Appeal No. 18-AP-0059

**SUPREME COURT OF WISCONSIN**

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,

Intervenor-Co-Appellants.

# PETITIONERS-RESPONDENTS' RESPONSE MEMORANDUM IN OPPOSITION TO THE WISCONSIN LEGISLATURE'S PETITION TO INTERVENE

## INTRODUCTION

The Joint Committee on Legislative Organization ("JCLO") petitions to intervene in this judicial review proceeding pursuant to Wis. Stat. §§ 809.13 and 803.09(2m). The standard for determining whether JCLO has standing to intervene is the substantial interest test provided in Wis. Stat. ch. 227, regardless of whether the motion is filed pursuant to Section 227.53(1)(d) or Section 803.09. Since JCLO fails to meet that standard, Petitioners-Respondents Clean Wisconsin, Inc. and Pleasant Lake Management District ("Petitioners-Respondents") respectfully urge this Court to deny the petition.

Analysis of the text and structure of Section 227.53(1)(d) demonstrates the erroneous nature of JCLO's and Intervenors' argument that the substantial interest test only applies in circuit court. JCLO's preferred interpretation requires circuit and appellate courts to apply different intervention standards, which is an unreasonable and absurd result. Because the Chapter 227 substantial interest standard

conflicts with the broad, vague interest JCLO contends satisfies Section 803.09(2m), the Chapter 227 standard controls this proceeding.

JCLO does not meet the Chapter 227 standard for intervention. JCLO's argument that Chapter 227 recognizes a "broad universe" of interests that allows a party to intervene is inconsistent with established case law. JCLO must have a substantial interest in the challenged decision of the Department of Natural Resources ("DNR"), *i.e.*, an interest that is recognized and protected by the pertinent statutes administered by DNR. JCLO instead asserts only a general interest in statutory interpretation. That interest is insufficient and this Court therefore must deny the Petition to Intervene.

## ARGUMENT

### I. Chapter 227 provides the proper intervention standard in this case.

#### a. The text and structure of Section 227.53(1)(d) demonstrates that the provision applies to all stages of judicial review proceedings.

Statutory interpretation determines whether the intervention provision in Chapter 227 applies only in circuit court, or at any stage of judicial review proceedings. "[S]tatutory interpretation begins with the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (quotations omitted). The text of Section 227.53(1)(d) does not expressly apply only in circuit court. The operative language provides that "*the court* may permit other interested parties to intervene." Wis. Stat. § 227.53(1)(d) (emphasis added). Had the Legislature wished to confine this provision's applicability to circuit court, it would have done so explicitly, as the Legislature has done in other contexts. *See, e.g.,* Wis. Stat. § 801.01(2) (providing that

chs. 801-847 "govern procedure and practice in circuit courts"). Yet no analogous statutory text requires this Court to limit the application of Chapter 227 standing requirements to judicial review proceedings in circuit court.

Analysis of the relevant statutory context confirms this interpretation. *Kalal*, 2004 WI 58, ¶ 46 ("[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes."). The use of the general term "court" in this provision contrasts with the use of "circuit court" elsewhere in Section 227.53, and in Chapter 227 generally. *See, e.g.*, § 227.53(1)(a)1, 3. The use of distinct language in different subsections of the same statute is presumed to reflect a legislative choice. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2019 WI 24, ¶ 29, 385 Wis. 2d 748, 924 N.W.2d 153 (quoting *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 351, 558 N.W.2d 653 (Ct. App. 1996).

Further, the differing use of "court" and "circuit court" is consistent with the purpose of the provisions at issue. "[C]ircuit court" is used to describe the procedure for filing a petition for review and to identify proper venue. Wis. Stat. § 227.53(1)(a)1, 3. This makes sense, as those provisions relate to procedures specific to initiating judicial review in circuit court. By contrast, "court" is used in Section 227.53(1)(d) because intervention might be sought, as here, in an appellate court.

Moreover, the Legislature has previously employed the term "court" to apply to courts of appeal. For example, the standard of review provisions in Section 227.57 apply in judicial review proceedings on appeal even though those provisions simply say "court." *See, e.g., Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 3, 382 Wis. 2d 496, 914 N.W.2d 21 (discussing Wis. Stat. § 227.57(10)); *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, ¶ 26, 335 Wis. 2d 47, 799 N.W.2d 73 (discussing Wis. Stat. § 227.57(3), (8)).

These points also demonstrate why this Court must not accept Intervenors' interpretation. *See* Intervenors' Memo. at 6. Their interpretation dictates that the Legislature meant the same term to have multiple meanings. "Court" would mean "circuit court" as used in Section 227.53(1)(d) but mean "circuit court or appellate courts" in Section 227.57. There is no reason to give the plain language of the statute such a strained interpretation, or to read words into the statute not put there by the Legislature.

Further, neither JCLO nor Intervenors cite case law to support their interpretation of Section 227.53(1)(d). The lone case cited is an unpublished court of appeals decision that did not involve a petition for intervention, and that case gives only a cursory nod to intervention in dictum. Intervenors' Memo. at 12, n.8.

JCLO and Intervenors also mischaracterize the 1983 Judicial Note appended to Section 227.58 in order to improperly read missing language into Section 227.53. JCLO Memo. at 10; Intervenors' Memo. at 9. The Note

states that an earlier version of the statute was modified to remove superfluous language dictating that Chapters 808 and 809 apply to appeals from judicial review decisions. *Id.* Petitioners-Respondents have never disputed that the Rules of Appellate Procedure in Chapters 808-809 are generally applicable to appeals of judicial review proceedings.[1] The relevant inquiry here is not whether Chapters 808 and 809 apply to appeals of judicial review proceedings. Rather, it is whether Chapter 803, which applies to cases in circuit as well as appellate courts through Section 809.03, conflicts with Chapter 227 because these two chapters set forth different standing tests for intervention. The only way to avoid that conflict is to recognize that the standing test in Chapter 227 governs intervention in both circuit and appellate courts. *See Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 639, 511 N.W.2d 874 (1994).

[1] For example, Chapters 808 and 809 govern the process for filing appeals, content and format of briefs, and other aspects of practice before the appellate courts, which are not present in Chapter 227.

**b. Section 227.53(1)(d) must apply in appellate proceedings to avoid absurd results.**

JCLO's and Intervenor's argument that Section 227.53(1)(d) only applies in circuit court also fails because it would lead to absurd results. *Kalal*, 2004 WI 58, ¶ 46 ("Statutory language is read to avoid absurd or unreasonable results."). Several unreasonable and absurd results would follow from applying a different intervention standard in circuit court and appellate courts. JCLO Memo. at 12-13; Intervenors' Memo. at 12, n.8.

If different standards apply, a movant would have to demonstrate that it has a substantial interest adversely affected by the underlying administrative decision to intervene in circuit court, but not in the court of appeals. There is no reason why the standing requirement should shift or relax as the case proceeds on appeal.

If a court denied a petition to intervene in a circuit court proceeding under Section 227.53(1)(d) due to lack of a legally recognized interest, a more relaxed intervention standard could allow a successful re-petition on appeal. As

applied here, it would mean a circuit court would have denied the JCLO petition for intervention, but a court of appeals could have granted the same petition. That outcome is untenable and is inconsistent with the purpose of providing a uniform procedure for judicial review proceedings in Chapter 227. *See Wagner*, 181 Wis. 2d at 640.

Applying a shifting intervention standard would be unprecedented. In cases other than judicial review proceedings, the rules of civil and appellate procedure apply the same intervention standards. *See* Wis. Stat. §§ 803.09, 809.13. Rather than interpret these provisions to create a shifting standard, the Court should apply the intervention standard in Section 227.53(1)(d) uniformly to judicial review proceedings, whether in circuit court or on appeal.[2]

---

[2] Petitioners-Respondents do not advance an argument that forecloses intervention after circuit court proceedings. This Court can find that a person may intervene pursuant to Section 227.53(1)(d) in the court of appeals as long as they are "interested" within the meaning of that provision. The legislative history cited by Intervenors is not to the contrary. Intervenors' Memo. at 4. Rather, the quoted text merely emphasizes Petitioners-Respondents' position that persons with a strong interest in the underlying administrative decision should be permitted to intervene.

Petitioners-Respondents have demonstrated that the intervention standard in Section 227.53(1)(d) applies in courts of appeal. The Court must next inquire whether there is a conflict between this standard and the one found in the Rules of Appellate Procedure.[3]

### c. The Chapter 227 intervention standard applies because it conflicts with the Rules of Appellate Procedure.

#### i. Chapters 227 and 803 conflict.

A person seeking intervention must be "interested," *i.e.*, have a substantial interest recognized by the law that governs underlying administrative decision. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 410-411, 466 N.W.2d 227 (Ct. App. 1991). In contrast, JCLO asks this

[3] Intervenors state that the case law on conflicts with Chapter 227 has "never been applied to appellate level procedure." Intervenors' Memo. at 11. The appellate level procedure at issue, however, merely incorporates the civil procedure standard. Wis. Stat. §§ 803.09, 809.13. Moreover, one of the cases cited *does* concern whether a general or more specific rule for appellate venue should apply, in light of a potential conflict with Chapter 227's venue provision. In *State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals*, 2018 WI 25, ¶ 21, 380 Wis. 2d 354, 909 N.W.2d 114, the Court concluded that there was no conflict in that case; but that it undertook the inquiry demonstrates that the question of the consistency between Chapter 227 and appellate procedure is supported by the case law, not contrary to it.

Court to interpret Section 803.09(2m) to permit intervention even when a prospective intervenor lacks that interest and injury, and thus standing, to participate in a case. JCLO Memo. at 15-16. The conflict between the standards is clear and arises only because of JCLO's and Intervenors' interpretation.

JCLO nevertheless argues that the Court must find no conflict based on a judicial preference for statutory harmonization. JCLO Memo. at 14-15. However, the cases cited are not part of the cases construing Chapter 227's applicability, which mention no such preference for harmonization. Moreover, even if such a preference for harmonization is applicable here, it cannot override a clear conflict between statutes.

JCLO further attempts to avoid a conflict by arguing that JCLO has an "inherent interest" under Section 803.09 that fits within a "broad universe" of interests recognized by Section 227.53(1)(d). JCLO Memo. at 16. Section 227.53(1)(d), however, does not recognize a "broad

universe" of interests. Rather, the case law makes plain that the interest required by Section 227.53(1)(d) is one unique to the context of judicial review of administrative decisions. *See Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶ 44, 333 Wis. 2d 402, 797 N.W.2d 789.

The only way to avoid a conflict is if the "interest" required for intervention pursuant to Section 803.09(2m) is the same as the "interest" required by Section 227.53(1)(d). If that is the case, the Court must deny JCLO's Petition to Intervene under Section 803.09, for failure to demonstrate a substantial interest affected by the administrative decision.

**ii. Section 803.09 must give way to the more specific Section 227.53 in the face of a conflict.**

JCLO argues that Section 803.09 is more "specific" than Section 227.53(1)(d) because "only three parties may invoke it . . . if a party to an action presents one of three purely legal issues[.]" JCLO Memo. at 15. However, Section 227.53(1)(d) is specific to judicial review actions, while Section 803.09 applies to civil cases generally.

Indeed, JCLO observes that Section 803.09(2m) applies in any court at any time in any case in which application of a statute is at issue. Plainly, Section 227.53(1)(d), limited solely to judicial review actions, is the more specific statute.

Further, none of the cases dealing with conflicts between Chapter 227 and other procedural provisions recognizes an exception to the rule that Chapter 227 controls in the presence of a conflict for "more specific" procedural provisions.

The presence of the phrases "at any time" and "as a matter of right" in Section 803.09(2m) similarly offers no reason why Chapter 227 standing requirements do not apply here. JCLO Memo. at 17, 18. First, there is no evidence that the Legislature implicitly overrode both the language of Chapter 227 and the case law navigating conflicts between Chapter 227 and generally applicable civil procedure statutes. Rather, the presence of the phrase "at any time" only highlights the conflict between these provisions, because Section 803.09 also applies in circuit court

proceedings, which cannot be squared with Section 227.53(1)(d). Second, that language is entirely consistent with Petitioners-Respondents' analysis that JCLO can intervene in non-Chapter 227 civil cases. Third, as Petitioners-Respondents analyzed in our initial Memorandum at 11-17, the term "as a matter of right" is not the same as an unconditional right to intervene.

## II. JCLO does not meet the Chapter 227 standard for intervention because it lacks a legally recognized interest.

A person seeking intervention must be "interested," *i.e.*, have a substantial interest recognized by the law governing the administrative decision. *See In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 410-411. JCLO makes no attempt to demonstrate an interest in the underlying high capacity well permits. JCLO instead misstates the interest requirement and then purports to have a novel, "inherent" interest that meets the requirement.

JCLO argues that "interested" parties need not be "aggrieved," within the meaning of Section 227.53(1), and

that JCLO meets a relaxed "interested person" standard because it is "concerned" about the outcome. JCLO Memo. at 13, n.3 (citing dictionary definition of "interested"). This misstates the purpose of the requirement that a party be "aggrieved" to petition for judicial review.

Section 227.53(1) uses the term "aggrieved" because it focuses on who is the petitioner, *i.e.*, the party whose interests were injured by the underlying administrative decision, as opposed to a party who prevailed in the administrative proceeding. *See* Petitioners-Respondents' Memo. at 6-7; *Pub. Intervenor v. Wis. Dep't of Nat. Res.*, 184 Wis. 2d 407, 420, 515 N.W.2d 897 (1994) (discussing reasons to preclude petitions for judicial review by prevailing parties). The term "aggrieved" is not designed to identify a heightened interest requirement for filing a petition for judicial review as compared to the interest required for intervention. The term merely limits the right to petition to the interested party who was "adversely affected" by the agency determination, with the aim of preventing

prevailing or uninjured parties from seeking review of advisory or otherwise non-judiciable matters. *See* Wis. Stat. § 227.52; *Pub. Intervenor*, 184 Wis. 2d at 420.

Critically, to be a party to that underlying decision, that person must already have demonstrated a substantial interest that would be affected by the administrative decision. The person may have petitioned for a contested case hearing by demonstrating a "substantial interest" that will be "injured in fact or threatened with injury"; the Legislature has not decided to exclude that interest from protection; and the injury is different in kind from the general public. Wis. Stat. § 227.42(1)(a)-(c). Otherwise, they may have intervened in the administrative proceeding as a person "whose substantial interests may be affected by the decision". Wis. Stat. § 227.44(2m). In other words, whether persons are petitioning for contested case hearing, intervening in a contested case hearing, petitioning for judicial review, or intervening in a judicial review proceeding, they must at a minimum have a substantial

interest that will be affected by the administrative decision. *Compare* Wis. Stat. §§ 227.42, 227.44(2m), 227.52, and 227.53(1). JCLO simply does not have that interest here.

Moreover, reliance on a dictionary definition of "interested" is neither appropriate nor necessary here, because courts have interpreted and applied the term in a consistent manner. *See* Petitioners-Respondents' Memo. at 8-11; *Kalal,* 2004 WI 58, ¶ 45; *Bruno v. Milwaukee Cty.*, 2003 WI 28, ¶ 8, 260 Wis. 2d 633, 660 N.W.2d 656 ("[W]ords or phrases with a peculiar meaning in the law must be construed according to such meaning.").[4]

Additionally, the definition offered by JCLO does nothing to support its argument that "interested" means something other than having a substantial interest that will be affected by the administrative decision. For example, JCLO's definition of "interested" includes "affected,"

[4] Courts have also interpreted "interest" in the context of § 803.09(1) to require a direct injury. *See* DNR Memo. at 7-8. Thus, even if this Court were importing the meaning of "interest" from the general civil procedure statute, it would still require that JCLO be injured by the agency decision, which it is not.

which, as JCLO notes, is what "aggrieved" means under Section 227.01(9). JCLO Memo. at 13, n.3. JCLO's dictionary definition of "interested" also includes "concerned," which suggests that anyone merely worried about the case can intervene. JCLO Memo. at 13, n.3.

JCLO has not demonstrated that the "interested" requirement means anything other than what courts have said it means: a person must have a substantial interest that will be affected by the outcome of the case, and that is recognized by the substantive statute being applied by the agency.

JCLO's second attempt to dodge the interest requirement to participate in judicial review proceedings is that JCLO is "inherently interested" in any case involving "challenges to laws." JCLO at 15. This argument also must fail.

The argument that Chapter 227 recognizes a "broad universe" of interests is inconsistent with established case law on standing in judicial review proceedings. *See* Section

I.c.i, above. Those cases make clear that protected interests are those recognized by the statutes at issue in an underlying administrative decision. *Id.*

Additionally, and as Petitioners-Respondents established in our initial memorandum, even under the existing intervention as of right provision in Section 803.09(1), the Legislature is not capable of merely asserting an interest in a policy outcome to qualify for intervention. *See* Petitioners-Respondents' Memo. at 18-22.

## III. JCLO also fails to meet the standard for intervention in Section 803.09.

As Petitioners-Respondents discussed in depth in our initial memorandum on intervention, JCLO also does not meet the generally applicable standards for intervention as of right. *See* Petitioners-Respondents' Memo. at 11-28. This conclusion is unaffected by JCLO's novel argument that it possesses an "inherent" interest in statutory construction, because case law establishes that such a purported interest is insufficient to intervene as of right under Section 803.09. *Id.* at 18-22.

Petitioners-Respondents further observe that JCLO's and Intervenors' arguments are predicated on the notion that Section 803.09(2m) does not conflict with Chapter 227 because the issue is being raised in the context of an appeal. However, Section 803.09(2m), and Section 803.09 generally, applies to intervention in both circuit and appellate courts. This fact reinforces the JCLO's internally inconsistent yet unavoidable conclusion that in the context of judicial review proceedings, the term "interest" in Section 803.09(2m) has two meanings: "substantial interest" in circuit court; and a broad, vague "inherent" interest in appellate courts. Of course, that conclusion defies every applicable canon of statutory construction and finds no support in any legislative history.

## CONCLUSION

Petitioners-Respondents respectfully ask the Court to apply the Chapter 227 standard and deny JCLO's Petition to Intervene.

Dated this 9th day of July 2019.

Respectfully submitted,

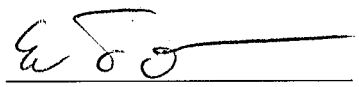
Evan Feinauer (State Bar No. 1106524)
Kathryn Nekola (State Bar No. 1053203)
Clean Wisconsin
634 W. Main Street, Suite 300
Madison, WI 53703
efeinauer@cleanwisconsin.org
608-251-7020 x21
*Attorneys for Petitioner-Respondent Clean Wisconsin*

Carl Sinderbrand (State Bar No. 1018593)
Axley Brynelson, LLP
2 East Mifflin Street, Suite 200
Post Office Box 1767
Madison, WI 53701-1767
608.257.5661
*Attorney for Petitioners-Respondents Pleasant Lake Management District and Clean Wisconsin*

## FORM AND LENGTH CERTIFICATION

I hereby certify that this motion conforms to the rules contained in Wis. Stat. § 809.81 as to form and certification and length requirement set forth in the supreme court order. The length of this memorandum is 3,350 words.

Dated: July 9, 2019.



Evan Feinauer