury it has suffered or will suffer by virtue of the high-capacity well approvals at issue in this case; and certainly not any injury within the zone of interests covered by the high-capacity well statutes. Second, the Legislature's intervention petition does not meet the clear timing requirements in Wis. Stat. § 227.53(1)(d). For either independent reason, the Legislature may not intervene in this judicial review proceeding.

1. The Legislature does not have standing to participate in this judicial review proceeding.

To participate as an "interested person" under Wis. Stat. § 227.53(1)(d), the Legislature must establish that it has suffered or will likely suffer some injury by operation of the Department's decision (or invalidation thereof), and that the alleged interest is one that is recognized and protected under the laws at issue. The Legislature cannot satisfy either element, and therefore does not have standing to intervene in this case.

First, in its petition to intervene, the Legislature made no attempt to establish an imminent (or even possible) injury that would support its participation. The closest the Legislature came was to suggest that it "has an interest in legislation that clearly defines the limits of administrative agency authority." (Pet. to Intervene 7.) In the Legislature's view, it "expressed that interest by implementing 2011 Wis. Act 21, which created Wis. Stat. § 227.10(2m)." (*Id.*) And that "interest in legislation," the Legislature maintains, is sufficient to support its intervention in this judicial review proceeding.

But this asserted interest at best relates to *advocating* for one interpretation of a law over another. This provides no indication of how the Legislature could ever be *injured* by one

interpretation of law over another. This is just the type of "[a]bstract injury" that courts reject as a basis for standing. *Fox*, 112 Wis. 2d at 525 (citation omitted); *see also Sokaogon Chippewa Cmty.*, 214 F.3d at 948. Rather, the Legislature must point to some "direct injury" that it "has sustained or is immediately in danger of sustaining," and which is both "real and immediate." *Fox*, 112 Wis. 2d at 525 (citation omitted).

The Legislature has not pointed to—and cannot point to—any such real and immediate injury. Even assuming that its "interest" in Act 21 could, in some case, rise to the level of an injury, this is not that case. Rather, this case is about high-capacity well approvals, with the ultimate question being whether the Department properly approved the challenged wells under the applicable statutes.

The Legislature faces no threat of "real or immediate" injury by this inquiry. If it were otherwise, the Legislature could assert "injury" each time this Court took up its task of statutory interpretation. Nothing in Wisconsin precedent supports such a capacious view of "injury." This failing, alone, defeats intervention.

Second, the Legislature's asserted interest in Act 21 is not within the zone of interests recognized or protected by the laws at issue here—Wis. Stat. ch. 281, governing high-capacity well approvals. This Court's analyses in *Waste Management* and *Fox* are instructive as to why the Legislature cannot satisfy the second step of the standing inquiry.

In *Waste Management*, the court rejected a landfill owner's alleged economic interests as insufficient to challenge DNR's environmental analysis in another owner's landfill application. Economic interests simply were not within the zone of interests protected by the applicable environmental laws. *See Waste Mgmt.*, 144 Wis. 2d at 504–09. Instead, "[t]he

nature of the statute, as well as the nature of [DNR's decision] . . . make clear that the interest protected, recognized, or regulated by the law is an environmental interest." *Id.* at 508. Likewise, in *Fox* the court rejected alleged psychological injuries as a basis for standing when the case involved, again, a challenge under an environmental protection statute. *See Fox*, 112 Wis. 2d at 530. Similarly, the court recognized that a person alleging injury under an environmental statute must assert a change in the nearby physical environment to come within the law's zone of interests. *See id.* at 525; *see also id.* at 533–34.

Like both *Waste Management* and *Fox*, this case involves the application and construction of environmental laws—here, laws governing high-capacity well approvals under Wis. Stat. § 281.34. *See also* Wis. Stat. §§ 281.11, 281.12. In short, those laws set forth standards and conditions for approval of high-capacity well applications, as well as provisions for conducting environmental review of well applications.

The Legislature made no attempt to show that its "interest" comes within these governing statutory provisions (again, putting aside that that "interest" is not even an injury to begin with). Rather, the Legislature asserts that it has an interest in laws that fulfill a particular view of how government should operate, namely laws "that clearly define[ ] the limits of administrative agency authority." (Pet. to Intervene 7 (citing Wis. Stat. § 227.10(2m)).) This is not within the zone of interests protected or recognized by the high-capacity well approval laws, which implicate environmental and water-related interests, and will typically be limited to individuals with injuries related to the physical environment near the well at issue. *Cf. Waste Mgmt.*, 144 Wis. 2d at 508; *Fox*, 112 Wis. 2d at 525, 533–34.

The Legislature's asserted interest is instead akin to other interests that have been uniformly rejected as a basis for standing. "As countless cases have held . . . such a generalized interest [in the legality of an agency's procedures] is insufficient to support standing, let alone intervention." *Sokaogon Chippewa Cmty.*, 214 F.3d at 948. To come within the zone of interests at issue here, the Legislature would need to "demonstrate (or at least claim) that it specifically would be adversely affected in some way, shape, or form, by the Department's alleged failure to follow applicable environmental statutes." *Id.* For example, as explained in *Sokaogon*, demonstrating a detrimental impact on access to water could establish "a sufficiently specific interest for it to be cognizable." *Id.*; *cf. Fox*, 112 Wis. 2d at 530; *Waste Mgmt.*, 144 Wis. 2d at 504–09. There is no asserted impact on the Legislature here.

Thus, the Legislature also falls short at step two of the standing inquiry, and intervention may be denied for this independent reason.

2. The Legislature's petition does not comply with Wis. Stat. § 227.53(1)(d)'s timing requirement.

In addition, the Legislature's petition to intervene is not timely under Wis. Stat. § 227.53(1)(d). That provision requires that a petition to intervene be filed *in the circuit court* at least five days before a hearing where that court acts on the petition. Wis. Stat. § 227.53(1)(d). Nothing in chapter 227 authorizes intervention in a judicial review proceeding *on appeal*, or at any time other than "5 days prior to the date set for hearing" in circuit court on the intervention petition. *Id.* And as this Court has held other timing requirements in chapter 227, those requirements "are

mandatory and not directory." *See Wagner*, 181 Wis. 2d at 642 (addressing timing requirements for filing of agency response and administrative record).

The Legislature's petition here—filed years after the completion of circuit court proceedings—is not timely under any reading of Wis. Stat. § 227.53(1)(d).

III. The general provisions for intervention do not allow for legislative intervention in this case.

In its petition to intervene, the Legislature did not acknowledge the specific procedures applicable to intervention requests under chapter 227. Instead, it relied on Wis. Stat. § (Rule) 809.13 and two generally applicable intervention rules incorporated therein (Wis. Stat. § 803.09(2) and (2m)) as bases for its intervention. For one thing, as discussed *supra* sec. I., the general intervention statutes do not, on their faces, apply here. Further, in light of chapter 227's clear requirements, these general provisions are inapplicable because they conflict.

A. Rules governing legislative and permissive intervention, and intervention on appeal.

Wisconsin Stat. § (Rule) 809.13 provides in relevant part: "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)."

Relevant here, Wis. Stat. § 803.09(2) and (2m) state general rules for intervention in actions before the circuit courts:

> (2) 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.
>
> (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).

On its face, the appellate intervention statute does not provide an independent basis to intervene. *See* Wis. Stat. § (Rule) 809.13. Rather, where a nonparty to the appeal files a petition to intervene in the appeal, "[t]he court may grant the petition upon a showing that the petitioner's interest meets the requirements of § 803.09(1), (2), or (2m)." *Id.*

As general rules of civil procedure, Wisconsin Stat. § (Rule) 809.13 and Wis. Stat. § 803.09 cannot be applied in a way that conflicts with Wis. Stat. ch. 227. *State ex rel. Town of Delavan*, 167 Wis. 2d at 725 (recognizing that Wis. Stat. chs. 801 to 847 apply to special proceedings "unless foreclosed by different procedure prescribed by ch. 227"). Thus, if the statutes cited within Wis. Stat. § (Rule) 809.13 conflict with the chapter 227 intervention process discussed above, the Legislature cannot rely on them to intervene in this appeal.

B. None of the general intervention procedures allow the Legislature to intervene in this judicial review proceeding.

The Legislature may not rely on the general civil procedure rules to support intervention because they conflict with chapter 227. The legislative intervention provision, Wis. Stat. § 803.09(2m), directly conflicts with Wis. Stat. § 227.53(1)(d), and therefore cannot be applied in judicial review proceedings. And the permissive intervention provision, Wis. Stat. § 803.09(2), if applied to allow intervention where chapter 227 would not, also conflicts. Neither allows the Legislature's intervention here.

1. The legislative intervention provision directly conflicts with the requirements for intervention under chapter 227 and therefore cannot be applied.

As discussed, Wis. Stat. § 227.53(1)(d) contains two explicit requirements to intervene in a proceeding for judicial review: that the proposed intervenor be an "interested party"—i.e., have standing—and that the petition to intervene be timely filed. But the legislative intervention provision, Wis. Stat. § 803.09(2m), would allow intervention

"at any time . . . as a matter of right." The legislative intervention provision directly conflicts with the dictates of Wis. Stat. § 227.53(1)(d) and therefore cannot be applied in a proceeding for judicial review. *See State ex rel. Dep't of Nat. Res.*, 380 Wis. 2d 354, ¶ 18 (reaffirming that if any conflict exists between the civil procedure rules and Wis. Stat. ch. 227, "the dictates of ch. 227 must prevail" (quoting *Wagner*, 181 Wis. 2d at 639)).

First, the legislative provision would allow intervention "as a matter of right," Wis. Stat. § 803.09(2m), without regard to whether the Legislature has standing in any particular judicial review proceeding. This directly conflicts with Wis. Stat. § 227.53(1)(d)'s requirement that an intervenor establish both elements of standing to participate as a party on judicial review. Because "of right" intervention is entirely incompatible with a requirement to show injury to a cognizable interest before being allowed to participate, the dictates of chapter 227 must prevail.

Second, the legislative intervention provision would allow intervention "at any time." This conflicts with the clear timing requirement in Wis. Stat. § 227.53(1)(d), which requires that petitions to intervene in judicial review proceedings be filed in the circuit court at least five days before that court holds a hearing on the petition. Thus, a conflict is plain on the face of the two standards, and the dictates of chapter 227 must again prevail.

Based on these two conflicts, the legislative intervention provision cannot be applied in proceedings for judicial review.

2. If applied to allow intervention where chapter 227 would not, the permissive intervention statute also would conflict and cannot be applied.

The Legislature next suggests that it may be permitted to intervene under Wis. Stat. § 803.09(2) because it claims an interest in certain legislation at issue. The Legislature's request must be denied for the same reasons already discussed.

Chapter 227 does not contemplate participation on judicial review by anyone who does not meet the requirements under Wis. Stat. § 227.53. Thus, to allow intervention in a judicial review proceeding, any other intervention procedure must be construed to comport with Wis. Stat. § 227.53(1)(d), or else it is inapplicable—it remains the case that Wis. Stat. § 227.53(1)(d)'s standing and timing requirements govern intervention in chapter 227 proceedings. Chapter 227 allows for intervention only when those standards are met, and permissive intervention cannot be used as an end run around those explicit standards. And the Legislature cannot satisfy its requirements here, for the reasons discussed.

3. The appellate intervention provision does not provide an independent basis for intervention.

As noted, the appellate intervention statute does not provide an independent basis to intervene. *See* Wis. Stat. § (Rule) 809.13. Rather, where a nonparty files a petition to intervene on appeal, "[t]he court may grant the petition upon a showing that the petitioner's interest meets the requirements of § 803.09(1), (2), or (2m)." *Id.*

The Legislature's failure to satisfy the requirements of § 803.09(2) and (2m) are therefore dispositive, and no further inquiry is necessary to deny the Legislature's petition to

intervene in this appeal.[6] The Legislature's petition to intervene must be denied.

IV. 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 meet the requirements for intervention. 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 State ex rel. Town of Delavan*, 167 Wis. 2d at 724, 727; *see also Rio Grande Pipeline Co.*, 178 F.3d at 539 (concluding that amicus participation was appropriate where proposed

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[6] Wisconsin Stat. § (Rule) 809.13 does not provide any explicit mechanism for appellate intervention in a chapter 227 proceeding. Thus, on its face, the appellate intervention statute can be read to preclude *any* intervention in a chapter 227 appeal; indeed, this would comport with the strict timing requirement for intervention under Wis. Stat. § 227.53(1)(d)—that a petition must be filed in the circuit court at least five days before that court holds a hearing on the petition.

Further, even if (for argument's sake only) appellate intervention in a chapter 227 proceeding were available via the permissive intervention statute, the Court would need to construe the requirements of permissive intervention in a way that would not conflict with chapter 227's intervention requirements. And under that hypothetical, the Legislature still cannot satisfy the underlying intervention requirements, as it did not seek to intervene in a way that would give effect to chapter 227's standing and timing requirements.

intervenor simply sought to "contribute its views"); *Noel Canning*, 705 F.3d at 514 (same).

CONCLUSION

For the reasons discussed, the Legislature's petition to intervene is governed by Wis. Stat. § 227.53(1)(d). Because the Legislature fails to meet that standard, its petition to intervene should be denied. Nonetheless, the Legislature may participate in this appeal as a nonparty, if this Court allows.

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