SUPREME COURT OF WISCONSIN

Clean Wisconsin, Inc. and Pleasant Lake Management District,

Petitioners-Respondents,

v.

Wisconsin Department of Natural Resources,

Respondent-Appellant,

Appeal No.
2018 AP 000059

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.

On Certification by Wisconsin Court of Appeals,
District II, dated January 16, 2019

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On Appeal From The Dane County Circuit Court,
The Honorable Judge Valerie Bailey-Rihn, Presiding,
Case Nos. 16CV2817, 16CV2818, 16CV2819, 16CV2820,
16CV2821, 16CV2822, 16CV2823, 16CV2824

THE WISCONSIN LEGISLATURE'S RESPONSE TO DEPARTMENT OF NATURAL RESOURCES' SUPPLEMENTAL MEMORANDUM CONCERNING INTERVENTION

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As shown in its memorandum filed June 19, 2019 ("Legisl.-Mem."), the Wisconsin Legislature is entitled to intervene as of right in this appeal. (Legisl.-Mem. at 6-7). Wisconsin Statutes sections 809.13 and 803.09(2m)[1] govern and set forth the requirements for intervention. It is of no matter that this is an appeal from a chapter 227 judicial review proceeding. The civil procedure rules apply to such proceedings unless the rule is "foreclosed by a different procedure prescribed" by chapter 227. (Legisl.-Mem. at 6-7, 11). When the chapter 227 proceeding has found its way to the appellate courts, chapters 808 and 809's appeal procedures apply. (Legisl.-Mem. at 10-11).

DNR asserts that the use of the word "action" in Wisconsin Statutes section 803.09 suggests the statute should not apply because a chapter 227 proceeding is a "special proceeding," not an "action." (DNR-Mem. at 4 n.1). The case it cites, *State ex rel. Department of Natural Resources v. Wisconsin Court of Appeals,*

[1] Legislative intervention (Wisconsin Statutes sections 13.365, 803.09(2m), and 809.13) was adopted in 2017 Wis. Act. 369, one of the pieces of "Extraordinary Session" legislation, which was recently upheld as validly enacted. *League of Women Voters of Wisconsin v. Evers,* 2019 WI 75, ¶ 2.

Dist. IV, 2018 WI 25, ¶ 18, 380 Wis. 2d 354, 909 N.W.2d 114, shows otherwise. As used in chapters 801 to 847, the word "action" expressly includes "special proceeding." *Id.* The intervention procedures of 803.09 and 809.13 therefore govern. *Id.* They apply to the intervention "unless foreclosed by a different procedure prescribed by ch. 227." (Legisl.-Mem. at 11). Chapter 227 does not "foreclose" the requested intervention and it does not prescribe any procedure for intervention on appeal.

I. The Legislature Meets The Standards For Intervention.

DNR argues that Wisconsin Statutes section 809.13 "does not provide an independent basis to intervene" because it incorporates the standard for intervention of Wisconsin Statutes section 803.09. (DNR-Mem. at 19, 22-23). Section 809.13 provides for intervention on appeal if movant "show[s]" that its "interest meets the requirements of s. 803.09(1), (2), or (2m)." The fact that section 809.13 incorporates the intervention standards of section 803.09 does not constrain the ability to

intervene on appeal. And this appeal meets the criteria for intervention as of right under section 803.09(2m).

The plain language of Wisconsin Statutes section 809.13 "clearly indicates that a non-party may intervene in an appeal," filed by another party, "as long as the non-party meets the requirements of the general intervention statute, Wis. Stat. § (Rule) 803.09." *City of Madison v. Wis. Emp't Relations Comm'n*, 2000 WI 39, ¶ 8, 234 Wis. 2d 550, 610 N.W.2d 94. An appellate intervention motion may be filed even after the deadline for filing a notice of appeal to initiate the appeal. *Id.*, ¶ 12.[2]

The Legislature meets the requirements for intervention established by Wisconsin Statutes sections 809.13 and 803.09(2m). (Legisl.-Mem. at 7-9). It is entitled to intervene as of right at "any time" under those statutes if a party challenges the

[2] However, if the movant was aggrieved by the judgment and therefore subject to the jurisdictional deadline for filing a notice of appeal (Wisconsin Statutes sections 808.04, 809.10(1)(e)) but failed to timely appeal, it cannot use intervention under Wisconsin Statute section 809.13 to participate in the action. *Weina by Peyton v. Atl. Mut. Ins. Co.*, 177 Wis. 2d 341, 347, 501 N.W.2d 465 (Ct. App. 1993).

construction or validity of a statute as part of a claim or affirmative defense. *Id.*

In this case, Clean Wisconsin challenges DNR permits for eight high capacity wells. It contends that DNR was required to conduct an environmental review before such permit approvals and impose necessary conditions. (Certification at 3-4). DNR argues that this case considers whether it correctly approved eight high capacity wells in light of "existing statutes." (DNR-Mem. at 4).

This chapter 227 judicial review proceeding challenged DNR's well permits, arguing that DNR failed to conduct the required environmental review. Opponents disagree, arguing that by virtue of Act 21—specifically, Wisconsin Statutes section 227.10(2m)—DNR is not permitted to conduct such additional environmental review for the wells. (Opening Brief, 5/2/2018 at 1). This appeal considers the construction and scope of the applicable statutes. (*Id.* at 24, 27-36, 43-47.) Petitioners-Respondents disagree as to the proper construction of the

statutes, and argue that DNR's interpretation of the statutes is unconstitutional. (Resp. Brief, 6/1/2018 at 22-40).

This case therefore turns on the parties' respective "challenge[] [to] the construction or validity of a statute, as part of a claim or . . . defense." Wis. Stat. § 803.09(2m). The Legislature may intervene in this case at any time as a matter of right. Wis. Stat. § 13.365. As spelled out in the parties' merits briefs filed in the Court of Appeals, this case squarely presents significant questions of statutory construction implicating DNR's powers and Act 21's constraints on the application of rules or standards not provided by statute. Therefore, the Legislature is entitled to intervene in this appeal as a matter of right.

II. Chapter 227 Does Not "Foreclose" Appellate Intervention.

Wisconsin Statutes section 809.13 governs intervention here. Such intervention does not "contradict" chapter 227. (Legisl.-Mem. at 16-17). On this issue the statutes are in harmony. (*Id.* at 13-15, 16-17.) Chapter 227 does not address intervention on appeal; indeed, it is silent on procedures in the

appellate courts, leaving them to chapters 808 and 809. (*Id.* at 10-11.)

The standards for intervention in the circuit court in chapter 227 judicial review proceedings are consistent with intervention under Wisconsin Statutes sections 809.13 and 803.09, allowing a person to intervene whose "interests" meet the section 803.09 requirements. Similarly, section 227.53(1)(d) broadly extends intervention to "interested persons." That broad scope encompasses the interests of the Legislature when the construction of a statute is at issue in a chapter 227 proceeding. (Legisl.-Mem. at 13-14, 15-16).

DNR argues that 809.13 intervention contradicts section 227.53(1)(d) because the latter contains a "timing requirement," suggesting there is a drop-dead deadline for filing a petition to intervene. (DNR-Mem. at 3, 13, 17-18, 20-21). That overstates the matter. Section 227.53(1)(d) sets no drop-dead deadline for filing for intervention; it is open-ended. Thus, it

could be filed at any time during a live chapter 227 proceeding.[3] Likewise, section 809.13 sets no deadline for filing for intervention.

Although it imposes no deadline, section 227.53(1)(d) does provide for notice of the motion, requiring the intervention motion to be filed at least five days prior to hearing of the motion. Contrary to DNR's argument (DNR-Mem. at 21), that notice period is not contradicted by section 809.13's procedures. Under Wisconsin Statutes section 809.13, there would be more than five days' notice before intervention is decided because that statute provides an 11-day response period. Both schemes thus contain a built-in notice period before the court will rule on the

[3] There must be an active proceeding for intervention. If there is no chapter 227 proceeding pending then there is no proceeding in which to intervene. *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983). Intervention is "ancillary" to the main cause of action. *Id.* If there is an appeal of such review pending in the appellate courts, intervention can occur consistent with section 227.53(1)(d) so long as it is requested while the appeal is still open. *See Muench v. PSC*, 261 Wis. 492, 53 N.W.2d 514 (1952) (considering intervention under Wisconsin Statutes section 227.16 and recognizing that attorney general was an interested person; however, intervention was denied because there was no pending proceedings in which to intervene).

intervention motion. There is thus no conflict between the two statutes.

This is different than other chapter 227 timing provisions, such as Wisconsin Statutes sections 227.53(2) and 227.55 (petition for review and record filing deadlines), which contain mandatory filing deadlines. *See Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 642, 511 N.W.2d 874 (1994); *see also Gomez v. Labor & Indus. Review Comm'n*, 153 Wis. 2d 686, 693, 451 N.W.2d 475 (Ct. App. 1989) (failure to properly serve LIRC by 30-day deadline for filing petition for judicial review was a "jurisdictional" error).

Additionally, without any basis, DNR assumes that intervention is forever "moot" after judicial review is completed in the circuit court. (DNR-Mem. at 7). That speaks nothing of filing to intervene in an appeal. Section 227.53(1)(d) only relates to intervention at the circuit court level; it does not address intervention on appeal. Chapter 227 provides generally for appeals. Wis. Stat. § 227.58. Nothing in chapter 227 sets the

timing for or precludes filing for intervention on appeal; rather, that is subject to the procedures of chapters 808 and 809.

There is no basis to hold that Wisconsin Statutes section 809.13 is inapplicable to an appeal in the chapter 227 context. (DNR-Mem. at 23 n.6). Chapter 227 is subject to the appeal procedures of chapter 809, and therefore section 809.13.

III. DNR's Arguments Would Rewrite The Statutes.

DNR conjures a conflict between intervention under Wisconsin Statutes sections 809.13 and 227.53(1)(d), arguing that chapter 227 permits intervention only for (i) "interested persons" who are (ii) injured, either directly by the agency's action or within the zone of interests of the substantive laws. (DNR-Mem. at 2-3, 7, 8-12, 14-17, 20-21, 22, 23 n.6). Element (ii) is manufactured from whole cloth by DNR; it is nowhere to be found in section 227.53(1)(d). Indeed, that added element is contrary to the statute.

Section 227.53(1) recognizes two different categories of persons involved in chapter 227 judicial review: (1) persons

"aggrieved" by the agency action, who may initiate the judicial review proceeding, who are "parties"; and (2) "other interested persons," who may intervene. Wis. Stat. § 227.53(1)(d). "Aggrieved" means a person "whose substantial interests are adversely affected by a determination of an agency." Wis. Stat. § 227.01(9).

"Other interested persons" and "aggrieved" persons are distinctly different categories. These are different terms used in the same section and are used to describe two different categories of persons. *State ex rel. Dep't of Nat. Res.*, 2018 WI 25, ¶ 28 ("When the legislature uses different terms in the same act, we generally do not afford them the same meaning . . . . So 'designate' cannot mean 'select' in the context of § 2 of Act 61."); *Gister v. Am. Family Mut. Ins. Co.*, 2012 WI 86, ¶ 33, 342 Wis. 2d 496, 818 N.W.2d 880 ("[W]here the legislature uses similar but different terms in a statute, particularly within the same section, we may presume it intended the terms to have different meanings."); *see* Antonin Scalia & Bryan A. Garner, Reading

Law: The Interpretation of Legal Texts 170 (2012) (canon of "Presumption of Consistent Usage" requires that "a material variation in terms suggests a variation in meaning").

Thus, by the statute's plain words, "other interested persons" is distinct from persons "aggrieved" by the action. "Interested" is a broad descriptor. It includes those who are concerned with the topic or have an interest in it. (Legisl.-Mem. at 13 n.3).

DNR disregards these plain words and argues that "other interested persons" permitted to intervene by Wisconsin Statutes section 227.53(1)(d) necessarily means persons who are directly injured by the agency action and are in the "zone of interest" of the law—essentially, that they are aggrieved. DNR argues that such direct injury must be shown for intervention under section 227.53(1)(d). To do so, DNR relies upon inapplicable cases considering "aggrieved" status entitling a party to file a judicial review action under section 227.53(1)—not intervention as an "other interested person."

For example, *Waste Management of Wisconsin v. State of Wisconsin Department of Natural Resources*, 144 Wis. 2d 499, 503–04, 424 N.W.2d 685 (1988), discussed at length by DNR, does not consider intervention or the "interested person" question, but rather the statutory right to challenge an agency's action under Wisconsin Statutes sections 227.15 and 227.16 (now 227.52 and 227.53) as an "aggrieved" person. In another case cited by DNR, *In re Delavan Lake Sanitary District*, 160 Wis. 2d 403, 414, 466 N.W.2d 227 (Ct. App. 1991), the court of appeals recognized that the standard to participate in a proceeding is not the same as that required to petition for review under chapter 227—the latter requires the party to be "aggrieved":

> The main issue on appeal is whether the town and the district have standing to *petition* for review of the department's determination. This is not the same as whether they have standing to *participate* in the proceedings for review. The distinction is important because an entity may have standing to participate yet, because not "aggrieved," lack standing to take an appeal [for judicial review under chapter 227]. Here, the town and the district were dismissed from further participation in the proceedings because they were not aggrieved. This result represents an improper blending of the two standards.

Id. at 410. (emphasis added).

A party must be "aggrieved" to file the judicial review action (thus becoming a "party"), but merely an "interested person" to intervene. There is no injury-standing requirement to intervene under section 227.53(1)(d). That would rewrite the statute to define "other interested persons" to mean persons aggrieved by the agency action, thus allowing only aggrieved persons to intervene. This is defeated by the plain words of the statute. One must be "aggrieved" to file for judicial review; it need only be "interested" to seek intervention. A person of course may be interested in the proceeding without being directly injured by it.

DNR's cited cases merely show that the courts have interpreted the term "aggrieved" to require a direct injury or effect, in order to obtain judicial review under Wisconsin Statutes section 227.53(1). But that is irrelevant to intervention. DNR offers no authority holding that a party must show a direct injury or effect to be an "other interested person" who may intervene under section 227.53(1)(d).

On the contrary, case law shows that a "party" who participated in a chapter 227 judicial review proceeding (*i.e.*, an "aggrieved" person), is not an "other interested person" with the right to seek intervention. *See Citizens' Util. Bd. v. Pub. Serv. Comm'n of Wis.*, 2003 WI App 206, ¶ 13, 267 Wis. 2d 414, 671 N.W.2d 11. The ability of aggrieved persons to participate in chapter 227 proceedings "originates from different authority from intervenors' ability to participate" in such proceedings. *Id.*[4]

DNR also erroneously looks to mandatory intervention under Wisconsin Statutes section 803.09(1), to argue that the word "interest" in that statute means the same as "other interested persons" in section 227.53(1)(d). (DNR-Mem. at 7-8).

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[4] In *Citizens'*, the court held that a party to an agency decision must file for judicial review by the 30-day deadline of 227.53(1). There, the party "failed to comply with those procedural requirements," and moved for intervention as an "other interested person" under section 227.53(1)(d), thus attempting an end-run around the "procedural requirements for judicial review." The court affirmed the circuit court's denial of intervention. Perhaps thinking of section 803.09(1), the court mentioned that courts consider whether a potential intervenor has "standing" and whether its interests are already adequately represented by another party. 2003 WI App 206, ¶ 7. However, that was not considering the definition of "interested person" of (1)(d) and it necessarily did not consider the legislative intervention category of 803.09 since it was not yet in existence. In that preliminary discussion in *Citizens'*, the court used the term "standing" loosely, merely mentioning it in passing.

Again, however, these statutes define different categories. In contrast to section 227.53(1)(d)'s broad category of "interested persons" who may intervene, Wisconsin Statutes section 803.09(1) describes a specific category of interested persons who shall be permitted to intervene as of right:

> ...anyone shall be permitted to intervene in an action when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties.

Wis. Stat. § 803.09(1) (emphasis added).

DNR cites cases regarding 803.09(1) mandatory intervention and its federal analogue, Fed. R. Civ. P. 24(a)(2),[5] to

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[5] *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 547, 334 N.W.2d 252 (1983) ("Because sec. 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, we look to cases and commentary relating to Rule 24(a)(2) for guidance in interpreting sec. 803.09(1)."). Also inapposite are the federal cases cited by DNR applying different intervention statutes and/or considering the Article III standing requirement for federal jurisdiction. *Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533 (D.C. Cir. 1999) (holding that Article III standing is required for intervention under federal statute on judicial review of agency orders); *Sokaogon Chippewa Cmty v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) (holding that party could not intervene as of right and court did not abuse its discretion in denying motion to permissively intervene as untimely); *Waterkeeper All. v. Wheeler*, 330 F.R.D. 1 (D.D.C. 2018) (explaining requirements under which "[p]arties may intervene as of

argue that 227.53(1)(d)'s phrase "other interested persons" incorporates the requirements of section 803.09(1). (DNR-Mem. at 7-8). This compares apples to oranges. Section 803.09(1) defines a specific subset of all interested persons who may intervene as of right due to their interest in the property or transaction. In applying that statute, case law considers whether the statutory elements are established and factors such as direct injury. *See City of Madison,* 2000 WI, 39 ¶ 11.

Section 803.09(1) defines a specific category of interested persons who may intervene as of right. That has no bearing on the meaning of the open-ended language—all "other interested persons"—found in Wisconsin Statutes section 227.53(1)(d).

Further, here the Legislature is entitled to intervene under Wisconsin Statutes section 803.09(2m) as a matter of right. That statute alone determines the requirements for intervention. *City*

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right under [Fed. Rule Civ. Proc.] 24(a)" and their relationship to Article III standing requirements).

None of these cases has any bearing on the scope of intervention under section 227.53(1)(d) for "other interested parties."

of Madison, 2000 WI 39, ¶ 11 n.7 ("intervention is a product of statutory creation, not the common law").

Conclusion

The Wisconsin Legislature respectfully requests that the Court grant its motion to intervene in this appeal as of right under Wisconsin Statutes sections 809.13 and 803.09(2m).

Dated this 9th day of July, 2019.

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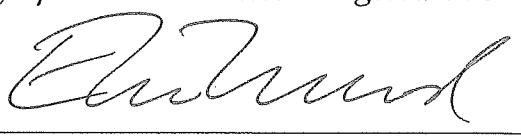
Attorneys for the Wisconsin Legislature

By: 

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wisconsin Statutes section 809.81 for a document produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this memorandum is 3,066 words.

Dated this 9th day of July, 2019.

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