STATE OF WISCONSIN
SUPREME COURT

FRIENDS OF THE BLACK RIVER FOREST
and CLAUDIA BRICKS,

Petitioners-Respondents,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES and NATURAL RESOURCES BOARD,

Defendants,

and

KOHLER CO.,

Intervenor-Appellant.

Sheboygan County Circuit Court
Case No. 18-CV-0178

Appeal No. 2019AP299

PETITION FOR REVIEW

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INTRODUCTION

Without review by this Court, virtually any objector could exercise expansive, if not unlimited, rights to sue state agencies by mere virtue of his or her disappointment with a state agency decision. Here, the Court of Appeals decided incorrectly that a plaintiff has standing to sue the Department of Natural Resources ("DNR") and the Natural Resources Board ("NRB") (collectively, the "Department") over a decision to swap state park land with a private entity without regard for whether such a decision directly caused the plaintiff's injury—relying instead on whether a stated interest did not "strain the imagination." Likewise, the Court of Appeals effectively abandoned the requirement that a plaintiff's purported injury be within the "zone of interests" to be protected or regulated by statute or constitutional guarantee. Because the Court of Appeals' decision effectively strips the Department of its statutory power to manage

Wisconsin's state park system, it should be reversed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does a plaintiff satisfy the "injury-in-fact" prong of the standing test by alleging an injury that will not, and cannot, result from the challenged action until numerous intervening, uncertain, and unrelated events occur?

The circuit court held that such allegations do not satisfy the first prong of the test for standing.[1]

The Court of Appeals reversed and held that a court may consider the potential outcome of unrelated, uncertain intervening events that do not "strain the imagination" for purposes of evaluating standing.

2. Does a plaintiff satisfy the "zone of interest" prong

[1] Case No. 2019AP299 (*Friends of the Black River Forest v. DNR* (Wis. Ct. App. filed Feb. 13, 2019)) was consolidated by the Court of Appeals with Case No. 2019AP534 (*Friends of the Black River Forest v. DNR* (Wis. Ct. App. filed March 18, 2019)). Kohler Co. does not ask this Court to review the holding in 2019AP534.

of the standing test by alleging a violation of statutes and regulations that expressly grant the Department the power to take such action?

The circuit court did not reach the "zone of interest" prong of the standing test.

The Court of Appeals held that Plaintiffs' allegations of "anticipated recreational, aesthetic, and conservational injuries that are environmental in nature" fall within the zone of interest statutes and rules that vest the Department with the authority to manage the state park system.

3. Does a Plaintiff satisfy the "zone of interest" prong of the standing test merely by alleging that an injury is environmental in nature, even where the statute at issue is not?

Neither the circuit court nor the Court of Appeals reached this issue.

BRIEF STATEMENT OF CRITERIA FOR REVIEW

The issues presented in this petition justify review because the Court of Appeals changed the law governing standing, and abandoned well-established principles from Wisconsin Supreme Court case law to set forward a brand-new test to determine whether a person is "aggrieved" within the meaning of Wisconsin Statutes section 227.53. This is a slippery slope. Review by the Wisconsin Supreme Court will correct the now judicially amended law of standing to challenge agency action by setting forth the proper test as to both the injury and zone-of-interest prongs of the analysis. These are critical legal questions that will recur every time a petitioner seeks judicial review of an agency action. *See* Wis. Stat. § 809.62(1r)(c)3. The decision of the Court of Appeals also is in direct conflict with the decision in *Chenequa Land Conservancy, Inc. v. Village of Hartland*, 2004 WI App 144, 275 Wis. 2d 533, 685 N.W.2d 573. *See* Wis. Stat.

§ 809.62(1r)(d). Finally, if the Court of Appeals was correct in its application of the law, the bounds of standing to seek judicial review of agency action will be dramatically expanded—to the point where it will essentially eliminate the burden altogether.

STATEMENT OF THE CASE

I. Nature of the Case and Statement of Facts

This case arises from an action for judicial review of agency action brought pursuant to Wisconsin Statutes sections 227.52 and 227.53. (R. 64-1.) Specifically, it challenges an exchange of land between Intervenor-Appellant Kohler Co. ("Kohler"), on the one hand, and the Department, on the other. (*Id.*, at 1-2.)

The Department is statutorily vested with the authority to administer the state parks of Wisconsin. In June 2017, it began a master planning process to consider updating the master plan of Kohler-Andrae State Park. (R. 3-4 ¶ ¶ 11-12;

64-4 ¶ 12; 21-2.)[2] In February 2018, in a separate proceeding, and pursuant to its statutory authority, the NRB determined that 4.59 acres of land within the Park boundary was no longer needed for conservation purposes. (R. 3-7.) The NRB thus voted to remove the 4.59 acre parcel from the Park boundary. (R. 46-5-6.) After removing the parcel from the Park boundary, the NRB approved an agreement with Kohler to exchange that 4.59 acres plus a 1.88-acre easement formerly within the Park, for 9.5 acres of Kohler-owned land also planned for and/or adjacent to the Park (including 3.9 acres of upland woodland, 2.4 acres of cropland, and 3.2 acres including a residence). (*Id.*, at 6; R. 3-7, 9.) The agreement was presented to NRB and recommended for approval on February 16, 2018; a memorandum was sent to the governor the same day. (R. 3-7.) The NRB accordingly

[2] All references to the record herein refer to the record associated with Sheboygan County Case No. 2018CV000178, which corresponds to Appellate Case No. 2019AP000299.

approved the land exchange on February 28, 2018. (R. 3-4 ¶ 12.)

Such land exchanges are not uncommon; as discussed at the February 28, 2018 meeting, the Department has "swapped land in the past," "many times" pursuant to the Board's statutory authority. (A-App. 042.) In fact, in the past five years, the Board has engaged in approximately 25 land exchanges, and 30 grants of access.[3] According to then-Division Administrator Doug Haag, land swaps are "fairly common." With 1.6 million acres of land, the Department is "constantly managing our real estate portfolio." *Id.* This exchange was also good for the environment and neighbors—facilitating access to the golf course in the least environmentally impactful way and to avoid trekking through

[3] The February 28, 2018 NRB meeting is available at http://dnr.wi.gov/about/nrb, or at https://www.youtube.com/watch?v=KiGUC2C-Fzw. This discussion occurred at 1:03:00-1:03:41 during the meeting. The Brief of Action from the meeting is included at A-App 040-051.

a quiet residential neighborhood. (A-App. 042-043.) And, it provided the Department needed housing for park personnel. *Id.*

The land exchange decision does not authorize any action with respect to Kohler's construction of a golf course in the vicinity of the Park or set that construction in motion. Nor does it have any impact on the permits Kohler is required to obtain before that construction can proceed; at present, Kohler is still prevented from constructing its golf course due to the reversal of a necessary individual wetland permit. The decision accomplishes one thing, and one thing only: the exchange of the 4.59 acres and the easement of Park land for the 9.5 acres of Kohler land and improvements.

II. Procedural Status

The Friends filed a petition in Sheboygan County on April 2, 2018, seeking judicial review of the Department's decision to exchange the land. (R. 3.) Kohler intervened and

filed a motion to dismiss, arguing, *inter alia*, that the Friends' petition failed to meet either prong of Wisconsin's standing test. (R. 21-22.) The Department joined Kohler's motion in part. (R. 40.) In response, the Friends filed an Amended Petition alleging additional purported "injuries"[4] and attempting to remedy the petition's failure to identify any statute or constitutional guarantee from which standing allegedly flowed. (R. 64.) Notably, though the Amended Petition alleged specific statutes and regulations, it did not allege any violation of the Wisconsin Environmental Protection Act (WEPA) or any other environmental statute. (*Id.*)

[4] Their allegations of injury in the Amended Petition include claims that the land exchange: (1) "permanently eliminates [the Friends'] opportunity to use land" within the Park; (2) "will reduce habitat for and populations of plants, birds, and animals . . . harming their ability to observe wildlife and study nature in and around the park"; (3) "will impact and reduce enjoyment of other resources" by "harm[ing] the aesthetics" of adjacent areas; (4) will increase the "traffic and noise caused in and around the park"; and (5) affects the Friends' interest in ensuring required procedures for state park planning are followed. (R. 64-6-7, ¶ ¶ 24-28.)

The circuit court dismissed the case on January 11, 2019, holding that the Friends lacked standing. (R. 67.) It emphasized the need to focus the standing analysis on the challenged decision (i.e., the land exchange) and found that the injuries alleged by the Friends did not flow directly from that decision.

The Friends appealed (R. 69), and the Court of Appeals reversed on September 15, 2020 (the "Decision"). While ostensibly adhering to the test for standing articulated by this Court, the Decision rejected the circuit court's focus on whether the alleged injuries flowed directly from the challenged agency decision, instead asking whether those injuries "strain[ed] the imagination." (Decision ¶ 21.) It held that because the land exchange "contemplate[s]" the construction of a golf course (Decision ¶ 20), the exchange could not be "divorced" from the eventual construction, even though the exchange did not itself set that construction in

motion. Because the alleged environmental, recreational, and aesthetic injuries did not "strain the imagination" with reference to the course's construction, the Decision held that the first prong of the standing test was met.

The Court then proceeded to the second prong of the standing analysis and held that the Friends' alleged injuries were within the zone of interest contemplated by the statutes and regulations they cited—statutes and regulations that *are not directed at environmental protections* but instead vest the Department with the statutory authority, and the discretion, to administer the state parks generally, and specifically, to dispose of land when that land is found to be no longer necessary for conservation purposes.[5] *See* Wis. Stat. § 23.15(1). Without addressing the binding case law cited by Kohler, the Court held in a single paragraph virtually devoid

[5] Specifically, the Petition cites Wisconsin Statutes sections 27.01(1), 23.11, 23.15, and the accompanying regulations in Wisconsin Administrative Code NR chapters 1 and 44.

of analysis that these statutes and provisions, despite purporting to grant authority to the Department, actually encourage the public to challenge essentially *any* exercise of that authority in the name of the environment:

> As noted the Friends alleged anticipated recreational, aesthetic, and conservational injuries that are environmental in nature. The statutes and accompanying regulations mentioned above recognize those injuries under the law. The Friends have accordingly alleged an interest recognized by law to meet the second step of the standing inquiry.

(Decision ¶ 31.)

ARGUMENT

I. The Court should grant review on the question of whether a plaintiff satisfies the "injury-in-fact" prong of the standing test by alleging an injury that is common to the population at large and that will not arise from the challenged action until numerous intervening, uncertain and unrelated events occur.

A. Review will clarify the proper bounds of the injury inquiry and ensure consistency with governing Wisconsin Supreme Court law.

The Court of Appeals' decision confuses the standing inquiry and runs directly contrary to controlling case law.

Review by this Court will clarify the bounds of the standing inquiry and the proper focus of the injury requirement—questions that will recur every time a party seeks judicial review of an agency decision (whether by the Department or by another state agency) pursuant to Wisconsin Statutes sections 227.52 and 227.53.

The Court of Appeals has muddied the standing test and transformed it into something altogether different than set forth in controlling case law. Instead of asking whether the challenged agency action (the land exchange) would or could *directly cause* the injuries alleged, it has created a new test, asking instead whether the injuries alleged "strain the imagination." (Decision ¶¶ 21-22.) This "test," apparently manufactured from an isolated turn of phrase in *Fox v. Wis. Dep't of Health & Soc. Servs.*, 112 Wis. 2d 514, 527, 334 N.W.2d 532 (1983) asks the court to assess, with reference to unknown criteria, how *likely* the injury is to occur. This is

confusing and starts the slide down a slippery slope of expanding standing, however. And the expansion of standing is particularly at risk given that this Court has made clear that "[t]he question of whether the injury alleged will result from the agency action in fact is a question to be determined on the merits, not on a motion to dismiss for lack of standing." *Wis. Env't. Decade, Inc. v. PSC* [hereinafter *WED I*], 69 Wis. 2d 1, 14, 230 N.W.2d 243 (1975).

Standing to seek judicial review of an administrative decision is governed by both sections 227.52 and 227.53(1), both of which "require a petitioner to 'show a direct effect on his legally protected interests.'" *Fox*, 112 Wis. 2d at 524 (quoting *WED I*, 69 Wis. 2d at 9). This is a two-part inquiry, asking first "whether the petition alleges injuries that are a direct result of the agency action." *WED I*, 69 Wis. 2d at 13. This "injury inquiry," in turn, comprises two separate questions: first, the injury "must not be so far removed from

the cause as to be merely hypothetical or conjectural"; and second, there must be a "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Fox*, 112 Wis. 2d at 532.

It is true that mere remoteness in time, or intervening events between the agency action and the injury, do not eliminate standing. *See WED I*, 69 Wis. 2d at 14. But in such circumstances, it is still necessary that the injury, or threat of injury, flow *directly* from the agency action. *See Fox*, 112 Wis. 2d at 529. That is, to the extent that the injuries alleged may occur "as an end result of a sequence of events," that sequence must still be "*set in motion by the agency action challenged*." *WED I*, 69 Wis. 2d at 14 (emphasis added). Simply put, *WED I* does not change the black-letter requirement that there must be a direct causal link between the specific agency action at issue and the injury alleged. *See id.*; *Milwaukee Brewers Baseball Club v. Wis. Dep't of Health*

& Soc. Servs., 130 Wis. 2d 56, 65, 387 N.W.2d 245 (1986) (first step of standing inquiry requires a "close causal relationship between the alleged injury and a change in the physical environment").

The correct question—whether the challenged action *directly causes* the alleged injury—is lost in the midst of the Court's focus on whether the injury is conceivable, or whether, on the other hand, it "strains the imagination." (*See, e.g.*, Decision ¶ 22 ("[W]e fail to see how the injuries alleged by the Friends strain the imagination when the land exchange decision itself seems to have contemplated that Kohler would construct a golf course."); *see also* Decision ¶ 27 ("[W]e do not see the alleged injuries here as hypothetical or conjectural given that the land exchange itself contemplates the construction of the golf course.").) The Court of Appeals' concentration on the powers of imagination shifts the focus from direct causation to the bounds of one's imagination.

(*See* Decision ¶ 22 (reasoning that it is "not difficult to imagine that the Friends will no longer be able to use the remaining parkland for recreation without interference from traffic and noise in the area caused by the golf course and its patrons" and that "it is easy to imagine that interference to habitats could interfere with the Friends['] ability to use the remaining parkland for recreational uses such as birding").) This Court's review is imperative to clarify that an unstrained imaginable effect is not the equivalent of a direct effect.

Moreover, the Decision further obscures the law by suggesting that courts need not consider whether *the challenged agency action* will directly cause the alleged injury. In fact, the Court of Appeals explicitly rejected the circuit court's (proper) focus on "the agency action challenged." *WED I*, 69 Wis. 2d at 14. Instead, it purported to consider whether the agency action set into motion a series of events that would result in the injury alleged—but

ultimately made its decision based solely on whether the injury was *possible* in light of the agency action, without requiring the challenged action to play any concrete role in bringing the injury about.

To illustrate, as the record makes clear, the land exchange will not cause the construction of the golf course (or the alleged injuries resulting from that construction) to occur.[6] Numerous permits must be obtained—permits that are not causally linked in any way to the land exchange. One of those permits, the individual wetland permit, has at present been reversed; without that permit, construction cannot take place, regardless of what happened with the land exchange.[7] Yet the Court of Appeals nevertheless held, incorrectly, that

[6] That the land exchange will not cause the construction of the golf course is borne out by the facts here. The land exchange agreement was approved on February 28, 2018, *nearly three years ago.* (R. 3-1.) Golf course construction has not commenced—and, more to the point, *cannot* presently commence.

[7] *See* https://dnr.wisconsin.gov/topic/EIA/Kohler.html.

"the land exchange has made those intervening steps possible and can be said to have a causal connection to the injuries alleged by the Friends." (Decision ¶ 27.) Even setting aside that the Court of Appeals was wrong on the facts (the land exchange has *not* made the intervening steps possible; in fact, they occurred *before* the land exchange),[8] mere possibility does not equate to the "close causal relationship" that the law requires. *Milwaukee Brewers*, 130 Wis. 2d at 65.

The Court of Appeals' Decision, while purporting to apply the black-letter law of standing, thus conflates the two steps of the injury requirement to the point of complete disarray. Its decision essentially holds that a plaintiff, to have

[8] The Court of Appeals was incorrect to state that "following the land exchange, Kohler admitted that it began the process of obtaining permits and other necessary approvals for the construction of the golf course." (Decision ¶ 23.) The land exchange was approved on February 28, 2018 (R. 64-5, ¶ 18); the individual wetland permit application was submitted on March 8, 2017, and the permit granted January 17, 2018, more than a month before the approval of the land exchange. *See* https://dnr.wisconsin.gov/topic/EIA/Kohler.html. This factual error further contributes to the confusion engendered by the Decision, as it is not possible for the land exchange decision to set in motion a chain of events that had already taken place before it was made.

standing, must allege injuries that do not "strain the imagination" and that those injuries must be "possible" in light of the challenged agency action. This is flatly wrong under Wisconsin law and confuses the established bounds for standing to pursue judicial review. This Court should therefore grant review to clarify that the proper injury inquiry for purposes of sections 227.52 and 227.53 asks not whether the injury is likely, fanciful, or possible, but instead whether the injury flows directly from, and has a close causal relationship to, the challenged agency action. *See WED I,* 69 Wis. 2d at 14.

B. The Court of Appeals dramatically expanded standing to challenge agency action in Wisconsin.

The Court of Appeals' application of the law would dramatically expand the injuries that give rise to standing to challenge agency action. Moreover, the Decision undermines binding precedent from this Court, creating confusion. The

Court of Appeals' analysis, if correct, would effectively eliminate the first prong of the standing inquiry altogether.

First, as discussed above, the Decision eliminates the requirement that the injury giving rise to standing be concrete, not merely speculative or hypothetical, and that it be directly caused by the challenged agency action. The Decision transforms the inquiry into whether the injury alleged "strains the imagination," suggesting that the question is whether the injury is likely to occur. But if the question is whether the injuries alleged will likely come to pass, and the procedural posture requires the court to assume that they will (for purposes of a motion to dismiss), then this "test" is no test at all. A plaintiff may allege virtually any injury; the Court will ask whether it "strains the imagination"; and, on the strength of the standards applicable to motions to dismiss, will be required to hold that the allegations are satisfactory.

Furthermore, the Court of Appeals' analysis expands the law of standing by breaking with Wisconsin Supreme Court precedent and recognizing standing on the basis of an injury lacking *any* causal connection to the challenged action. As discussed above, this is not a case in which the land exchange set into motion a chain of events culminating in the construction of the golf course. In fact, the land exchange *per se* does not result in any injury at all. The land exchange has virtually no causal connection to the permitting processes required to commence construction; indeed, as previously discussed, construction cannot presently commence at all. Yet the Court of Appeals held that, simply because the land exchange "contemplated" the eventual construction of a golf course, that "contemplation" demonstrated the requisite causal connection.

This is flatly inconsistent with precedent from this Court. Contemplation is not the same as causation. *See*

Milwaukee Brewers, 130 Wis. 2d at 65 (requiring a "close causal relationship"). Nor does the fact that a decision contemplated the possibility of other actions in the future mean that it set those actions in motion—particularly not where, as here, Kohler *cannot take those actions* without first obtaining independent, unrelated permits (for which it had applied *before* the land swap agreement took place). The principle that standing may lie if a decision "set[s] [a sequence of events] in motion," *WED I*, 69 Wis. 2d at 14, *must* require more than mere foreseeability. Yet the Court of Appeals' decision, though it purports to adhere to those principles, abandons the requirement of causation and the call for a direct link between action and injury, expanding the field of actionable injury to virtually *anything*—so long as it can be "contemplated" in light of the agency action and does not "strain the imagination."

Finally, the Court of Appeals' analysis expands the field of standing in yet another way: it eliminates, without discussion, the principles that neither generalized grievances nor policy disagreements confer standing. The Friends' petition alleged precisely *one* "injury" that arguably flowed from the challenged land exchange: the loss of access to the particular parcel of land conveyed from the Department to Kohler.[9] (R. 64-6, ¶ 24.) The Friends' "loss" of access to 4.59 acres arises from the Department's judgment that the value to the park system of obtaining 9.5 acres—fully 6.3 acres of which is undeveloped wildlife habitat—and a residence to house park personnel outweighs the value of 4.59 acres adjacent to existing park maintenance facilities. (R. 64-11.) (Ironically, the Department could exclude the Friends from accessing the 4.59 acres independent of the land

[9] The other injuries alleged all could flow only from the construction of the golf course, which as previously discussed has no causal link to the land exchange decision.

exchange—just as it currently excludes park-goers from the maintenance facilities adjacent to the 4.59 acres.) In other words, the Friends' loss of access comes about as a result of the Department carrying out its express statutory authority to manage the state parks. Wis. Stat. § 27.01(1)-(2).

And, the injuries that the Friends complain about *are not set in motion* as a result of the challenged decision. As discussed above, on February 28, 2018, NRB made *two* decisions with regard to this matter: 1) it removed the 4.59 acres from the Park boundary; and 2) it approved the land exchange with Kohler. It is the removal of the 4.59 acres from the Park boundary that will have set in motion any of the injuries that the Friends allege may occur, *not* the decision to exchange the land with Kohler. And, the Friends have not challenged the first decision. (*See* R. 64-1 (Amended Petition for Judicial Review): "The decision at issue is the Board's February 28, 2018 vote to convey 4.89 [sic] acres of land

within Kohler-Andrae State Park to Kohler Co., as well as a 1.88 acre easement.").)

The Friends' challenge is no more than a disagreement with the Department's policy determinations in carrying out that authority. But "[c]ourts are not the proper forum for citizens to 'air generalized grievances' about the administration of a governmental agency." *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Labor & Human Relations*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979); *see also Aqua-Tech, Inc. v. Como Lake Prot. & Rehab. Dist.*, 71 Wis. 2d 541, 553, 239 N.W.2d 25 (1976); Gabrielle B. Adams et al., *Wisconsin Civil Procedure Before Trial*, § 7.81 (6th ed. & Supp. 2018-19) (absent narrow exceptions, standing cannot lie on the basis of a general injury to the public). Rather, "[p]olicy disputes are more properly resolved in the political arena than in environmental litigation." *Fox*, 112 Wis. 2d at 532. The Friends had an opportunity to (and did) present

their concerns to the DNR and NRB at the February 28, 2018 meeting at which the decision was made, and NRB approved the land exchange anyway—after weighing those concerns. (R. 46-3-5.)

Here, the Friends' challenge amounted to exactly that: a generalized disagreement with the Department's exercise of its authority to manage the state park system. The purported "injury" they allege giving rise to standing is not unique to them and, in fact, seeks to elevate their personal interests over those of the public in general as determined by the Department. This should not give rise to standing under Wisconsin law. *See Chenequa Land Conservancy, Inc.*, 275 Wis. 2d 533, ¶ 17 ("The injury asserted must be such that it gives the plaintiff a personal stake in the outcome of the controversy."). The Friends alone will not lose access to the particular piece of land that the Department conveyed to Kohler (in exchange for land that Kohler conveyed to the

Department). And the "loss" is not even a loss: it is an administrative decision made by the Department to swap 4.59 acres for double that acreage, an exercise of its authority in park administration.[10] If the Court of Appeals' analysis is correct, it will open the door to judicial review, and court interference, in virtually every exercise of agency power—regardless of whether there is an individualized injury, and regardless of whether the purported "injury" is, in reality, nothing more than a disagreement with the agency's exercise of its discretion in carrying out its statutory powers.

While the test for standing under sections 227.52 and 227.53 is liberal, it is still a test that must be passed. It cannot be eliminated or ignored altogether—and that is precisely

[10] It is beyond dispute that the Department has the authority to exclude the public, including the Friends, from certain state park lands. *See* Wis. Admin. Code § NR 45.04(e): "The department may close, by posted notice, any land, structure, or property owned or administered by the state of Wisconsin and under management, supervision, and control of the department." And the Department plainly has the authority to grant easements. Wis. Stat. § 27.01(2)(g).

what the Decision encourages plaintiffs to do. Kohler therefore respectfully requests that the Court grant review of the first issue presented and clarify that, to have standing to bring a petition for judicial review, a petitioner must allege an injury that flows directly from the challenged action; has a close causal relationship to that action; and amounts to more than a generalized policy disagreement with the agency's administration.

II. The Court should grant review on the question of whether a Plaintiff satisfies the "zone of interest" prong of the standing test by challenging Departmental action pursuant to statutes expressly granting the Department the power to take such action.

The Decision on the second prong of the standing test is facially wrong. Spanning merely five paragraphs, the Court of Appeals summarily held: "We see the nature of [the statutes and accompanying regulations cited by the Friends] as creating an environmental interest in the protection and

regulation of Wisconsin's state parks, including the Kohler-Andrae State Park at the heart of the dispute here." (Decision, ¶ ¶ 28-32.) This expansive holding is directly contrary to *Chenequa Land Conservancy, Inc.*, 275 Wis. 2d 533, and would confer standing whenever any agency action involving the management of state land is implemented. Review by this Court will clarify the correct application of the "zone of interest" inquiry.

The second prong of the standing test requires the Friends to establish that the legally protected interest that has been injured is within the "zone of interests" to be protected or regulated by the statute or constitutional guarantee in question. *Coyne v. Walker*, 2015 WI App 21, ¶ 7, 361 Wis. 2d 225, 862 N.W.2d 606 (citing *WED I*, 69 Wis. 2d at 10). It is the petitioner's burden to identify the particular statute he or she contends was violated. *MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Wis.*, 164 Wis. 2d 489, 493, 476 N.W.2d 575

(Ct. App. 1991). The Friends base their challenge on Wisconsin Statutes sections 27.01(1), 23.11, 23.15, and Wisconsin Administrative Code NR chapters 1 and 44. None of these laws or regulations are aimed at protecting or regulating the environment, nor are they intended to protect against the environmental/aesthetic injuries the Friends assert here. Instead, these statutes and rules direct the Department's management of state park lands.

A. The Court of Appeals' holding, if allowed to stand, will thwart the plain language of the cited statutes, hamstring administration of state lands and effectively eliminate the threshold for standing.

The statutes and regulations asserted by the Friends, Wisconsin Statutes sections 27.01(1), 23.11, 23.15, and the associated administrative rules Wisconsin Administrative Code chs. NR 1 and 44, are not intended for the protection or regulation of the environment independent of the Department's administration of statute parks. These statutes

and rules empower the Department to administer state parks, and should not be converted into something they are not.

Each asserted statute and regulation bears review individually.[11] First, Wis. Stat. § 27.01 sets forth the policy of the legislature to "acquire, improve, preserve and administer a system of areas to be known as the state parks of Wisconsin." It is a statement of purpose that vests authority within the Department to select "a balanced system of state park areas," and to acquire, develop and administer state parks:

> PURPOSE. It is declared to be the policy of the legislature to acquire, improve, preserve and administer a system of areas to be known as the state parks of Wisconsin. The purpose of the state parks is to provide areas for public recreation and for public education in conservation and nature study.[12] An area may qualify as a state park by reason of its scenery, its plants and wildlife, or its historical, archaeological, or geological

[11] Wis. Stat. § 23.15 is specifically addressed at section II.B., *infra,* and will not be re-addressed here.

[12] "Conservation and nature" refer to *public education* of the same; this general policy in favor of public education is not the same as protecting or regulating the environment itself. Wis. Stat. § 27.01(1).

> interest. The department shall be responsible for the selection of a balanced system of state park areas and for the acquisition, development and administration of the state parks. No admission charge shall be made to any state park, except as provided in subs. (7) to (9).

Wis. Stat. § 27.01(1). Subsection (2) confers upon the Department a wide variety of powers, in furtherance of that policy. Thus, the statute *on its face* facilitates the administration of the state park system and provides the Department with tools to manage that system.

The Friends do not argue that the Department has failed to develop a state park system; nor do they argue that this land swap would result in an "unbalanced system of state park areas." Instead, the Friends argue that this general statement of purpose vests them with an enforceable interest to safeguard the specific 4.59 acres subject to the Board's decision.[13] But this statute does not create an enforceable,

[13] And, as discussed above, it is not the decision to exchange the land that deprived the Friends of their ability to access the 4.59 acres; instead, it was the earlier, separate NRB decision to remove the land from the Park boundary. That decision has not been challenged. (R. 64.)

self-executing right. *See, e.g.*, *Schilling v. State Crime Victims Rights Bd.*, 2005 WI 17, ¶ 14, 278 Wis. 2d 216, 692 N.W.2d 623.

Likewise, Wis. Stat. § 23.11 sets forth the "General Powers" of the Department; Wis. Admin. Code ch. NR 1 sets forth the rules governing the NRB, and Wis. Admin Code ch. NR 44 defines the "master planning" polices for the Department's policies. Each of these is for the benefit of the Department, not for the public. And critically, the Friends *have not even alleged* any facts that would substantiate a violation of any of these statutes and regulations. Nor could they. Wis. Stat. § 23.11(1) specifically authorizes the Department to do what it did here: "said department is granted such further powers as may be necessary or convenient to enable it to exercise the functions and perform the duties required of it by this chapter and by other provisions of law." Wis. Admin. Code § NR 1.47(1) states

that land *within a park boundary* may not be disposed of. However, the Department removed the 4.59 acres from the Kohler-Andrae State Park boundary prior to voting on the land exchange.[14] Wis. Admin. Code ch. 44 has the purpose of creating uniform planning processes for the management and use of Department-managed properties. *See* Wis. Admin. Code § NR 44.01. This chapter defines the process that the Department is required to implement in the development of master plans for state parks. The decision at issue here was not part of the master planning process, and this chapter is erroneously cited.

The Friends' argument that these statutes and regulations, which are express grants of authority by the legislature to the Department, are intended to allow the

[14] The Friends do not allege that the Department has violated Wis. Admin. Code § 1.47(2), which provides the order of priority for disposing of property that has been determined to be unnecessary for conservation purposes.

general public to challenge each and every exercise of that power, is flatly illogical and unsupported by Wisconsin law. Kohler is unaware of any case in which the statutes and regulations at issue here were held to provide the basis to challenge an administrative decision expressly authorized by the statutes, and made by the Department in furtherance of its duties in administering the state parks. If the Decision is not clarified, authority expressly delegated to the Department by the legislature can be trumped by lawsuits from objectors.

Allowing the Friends to contort these statutes for unintended purposes and in a way that is contrary to their plain language subjects virtually any legislatively-delegated agency decision to challenge, eviscerating the law of standing. Any decision of the Department that may impact a state park would arguably impact objectors' "alleged anticipated recreational, aesthetic, and conservational injuries that are environmental in nature," and would thus fall within

the zone of interest of Wis. Stat. § 27.01 and the associated provisions of the Wisconsin Administrative Code. Taken further, any government agency decision relating to state-owned land could be second-guessed—thwarting decisions ranging from siting of state facilities to routine right of way transactions in which the Department of Transportation engages daily. This is not the law, and it merits clarification.

B. The Court of Appeals' holding on the zone of interest prong directly conflicts with *Chenequa.*

The Decision is also directly contrary to the Court of Appeals decision in *Chenequa Land Conservancy, Inc.*, 275 Wis. 2d 533, warranting Supreme Court review. *See* Wis. Stat. § 809.62(1r)(d). There, the Court addressed the Department of Transportation's ("DOT's") sale of property pursuant to Wis. Stat. § 84.09(5), which mirrors Wis. Stat. § 23.15, and allows the DOT to sell property under its jurisdiction when it determines that such property is no longer

necessary for the state's use for highway purposes, subject only to approval by the governor. The Conservancy argued that the DOT's sale of land it had adjudged to be no longer necessary for the state's use was improper, and that it should have been allowed to purchase the land. The Conservancy also argued that it had a "legally protectable interest in DOT following the requirements of Wis. Stat. § 84.09(5)." *Chenequa Land Conservancy, Inc.*, 275 Wis. 2d 533, ¶ 10. The Court examined that statute, which is analogous to Wis. Stat. § 23.15 at issue here, and held:

> [T]here are no substantive criteria for determining what property to sell. There are also no substantive criteria for determining whether to sell at a public or private sale or for determining to whom to make the sale. . . There is nothing in WIS. STAT. § 84.09(5) that indicates this section was intended to establish procedures to protect persons or entities interested in purchasing state property.

Chenequa Land Conservancy, Inc., 275 Wis. 2d 533, ¶ ¶ 21-22.

The Court went on to hold that the statutory requirements in Wis. Stat. § 84.09(5) that require DOT to provide the governor with a full report, and the governor's right to approve the sale, were for the *governor's* benefit—not that of the purchasers. *Chenequa Land Conservancy, Inc.*, 275 Wis. 2d 533, ¶ 22. The Court explained: "There is nothing in § 84.09(5) that suggests it is intended to ensure the public gets the highest price for the property, or that the sales be carried out in particular ways to benefit the public." *Id.,* at ¶ 25.

Though Wis. Stat. § 23.15 is the mirror image of the statute at issue in *Chenequa,* the Court of Appeals did not even attempt to distinguish it—perhaps because it cannot. Neither statute provides substantive criteria for determining what property to sell or how it is to be sold. Neither statute references the "environment," "environmental interests," or any generalized "public benefit." No substantive criteria *at*

all govern either the DOT's or the Department's decision to sell property, other than the finding that it is no longer necessary for *the state's* use for conservation purposes. Like the statute at issue in *Chenequa*, there is no hint of any legislative intent that § 23.15 is meant to protect the public's interest in the environment, or in recreation, or in mandating that the Department fulfill its duties. The Department has discretion to manage state park lands, including disposing of property found no longer necessary and acquisition of property deemed of greater value and usefulness to the Department.

The Decision is "in conflict with . . . other court of appeals' decisions," and therefore merits review pursuant to Wis. Stat. § 809.62(1r)(d). The Court of Appeals' failure to address *Chenequa* creates a conflict that will unquestionably sow confusion as courts seek to understand when *Chenequa*

applies and when it can, apparently, be ignored. Clarification is appropriate.

III. The Court should grant review on the question of whether a Plaintiff may satisfy the "zone of interest" prong of the standing test solely by alleging that an injury is environmental in nature, even where the statutes at issue are not.

The Decision elevates the Friends' alleged anticipated recreational, aesthetic, and conservational injuries into injuries that are "environmental in nature" and protected under statutes directing the Department to manage state parks. (Dec. ¶ 31.) Simply asserting that statutes are environmental in nature, however, does not make it so and cannot infuse unintended meaning onto the plain language of the statutes.

Kohler does not argue that injuries such as those alleged here are never actionable, or are not within the zone of interest of *any* statute. Importantly, though, this is not a case brought under the Wisconsin Environmental Policy Act (WEPA). Rather, this case is brought under the statutes and

regulations that set forth the obligations of the Department. And unlike WEPA, sections 27.01(1), 23.11, and 23.15(1) do not evince an "intent[] to recognize the rights of Wisconsin citizens to be free from the harmful effects of a damaged environment." *WED I*, 69 Wis.2d at 18; *cf. id.* at 17 (quoting ch. 274, Laws of 1971, § 1) (statement of legislative purpose in enacting WEPA). There is nothing in any of these statutes that suggest that they were intended, like WEPA, to ensure the protection of the environment.

The Decision engenders confusion as to the proper means of challenging environmental injuries; clarification is needed to establish that, while certain avenues do exist to challenge such injuries, park administration statutes are not one of those avenues. The Friends have shown that they are familiar with the avenues: they have filed a number of additional suits, asserting statutes that *were* intended to protect or regulate the environment. For instance, the Friends

challenged the Department's issuance of an individual wetland permit approving fill in a contested case. That matter is currently pending in Sheboygan County Case No. 19-CV-199 (Judge L. Edward Stengel presiding) (*Kohler Co. v. Wis. Dep't of Nat. Res.*, No. 2019CV000199 (Wis. Cir. Ct. Sheboygan Cnty. filed Apr. 11, 2019)). The Friends also challenged the Department's decision to issue a final environmental impact statement in Sheboygan County Case No. 18-CV-82 (Judge L. Edward Stengel presiding) *(Friends of the Black River Forest et al v. Wis. Dep't of Nat. Res.* No. 2018CV000082 (Wis. Cir. Ct. Sheboygan Cnty. filed Feb. 14, 2018)). That case is currently pending in the Court of Appeals (Case No. 19-AP-2434) (*Friends of the Black River Forest v. Wis. DNR*, No. 2019AP002434 (Wis. Ct. App. filed Dec. 30, 2019)). Finally, the Friends have challenged the Department's issuance of stormwater coverage in pending Sheboygan County Case No. 19-CV-80 (Judge L. Edward

Stengel presiding) (*Friends of the Black River Forest et al v. Wis. Dep't of Nat. Res.*, No. 2019CV000080 (Wis. Cir. Ct. Sheboygan Cnty. filed Feb. 8, 2019)). Certainly, the Friends are receiving ample review of decisions that *do* arguably impact their interests in protecting and regulating the environment. The Decision at issue here, though, does not.

A. The Court of Appeals' decision conflicts with governing Wisconsin case law, including *Waste Management of Wisconsin v. Department of Natural Resources*, 144 Wis. 2d 499 (1988).

Attempts to use statutes for unintended purposes cannot stand, and clarification is necessary to bring this case in line with zone of interest analyses in *Waste Management* and other Wisconsin cases.

Waste Management evidences how interested individuals seek to contort statutes for their own self-interest —and how the Supreme Court must defend those statutes. In *Waste Management*, the Supreme Court considered whether

an asserted economic injury that Waste Management claimed it would suffer if the Court allowed a competitor solid waste landfill to be built fell within the "zone of interest" of Wis. Stat. § 144.44(2)(nm), which provided the DNR's rules regarding determinations of need for such facilities. In making a determination of need, the statute at issue required the DNR to conduct a feasibility report, considering issues such as "quantity of waste suitable for disposal," "design capacity of the proposed facility," and whether the facility is "environmentally sound." Waste Management argued that its interests were within the protected zone of environmental interests regulated by Wis. Stat. § 144. *Id.* at 504. Applying the second prong of the standing analysis, the Court held that the Department's methodology in engaging in the determination of need:

> [D]emonstrates the nature of the DNR's concern with the environmental problem of waste disposal. . . The nature of the statute, as well as the nature of the determination of need, make clear that the interest

> protected, recognized, or regulated by the law is an environmental interest. . . In this context, an argument for standing based on alleged harm to an economic interest must fail. The statute at issue here, sec. 144.44(2)(nm) does not recognize, nor does it attempt to regulate or protect an economic interest.

Id., at 508-509.

If the Friends are permitted to commandeer statutes for their own purposes and overcome standing thresholds merely by asserting that they seek to protect the environment, as the Court of Appeals has allowed them to do, each and every agency decision can become susceptible to judicial review merely by claiming that it falls within an "environmental" interest. The legislature has carefully crafted a plethora of statutes and rules to protect and regulate the environment—appropriately so. But self-interested plaintiffs should not be able to manufacture an environmental interest in statutes and regulations intended for an entirely different purpose by their plain language. The Court should clarify as much.

CONCLUSION

The Decision turned the law of standing on its head; the Court now has an important opportunity to re-establish the settled law of standing. If it does not, the implications will be far reaching. Not just the Department, but each and every state agency that is charged with management of state lands, could be paralyzed by a flood of challenges to even its most mundane and basic decisions. Even if the injuries alleged are not causally connected to the challenged action, so long as they do not "strain the imagination," they will suffice under the Decision. Any statute or regulation that plaintiffs merely assert protects the environment would create an "environmental interest" and a new basis for environmental protection. This is not the law, and the Decision merits clarification and correction.

Dated this 15th day of October, 2020.

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FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. § 809.19(8)(d), I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a document produced with a proportional serif font. The length of this brief is 7,650 words.

Dated this 15th day of October, 2020.

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CERTIFICATE 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 section 809.19(12), Stats.

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

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of October, 2020.

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PETITIONER'S APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum:

(1) a table of contents;

(2) the decision and opinion of the court of appeals;

(3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

(4) any other portions of the record necessary for an understanding of the petition.; and

(5) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b).

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings

of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 15th day of October, 2020.

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