STATE OF WISCONSIN COURT OF APPEALS
DISTRICT I

Appeal Nos. 2019AP299 and 2019AP534 (Consolidated)

FRIENDS OF THE BLACK RIVER FOREST
and CLAUDIA BRICKS,

Petitioners-Appellants,

v.

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES and NATURAL RESOURCES
BOARD,

Respondents-Respondents,

KOHLER COMPANY,

Intervenor-Respondent. Appeal No. 2019AP299

FRIENDS OF THE BLACK RIVER FOREST
and CLAUDIA BRICKS,

Plaintiffs-Appellants,

v.

WISCONSIN DEPARTMENT OF NATURAL
RESOURCES and NATURAL RESOURCES
BOARD,

Defendants-Respondents,

KOHLER COMPANY,

Intervenor-Respondent. Appeal No. 2019AP534

(*Continued caption and counsel listed on inside cover*)

APPEAL FROM FINAL ORDER OF THE
SHEBOYGAN COUNTY CIRCUIT COURT,
THE HONERABLE L. EDWARD STENGLE PRESIDING
SHEBOYGAN COUNTY CASE NO. 18-CV-0178

APPEAL FROM THE FINAL ORDER OF THE
DANE COUNTY CIRCUIT COURT,
THE HONORABLE STEPHEN E. EHLKE, PRESIDING,
DANE COUNTY CASE NO. 18-CV-2301

NON-PARTY *AMICUS CURIAE* BRIEF OF CLEAN WISCONSIN, INC., IN SUPPORT OF PETITIONERS

Katie Nekola, SBN 1053203
Knekola@cleanwisconsin.org
Tel. (608) 251-7020 ex. 14

Evan Feinauer, SBN 1106524
Efeinauer@cleanwisconsin.org
Tel. (608) 251-7020 ex. 21

Attorneys for Clean Wisconsin, Inc.

Brandon Hunzicker
Law Student Extern

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703
Fax. (608) 251-1655

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STATEMENT OF INTEREST

Wisconsin is endowed with bountiful natural resources and scenic places, but the benefits of this endowment are only secure when citizens who would be deprived of them have the right to be heard in court. Clean Wisconsin has been a party in numerous cases on behalf of its members to protect their environmental interests. We have been the voice for Wisconsin citizens concerned about the quality of the air they breathe, the water they drink, and the beautiful places they enjoy. For decades, Wisconsin courts have acknowledged the right of groups like Clean Wisconsin and, here, the Friends of the Black River Forest, to have their day in court when their protected interests in the environment are put at risk. Clean Wisconsin submits this brief urging rejection of the Sheboygan County Circuit Court ruling that would break with decades of precedent to deny standing in this case.

INTRODUCTION

Clean Wisconsin, formerly Wisconsin's Environmental Decade, will show in this amicus curiae brief that the Sheboygan County Circuit Court erred when it found that Friends of The Black River Forest lack standing. The Friends meet the straightforward standing requirements established by

Wisconsin's Environmental Decade, Inc., v. Public Service Commission of Wisconsin, 69 Wis. 2d 1, 230 N.W.2d 243 (1975) (Hereinafter *WED*) by alleging direct environmental injuries that are recognized by law. Reversing the Circuit Court's ruling will not only correct an erroneous interpretation and application of law, it will ensure that Wisconsin's tradition of citizen advocacy for environmental rights is not undermined by a restrictive and novel interpretation of standing doctrine.

Part I of this brief will review Wisconsin's environmental standing test. Part II will examine US Supreme Court cases as persuasive authority on environmental standing. Part III will highlight the Circuit Court's errors of law and application of fact to law and briefly state how the Friends' allegations easily meet the standing requirements.

Ultimately, this brief will show that *WED* and its progeny govern this case, standing is clearly present here, and that Wisconsin residents stand to lose should the Circuit Court's misguided ruling be allowed to stand.

ARGUMENT

I. *Wisconsin's Environmental Decade v. Public Service Commission* Governs Standing for Environmental Injuries

While cases since *WED* have further refined the test for environmental standing, *WED* continues to provide the basic framework.

A. WED Provides a Two-Step Test to Determine Standing

WED holds that environmental harms can confer standing if plaintiffs allege a direct injury to an interest that is recognized by law. In that case, WED, acting on behalf of individually named members, alleged that PSC orders "harm the environment by prematurely devouring the last, dwindling reserves of natural gas, and by encouraging environmentally destructive practices such as strip mining." *Id*. at 6-7. The circuit court dismissed the action, reasoning that the "'petitioner is not a person aggrieved whose legal rights, duties or privileges are directly affected by the orders of respondent.'" *Id*. The Supreme Court then analyzed the dismissal and in the process formulated Wisconsin's current two-step standing analysis: "The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner. The second step is to determine whether the interest asserted is recognized by law." *Id*. at 10. This brief now addresses these steps in turn.

1. Direct Injury

The court looked to the federal system for persuasive authority and found that: "allegation of injury in fact to aesthetic, conservational and

recreational interests has been readily accepted as sufficient to confer standing." *Id*. at 10-11.

The PSC argued that the alleged injuries were "speculative and remote and cannot be construed as being directly caused by the order in question." *Id*. at 13-14. The court rejected this argument, agreeing instead with WED that "directly affected" includes injuries that are "remote in time" or that "will only occur as an end result of a sequence of events set in motion by the agency action challenged." *Id*. at 14. Whether an injury will actually result is a factual question "to be determined on the merits, not on a motion to dismiss for lack of standing." *Id*. at 14.

WED thus established that an aesthetic, conservational, or recreational interest can be the basis of a direct injury, and that the injury can be in the future and require a sequence of events to trigger it.

2. Interest Recognized by Law

The court noted with approval that "federal courts have shown a willingness to find that environmental interests are arguably within the zone of interest protected by virtually any statute relating to environmental matters." *Id*. at 10-11. The court accepted WED's argument that its members'

interest "in the future adequacy of their service" was covered by the statutes. *Id*. at 15-17. The Court held that:

> WED is asserting more than the general interest of the citizens of Wisconsin in seeing their laws properly executed. WED has alleged injury to the environmental interests of its members who live in the affected area and injury to the interests of its members, who are customers of the corporation, to continue to enjoy adequate and sufficient service through the conservation of natural gas. We conclude that these interests are sufficiently protected under the relevant statutes that WED has standing to seek review of the PSC's actions in this case.

Id. at 19.

WED clearly shows that environmental, conservational, or recreational interests can be legally injured. When identifiable people, or an organization representing the environmental interests of those people, allege a direct injury to those interests as a result or future consequence of an agency action, and when those interests are sufficiently recognized by law, a court has a matter before it that can be addressed on the merits. This remains the current rule on environmental standing. Subsequent cases have added clarity to its requirements without altering them.

B. *Subsequent Caselaw Refined the* WED *Analysis*

1. The Sequence of Events Must be Direct, and the Injury Must be to a Protected Interest

In *Fox v. Wisconsin Department of Health & Social Services.*, 112 Wis. 2d 514, 334 N.W.2d 532 (1983), the Court reaffirmed the holdings of *WED* while defining the scope of the "sequence of events" that "directly effects" a plaintiff in the injury analysis.

In that case, the Court found allegations that a prison location would lead to increased recidivism, a breakdown of family ties, and increased welfare costs to be "presumed psychological effects" on third parties that were "simply too remote" for direct injuries. *Id*. at 526-27. The sequence of events giving rise to standing cannot be "so 'conjectural or hypothetical' . . . as to strain the imagination" or represent "a sequence of increasingly unlikely events." *Id*. at 527-29 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)).

Fox further clarified that a standing theory based on a law protecting environmental interests must demonstrate an *environmental* injury. The court reiterated the holding from *WED* that "there must be some substantial and direct causal link between the injury claimed and the physical environment" *Id*. at 531.

2. Injuries Need Not be Certain

While *Fox* emphasized the limit to the sequence of events a court will consider, *Milwaukee Brewers Baseball Club v. Wisconsin Department of Health & Social Services*, 130 Wis. 2d 56, 387 N.W2d 245 (1986) shows that a court may still find standing based on injuries several steps removed from an agency action. After stating that "*Fox* did not alter the two-step test for determining standing," the Court found an allegation of future traffic congestion as a result of a proposed prison to affect environmental interests recognized by law, thus conferring standing. *Id*. at 68-70.

In *Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W.2d 748 (1997), the plaintiff's alleged injury was the possibility of his land decreasing in value and thus causing him to pay higher relative taxes due to a tax freeze. *Id*. at 249. The Court agreed, saying that "[t]he injury necessary for standing must be actual or threatened" and that the plaintiff's "property values *may* decrease resulting in higher real property taxes relative to other agricultural land." *Id*. at 250 (emphasis added). This case makes plain that injuries need not be certain to confer standing.

3. Rules Create Legally Protected Interests

In *Trojan v. Board of Regents of the University of Wisconsin System*, 104 Wis. 2d 277, 311 N.W.2d 586 (1981) the Court agreed that a party had a "legally protected interest[]" in an administrative code, and thus had standing to challenge an action. *Id*. at 286-88. The court described a related statute that "recognize[d] [the] concept of faculty self governance" as merely "fortif[ying]" the party's argument. *Id*. at 286.

II. Environmental Injury at The US Supreme Court

Federal environmental standing doctrine is persuasive authority in Wisconsin. *WED* at 10-11. The federal cases suggest that *WED* and its progeny remain broadly consistent with the federal standing doctrine.

In *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972), the Court held that development in wild areas could lead to an "injury in fact" since "[a]esthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." However, the court required that "the party seeking review be himself among the injured" and found that Sierra Club "failed to allege that

it or its members would be affected in any of their activities or pastimes by the Disney development." *Id*. at 735.

Like *Fox, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) explained that an injury must be "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" (Quoting *Lyons* at 102). Defenders of Wildlife members had traveled to see endangered species and argued that US government projects would injure their future enjoyment of the species. *Id*. at 563-64. The Court maintained that while "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for the purposes of standing," the petitioners did not have an "imminent" injury since they professed only "someday intentions" to return to those places. *Id*. at 562-64. The concurrence suggested that had the plaintiffs purchased airline tickets to return they may have had standing. *Id*. at 579 (Kennedy, J., concurring).

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) illustrates personal and concrete injuries capable of conferring standing. The plaintiffs lived near a river and had once used or wanted to use it for recreation but, fearing pollutants, chose not to. *Id*. at 181-83. The Court held that "environmental plaintiffs adequately allege injury in

fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id*. at 183 (quoting *Morton* at 735).

III. The Circuit Court Erred In Applying The Environmental Standing Test

The federal and state post-*WED* caselaw does not displace *WED's* approach to standing, and *WED* therefore governs this case. Accordingly, to have standing, Friends of the Black River Forest needs to show that it, or its members, will be injured and that a law protects its interests from injury. Harms to aesthetic, conservational, or recreational interests suffice for an injury. *WED* at 10-11. The injury can be remote in time and at the end of a series of events which may occur as a result of an agency's action. *WED* at 14; *Norquist* at 250. However, the injury cannot require leaps of imagination across unlikely or conjectural circumstances. *Fox* at 527-29. Finally, a law, which can be a rule, must recognize the kind of injury the Friends allege. *Trojan* at 286-288.

When reviewing a dismissal courts "accept as true all well-pleaded facts in the complaint and any reasonable inferences therefrom" and review standing de novo. *Munger v. Seehafer*, 2016 WI App 89, ¶17, ¶48, 372 Wis. 2d 749, 890 N.W.2d 22. A "modicum of evidence" in the record is enough

for standing. *Kammes v. State, Mining Inv. & Local Impact Fund Bd.*, 115 Wis. 2d 144, 152, 340 N.W.2d 144 (Ct. App. 1983). "The review provisions of ch. 227, Stats., are to be liberally construed." *WED* at 13.

A. The Friends have Alleged Direct, Imminent Injuries.

The Friends' complaint and briefs contain detailed allegations of the injuries that will be caused by the land swap at issue.

The Circuit Court found the basic facts "not in dispute" and that the property involved was "in the park" and would be "within the plans for the proposed Kohler development." (A-App 002). The Court stated: "the petitioners allege that the land swap will result in the loss of use of land, damage to the environment, and create additional traffic and noise which will adversely affect the individually named petitioners and the members of the institutional petitioner." *Id*. The test for standing requires nothing more. Taking the Friends' allegations as true, these findings easily satisfy the direct injury portion of the standing test.

Describing the scope of its inquiry, the court stated, "petitioners' injuries must stem from the immediate question before the court and not from future development of the land in question." *Id*. at 3. This is a misstatement of law.

First, injuries can be remote in time so long as they remain direct. *Brewers* at 69-70. Second, loss of access and the resulting loss of recreational and aesthetic enjoyment is an allegation of an immediate injury. (A-App at 019) (the agency decision "permanently eliminates" Friends' members' access to land that they "have used and enjoyed previously, and would continue to use and enjoy but for Respondent's decision"). Further injuries, such as a diminished "ability to observe wildlife and study nature in and around the park" resulting from a reduction in habitat *would* occur in the future. *Id*.

Ignoring caselaw finding standing for injuries "remote in time" or as a result of a "sequence of events set in motion by the agency action" the court dismissed each allegation of injury resulting from development. *WED* at 14; A-App 004-06. The Court reasoned that the various injuries would follow only if Kohler "obtained all the necessary approvals for the commencement of construction . . . . [and] the land swap agreement itself does not provide for any changes to the land." (A-App at 4). The court did not, as *WED* requires, look beyond the initial agency action to a sequence of events stemming from it. *WED* at 14. Obtaining additional permits or other

approvals may not be entirely certain, but certainty is not required for standing. *See Norquist* at 250.

The Circuit Court acknowledged that Kohler is planning to build a golf course and that the property the NRB agreed to divest is within its development plans (A-App at 002). There is therefore nothing conjectural or speculative about Kohler developing this land, the very sequence of events that would give rise to the injuries alleged. The Court's distinction between the agency action and the foreseeable, planned, and intended effects of that agency action is not only unsupported by the caselaw, it risks narrowing environmental standing in an alarming fashion.

This error is particularly concerning to Clean Wisconsin because many projects, including those threatening the worst impacts on environmental quality, require multiple approvals. The Circuit Court's conclusion that the presence of multiple required approvals defeats standing would have the perverse effect of making it harder to seek review of the most significant projects impacting the environment. This conclusion must be rejected.

B. The Friends Identified Rules and Statues that Protect the Kind of Injuries Alleged.

The Circuit Court did not rule on the "recognized by law" portion of the standing test. (A-App at 6). However, the Friends have pointed to statutes and regulations that so obviously protect residents' environmental interests in Wisconsin's State Parks that there can be no legitimate disagreement on this point.

WED acknowledged that "federal courts have shown a willingness to find that environmental interests are arguably within the zone of interest protected by virtually any statute relating to environmental matters." *Id*. at 10-11.

Kohler's wrongheaded assertion that these statues and rules do not even *arguably* protect the Friends' interests ignores the obvious fact that "the purpose of the state parks is to provide areas for public recreation and for public education in conservation and nature study." Wis. Stat. 27.01(1). State Parks exist so that Wisconsinites have access to beautiful and ecologically valuable places for recreation and education. This interest is permanent because "state owned lands within state park boundaries shall not be sold or otherwise disposed of." NR 1.47(1). If language like this is not found to

arguably protect the environmental interests of a Wisconsin resident for the purpose of standing, then it is hard to imagine what would.

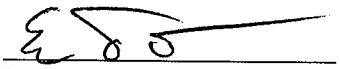
CONCLUSION

Kohler states that the Friends seek to "undermine" and "impede" its project and that the Friends are "interfering" "with DNR's authority to administer the state parks." (Kohler Br. at 8.) The implication appears to be that citizens do something improper when they exercise the long-established right to have state government action reviewed by an independent judiciary. Whether the Friends should ultimately prevail on the merits is a question for another day, but the question of whether they have standing to make their case has been answered in the affirmative for decades.

Accepting the Circuit Court's erroneous and novel standing ruling would deprive Wisconsin residents of their right to vindicate their interests in the natural world at a time when those interests need more appreciation and protection than ever. We urge this Court to reverse the Circuit Court's ruling and allow Wisconsin residents an opportunity to be heard on the critical issues in this case.

Respectfully submitted this 13th day of November, 2019.

CLEAN WISCONSIN, INC.



Evan Feinauer, SBN 1106524
efeinauer@cleanwisconsin.org
Tel. (608) 251-7020 ex. 21

Katie Nekola, SBN 1053203
knekola@CleanWisconsin.org
Tel. (608) 251-7020 ex. 14

Attorneys for Clean Wisconsin

Brandon Hunzicker
Law Student Extern
bhunzicker@cleanwisconsin.org

634 West Main Street, Suite 300
Madison, WI 53703
Fax. (608) 251-1655

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), and (c) for a brief produced with a proportional serif font. The length of this brief is 2,972 words.

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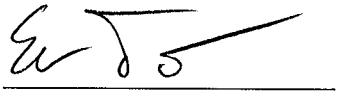

Evan Feinauer

CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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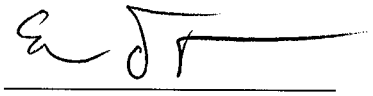

Evan Feinauer