STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 22-AP-1106

CLEAN WISCONSIN, INC. AND SIERRA CLUB,

Petitioners-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Respondent-Respondent,

SOUTH SHORE ENERGY LLC AND DAIRYLAND POWER COOPERATIVE,

Interested Parties-Respondents,

v.

MICHAEL HUEBSCH,

Other Party.

On Review from Dane County Circuit Court Case No. 20-CV-585,
The Hon. Jacob B. Frost, Presiding Judge

JOINT REPLY BRIEF OF PETITIONERS-APPELLANTS CLEAN WISCONSIN, INC. AND SIERRA CLUB

PINES BACH LLP

Christa O. Westerberg, SBN 1040530
122 West Washington Avenue, Suite 900
Madison, Wisconsin 53703

(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com

SIERRA CLUB

Megan Wachspress*
2101 Webster Street, Suite 1300
Oakland, CA 94612
(773) 704-9310 (telephone)
megan.wachspress@sierraclub.org
*Appearing Pro Hac Vice

Attorneys for Petitioner–Appellant, Sierra Club

CLEAN WISCONSIN, INC.

Brett Korte, SBN 1126374
Staff Attorney
Clean Wisconsin
634 W. Main St. #300
Madison, WI 53703
(608) 251-7020 (telephone)
bkorte@cleanwisconsin.org

Attorney for Petitioner–Appellant, Clean Wisconsin, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The Public Service Commission of Wisconsin ("the Commission") and Dairyland Power Cooperative and South Shore Energy LLC (collectively, "Dairyland") rely on platitudes about the Commission's "decades" of experience to defend its decision ("Decision") to grant a Certificate of Convenience and Necessity ("CPCN") for the Nemadji Trail Energy Center ("NTEC") project. However, experience is no substitute for applying the correct legal standards, properly exercising discretion, and making decisions supported by the record in a given case. While the Commission has historically benefitted from deference from the courts, the Legislature and Wisconsin Supreme Court now require more scrutiny of agency decisions. *E.g.*, Wis. Stat. §227.10; *Wis. Legislature v. Palm*, 2020 WI 42, ¶52, 391 Wis. 2d 497, 942 N.W.2d 900; *Tetra-Tech EC, Inc. v. DOR*, 2018 WI 75, ¶¶3, 84, 382 Wis. 2d 496, 914 N.W.2d 21. The NTEC Decision cannot survive this scrutiny, and Clean Wisconsin and Sierra Club ("Environmental Petitioners") request that the Court reverse or, alternatively, remand the Commission's decision.

STANDARD OF REVIEW

Since *Tetra-Tech*, courts review agency legal interpretations *de novo*. The Commission and Dairyland nominally acknowledge as much but nonetheless attempt to extract as much deference as possible to the Commission's legal interpretations and discretionary findings, including by citing statements in *Clean Wisconsin v. PSC*, 2005 WI 93, 282 Wis. 2d 250, 700 N.W.2d 768, that a CPCN is a legislative decision.

Clean Wisconsin does not dictate the standard of review here. *Clean Wisconsin* affirmed issuance of a CPCN under the now-obsolete "great weight" level of deference. *Id*. ¶¶119, 136-40, 190. (Indeed, the deciding justice in *Clean Wisconsin* stated "but for" that standard, he would have reversed its decision that the WEPA review was adequate. *Id*. ¶¶287-288 (Butler, J., concurring).) Dairyland claims that *Tetra-Tech* did not overturn *Clean Wisconsin* (Dairyland Br. at 6), but *Tetra-Tech* did not concern a CPCN so there was no need to overrule *Clean Wisconsin*. *Clean Wisconsin*'s declarations of deference and the judicial largesse it afforded the Commission's legal interpretations cannot survive *Tetra-Tech*. Even Dairyland seems to concede that the "legislative" aspect of the Commission's decision refers only to its discretionary decisions, and not its interpretations of law. (Dairyland Br. at 5.) Discretionary decisions that rest on an erroneous interpretation of law are an erroneous exercise of discretion. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc*., 2011 WI 36, ¶83, 333 Wis. 2d 402, 797 N.W.2d 789.

Calling the Commission's decisions "legislative" does not exempt the Commission from the basic rules that apply to agencies and agency proceedings.

ARGUMENT

I. The Applicants Have the Burden of Proof in a CPCN Proceeding, and the Standard of Proof is Preponderance of the Evidence.

In briefing, the Commission and Dairyland assert that the CPCN law assigns no burden of proof. (Commission Br. at 18; Dairyland Br. at 11.) This is at odds with the Commission's position in circuit court (Doc.237-7, A-App-007)[1] and even the Commission's initial decision, however awkwardly stated (*see* R.22 at 16, A-App-037). The Commission should not be permitted to walk back this position now.

As to what standard must be met in carrying this burden, all parties agree that the "substantial evidence" test is the appropriate *standard of review* for this Court in reviewing the Commission's factual findings. (Env. Pet. Br. at 20; Commission Br. at 8; Dairyland Br. at 5.) The Commission erred by trying to apply this standard to its own decisionmaking. This error is plainly stated in the Decision: "[A]lthough in administrative hearings **such as this one** the common-law rule that the moving party has the burden of proof is generally observed, **observing this rule is fulfilled by weighing the evidence to determine whether a finding is supported by substantial evidence**." (R.22 at 16, A-App-037 (emphases added, footnote omitted).)

[1] The circuit court believed this issue was undisputed. (Doc. 237-7, A-App-007 ("I do not believe that anyone disagrees with Petitioners that Applicants bore the burden of proof.").)

This is exactly the error reversed by the Wisconsin Supreme Court in *Reinke v. Personnel Board.* The court reversed an agency's administrative judgment that relied on a substantial evidence standard, explaining: "The substantial evidence rule is only applicable on judicial review; and, therefore, the [agency] misinterpreted its function, when it found that there was substantial evidence to support the action of the appointing authority." 53 Wis. 2d 123, 133, 191 N.W.2d 833 (1971). The court went on to conclude that "[t]he function of the [agency] is to make findings of fact which it believes are proven to a reasonable certainty, by the greater weight of the credible evidence…." i.e., a preponderance of the evidence. *Id.* at 137-38. Ultimately, the court adopted the preponderance of the evidence standard as the standard of proof required of the agency when making findings of fact because it is the standard "used in ordinary civil actions…." *Id*. at 137. In an attempt to evade the force of the decision, the Commission implies the *Reinke* decision was controlled by the Charter of the City of Milwaukee. This is a mischaracterization; the case involved *state* personnel and the court cited the Charter's standard for disciplinary proceedings as a persuasive example. *Id*. at 137.

In contrast, *Gateway City Transfer Co. v. PSC*, 253 Wis. 397, 34 N.W.2d 238 (1948), which Dairyland claims is "binding caselaw," is nothing of the sort. (Dairyland Br. at 12-13.) *Gateway* concerned the Common Motor Carriers Act and not the Plant Siting law. 253 Wis. at 405 (affirming denial of truck line's request to serve additional routes). In quoting *Gateway*, Dairyland omitted the language in bold: "Hearings before the Public

Service Commission **under the Common Motor Carriers Act** are not to be treated as civil actions." (Dairyland Br. at 12.) Notably, the Commission did not cite *Gateway* in its brief at all. (Commission Br. at 20 (dismissing cases of this era as preceding the modern Plant Siting Law by thirty years).) It is inapposite.

Whether a party seeking a CPCN carries the burden on proof, and what standard the Commission ought to apply in determining whether they have met that burden are pure questions of law, to which no deference is owed the Commission, Wis. Stat. §227.57(11), and *Clean Wisconsin* does not answer it. While some aspects to the Commission's discretionary decisions may be legislative, the fact remains that the decisionmaking process employs a contested case procedure to which Wis. Stat. ch. 227 applies. *See* Wis. Admin. Code §PSC 2.01. Following *Reinke* ensures weighty CPCN decisions are made on a complete record; while the circuit court punted by describing CPCN standards as "squishy," administrative effectiveness and due process require judicial clarity on this point. (Doc.237-9, A-App-009.)

This Court should confirm that applicants for a CPCN have the burden of proof to show the Plant Siting Law and Energy Priorities Law are satisfied, and that the standard of proof is preponderance of the evidence.[2]

[2]The Commission has the burden to show this Court that its decisions under WEPA were correct. *Wisconsin's Env'tl Decade, Inc. v. PSC*, 79 Wis. 2d 409, 430, 256 N.W.2d 149 (1977).

II. The Commission Made Errors of Law, Discretion, and Fact in Finding that the NTEC Project Satisfied Wis. Stat. §196.491(3)(d)3. and 4.

A. The Commission Made Errors of Law and Discretion

As Environmental Petitioners' opening brief explains, the Commission misapplied the CPCN law by failing to make findings on all required factors, deferring findings to the Wisconsin Department of Natural Resources ("DNR") and failing to explain, *inter alia*, how and why future DNR permits would satisfy the Commission's duties.

Dairyland claims that it was sufficient for the Commission to state conclusory findings that the applicable statutory criteria were satisfied, relying on *Clean Wisconsin*. (Dairyland Br. at 20.) But even then, as Dairyland acknowledges (*id*.), a reviewing court must be able to discern the "basis of the decision" from the findings and conclusions. *Clean Wis*., 282 Wis. 2d 250, ¶145. Because the Commission did not discuss multiple factors under Wis. Stat. §§196.491(3)(d)3. and 4., it is not possible to discern the basis for its Decision that these factors were satisfied or even how they were applied. (Env. Pet. Br. at 33-34, 45-46 (identifying "ecological balance," "public health and welfare," "historic sites," "geological formations," and "the aesthetics of land and water and recreational use" as factors not discussed in the Decision).) It is not enough to point to the 68-page decision, as Dairyland frequently does, and suggest the Commission must have considered the relevant factors, somewhere, somehow. (*E.g*., Dairyland Br. at 20, 22.)

For its part, the Commission claims the language of Wis. Stat. §196.491(3)(d)3. and 4. did not require a finding on every statutory factor. (Commission Br. at 25, 29.) For the public interest factor, it claims the Commission need only "consider" the applicable factors, and for the undue adverse impact determination, the statute's "such as, but not limited to" language permitted it to bypass certain factors. Surprisingly, the Commission states "the list of environmental values contained in §196.491(3)(d)4. is neither mandatory nor complete" and "does not require an applicant to present evidence on, or the Commission to consider, any individual value named in the statute, much less each and every value listed." (Commission Br. at 29.) In contrast to Environmental Petitioners' brief at 31-34, the Commission cites no case law to support its claim that the Commission may ignore the Legislature's direction, nor does it explain how its interpretation preserves the "but not limited to" statutory language. The Commission's argument also reveals the folly of failing to assign a standard of proof to applicants seeking a CPCN, because it disincentivizes the applicants from providing complete information on all statutory factors, and the Commission from examining them.

The Commission next claims that it properly interpreted Wis. Stat. §196.491(3)(d)3. and 4. when it imposed conditions on its decision under Wis. Stat. §196.491(3)(e). (Comm'n Br. at 31-34.) The statute permits approvals with conditions when "necessary for an affirmative finding under par. (d)." Wis. Stat. §196.491(3)(e). This language necessarily implies the Commission will explain how the conditions will assure

compliance with the Plant Siting law. In this case, there is little analysis in the Commission's decision connecting the conditions it chose to impose with satisfaction of the broad public interest and undue adverse impact determinations. This was an error of discretion. *See Daniels v. Wis. Chiropractic Exam. Bd.*, 2008 WI App 59, ¶6, 309 Wis. 2d 485, 750 N.W.2d 951 ("Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning . . .") (citation and internal quotation marks omitted).

Dairyland claims the Commission did connect these dots, but it only points to the length of the Commission's decision and three isolated lines within it. (Dairyland Br. at 22.) It does not address Environmental Petitioners' explanations as to why these three items were insufficient (Env. Pets.' Br. at 35-36).[3] With no citation to the record, Dairyland states that "[t]here is no support in law or logic" for Environmental Petitioners' claims that "there are gaps in DNR's regulatory jurisdiction that the Commission must fill," even while acknowledging the gaps that Environmental Petitioners identified. (Dairyland Br. at 21 & n.3.)

But as the dissenting commissioner explained, this is exactly what the Commission must do: acknowledge those gaps that do exist, and explain why relying on DNR permitting nonetheless satisfies the

[3] Dairyland also misunderstands the slope failure concern as solely related to the proposed sheet pile wall, instead of Environmental Petitioners' actual concern that stormwater discharge from the top of the hill on which the plant is located and heavy rains will cause severe erosion that will harm the wetlands and river below, and (in an extreme case) cause a loss of site infrastructure. (R.48 at 5-7; R.64 at 2.)

Commission's broad public interest and undue adverse interest determinations. (R.22 at 69-71, A-App-090-093.) For example, Clean Wisconsin Witness Mosca testified that for stormwater, "[d]esign events well in excess of regulatory requirements should be considered, especially in-light of recent large rain events in the region" and challenges presented by the site's soils and layout. (R.48 at 7.) The Commission's Decision attempts to smooth over these issues by saying it was "persuaded by the applicants and **by the mitigation recommendations suggested by DNR witnesses** that sufficient mitigation measures can be implemented to minimize and mitigate these impacts." (R.22 at 47-48 (emphasis added); A-App-068.) However, no DNR witnesses testified about stormwater mitigation, and stormwater plans had not been reviewed by DNR at the time of the contested case hearing. (R.164 at 198:20-199:15, 391:10-23.) Even now, the Commission concedes it is not known whether Dairyland will be able to satisfy the conditions the Commission imposed. (Commission Br. at 28.) On this record, the Plant Siting law demanded more from the Commission.

The Commission had an obligation to apply all required legal factors under Wis. Stat. §§196.491(3)(d)3. and 4. and explain how they were satisfied, especially without the cushion of great weight deference from *Clean Wisconsin*. 282 Wis.2d 250, ¶33.

B. *The Commission Lacked Substantial Evidence for its Findings that Wis. Stat. §§196.491(3)(d)3. and 4. Were Satisfied*.

Environmental Petitioners principally rely on their opening brief as to substantial evidence issues under Wis. Stat. §196.491(3)(d)3. and 4., but make the following observations.

First, as to the public interest factor under Wis. Stat. §196.491(3)(d)3., the Commission and Dairyland largely attempt to backfill Dairyland's failure to provide affirmative evidence supporting applicable statutory factors or the Commission's failure to cite any. (Commission Br. at 24-31; Dairyland Br. at 23-30.) They also misrepresent the facts and/or Environmental Petitioners' arguments, as when Dairyland claims Mr. Mosca testified the NTEC plant would "fall into the river" (Dairyland Br. at 28; *contra* note 3, *supra*), or when the Commission says the Husky refinery disaster was "remote in time and place" from the NTEC site (Commission Br. at 25). In fact, one of Dairyland's selling points was that the NTEC site would be located adjacent to the Husky and Enbridge Superior terminal areas (R.164 at 194), and the Husky explosion occurred just one year before the NTEC public hearing. (R.165 at 38, 94.)

Second, as to the undue adverse environmental impact finding under Wis. Stat. §196.491(3)(d)4., the Commission and Dairyland claim there was sufficient evidence on factors like waterways and wetlands, and that DNR witnesses were well-informed about the project such that it was reasonable to defer further issues to future permitting processes. (Commission Br. at 30; Dairyland Br. at 29-30.) Yet the record repeatedly

shows the DNR did not have sufficient information about project impacts, such as a large wetland at the toe of the slope of the Preferred Site (R.164 at 399:5-400:9) or, contrary to Dairyland's claims, engineering plans sufficient to determine whether a Chapter 30 waterway permit would be required for WW-501f or other waterways. (R.164 at 394:18-397:3 (DNR witness Tekler testifying "we do not have the plans required to determine what permits are even required"); R.56 at 5:22-26.)

The DNR is required to issue its permits within 30 days after the Commission's final decision. Wis. Stat. §30.025(4)(c). But the record shows it would not have sufficient information to do so by 30 days after the Commission's January 30, 2020, final decision, or at the least, that DNR did not know when it would receive sufficient information. (R.164 at 394:18-397:3, 401:3-5-402:22 (DNR witness Tekler agreeing she would require resubmission of information and would conduct a site visit in the spring of 2020).) This should have been a red flag to the Commission, but instead, it issued a Decision without a sufficiently developed record for it to find the project would not cause undue adverse environmental impacts.

III. The Commission Improperly Applied the Energy Priorities Law

A. The EPL Applied to the Commission's Decision.

The Commission and Environmental Petitioners agree that Wis. Stat. §§1.12 and 196.025, Wisconsin's Energy Priorities Law ("EPL"), is applicable to the Decision. (*See* Commission Br. at 36.) Dairyland's contentions otherwise are unavailing.

It is true that for merchant plants, like NTEC, the Commission does not consider whether the facility would satisfy a reasonable need of the public for an adequate supply of energy; nor does it consider alternative sources of supply, engineering, or economic factors. *See* Wis. Stat. §196.491(3)(d)2.-3. However, the Commission must still determine whether a merchant plant is in the public interest. *See* Wis. Stat. §196.491(3)(d)3. As the Commission's Decision here explains, "[i]nherent in that public interest inquiry is an assessment of how the proposed project fits in with the state's [EPL]…." (R.22 at 19.) Namely, "the Commission still must assess whether a proposed wholesale merchant plant project is environmentally sound." *Id*. It is therefore "appropriate for the Commission to assess how the proposed project fits within the state's preferred means of meeting Wisconsin's energy needs, which is laid out in the [EPL]." *Id*.

B. The Commission Erred in Applying the EPL.

Despite recognizing it was required to consider the EPL when deciding whether to issue a CPCN for the NTEC plant, the Commission made legal and factual errors when it determined granting the CPCN satisfied the EPL. (Env. Pets. Br. at 50-56.)

As Environmental Petitioners argued before the Commission, the availability of renewables paired with battery storage should have precluded a finding that the EPL has been satisfied. The Commission attempts to evade this conclusion by arguing that because no examples of such resources currently *existed in Wisconsin* at the time, those resources were somehow *unavailable* in Wisconsin. (*See* Commission Br. at 37, n.18.)

This distinction is not contemplated by statute and was irrelevant to the Commission's consideration. Sierra Club Witness Goggin provided several examples of utility scale battery projects in other states. (*See* R.164 at 313:14-314:3) The Commission should have held Dairyland to its burden to show no other higher-priority resources were available.

The Commission's decision lacks legal and factual support.

IV. **The Commission Erred When It Found WEPA Was Satisfied**.

No party disputes that this Court reviews the adequacy of an EIS *de novo*. (*See* Commission Br. at 38.) The EIS was inadequate because it failed to assess the significance of *direct* greenhouse gas emissions; or to describe the extent and nature of *indirect* greenhouse gas emissions.

First, direct emissions: the EIS includes an estimate of greenhouse gas emissions due to combustion of methane at the proposed project, *see* R.138 at 46, but does not provide any context for this total or to assess the project's relative contribution to climate change impacts. Discussion of "the significance" of impacts is essential to any comparison of the proposed action and its alternatives or mitigation strategies. *See* 40 C.F.R. §1502.16.[4] With respect to greenhouse gas emissions, this discussion must include some scientifically-based methodology to make the public aware of the "scale and scope relative to the industry []." *See 350 Montana v. Haaland*, 50 F.4th 1254, 1264-72 (9th Cir. 2022).

[4] WEPA directs agencies to "substantially follow[] the guidelines issued by the United States council on environmental quality," which are set forth at 40 C.F.R. §1501 *et seq*., when preparing an EIS. Wis. Stat. § 1.11(2)(c).

Second, indirect emissions: Neither the Commission nor Dairyland disputes that an EIS must consider indirect emissions. *See Wisconsin's Env'tl Decade*, 79 Wis. 2d at 428–30 ("Any construction limiting the Act to direct environmental effects would be contrary to its manifest intent.") Nevertheless, the Commission claims Environmental Petitioners' reference to *Applegate-Bader Farm, LLC v. DOR* is "misplaced" because the case addressed the adequacy of an environmental assessment rather than an EIS. (Commission Br. at 39). But it would be both unreasonable and contrary to the purpose of WEPA if indirect effects that must be considered in the document used to decide *whether* to perform an EIS could be ignored in the more comprehensive EIS itself.

The EIS failed to quantify emissions associated with natural gas extraction.[5] Dairyland claims that the EIS includes a "qualitative discussion" of upstream impacts (Dairyland Br. at 38 (citing R.138 at 46-47)), but this discussion merely acknowledges the *existence* of impacts. The most detail offered by the EIS is a reference to "public health implications" of an unspecified nature or magnitude due to the utilization of "water and…materials" in the fracking process. (R.138 at 47.)

Federal courts interpreting the parallel National Environmental Policy Act have found that an EIS that does not provide a quantitative

[5] Dairyland's claim that the EIS "quantifies how much methane (CH4) will serve as a multiplier for the global warming potential of GHG components" is misleading. The EIS states that methane has 21 times the global warming potential, on a per-lb basis, as carbon dioxide; this is a general fact about the two gases that says nothing about the project.

estimate of indirect greenhouse emissions or "explain more specifically why it could not have done so" is legally insufficient. *See Center for Biological Diversity v. Bernhardt*, 982 F.3d 723, 737 (9th Cir. 2020) (citations omitted). Dairyland misrepresents what it characterizes as "more recent federal circuit decisions" to the contrary. (Dairyland Br. at 33.) In these cases, all parties agreed that where a project has a "reasonably close causal relationship" to upstream gas production, those upstream emissions *are* within the scope of NEPA analysis. *See Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019); *accord Delaware Riverkeeper Network v. FERC,* 45 F.4th 104, 109 (D.C. Cir. 2022). However, the relevant projects were pipelines, and there was no evidence that the projects would facilitate previously impossible gas extraction. Construction and operation of the gas-fired power plant proposed here, however, will necessarily increase demand for gas and thus has not just a "reasonably close" but direct "causal relationship" with increased gas production.

Attempting to defend the adequacy of the EIS, Dairyland invokes the length of the EIS and its discussion of *other* topics: location (§2.1); noise (§§3.3.11.7, 4.3.11.7); siting of the electric transmission lines to the proposed plant (§3.4); the possibility of a no-action alternative (§2.8); and to the EIS's restatement of the EPL (§5.1.2.2). (Dairyland Br. at 31.) All of these references are non-sequiturs, because none address greenhouse gas emissions. That the Commission filled 300 pages with discussion of *other* issues does not substitute for this crucial missing piece. *See* 40 C.F.R. §1502.15 ("Verbose descriptions of the affected environment are

themselves no measure of the adequacy of an environmental impact statement."). And Dairyland's reliance on the mere *statement* that alternatives exist at §2.8 proves Environmental Petitioners' point: The EIS simply does not grapple with alternatives that might mitigate the project's greenhouse gas impacts.

The Commission's efforts to rehabilitate the EIS are similarly unavailing: it suggests without argument that the EIS is exempt from an analysis of air pollution impacts because Wis. Stat. §196.491(3)(d)4. does not allow the Commission to deny an application for a merchant generation facility on the basis of air pollution impacts if the facility complies with certain regulations. But "[t]he policies and goals [of WEPA] *are supplementary* to those set forth in existing authorizations of agencies." Wis. Stat. §1.11(5) (emphasis added). The Commission is obligated, like all Wisconsin agencies, to fully analyze and articulate the direct and indirect environmental impacts of its actions for the benefit of the public as well as decision-makers. The EIS at issue in this proceeding failed to do so, and the Commission erred as a matter of law in making a finding to the contrary.

V. **The Commission's Objections That This Appeal is Premature Should be Rejected**.

The Commission—but not Dairyland—adds an issue to this appeal, asserting that it was filed prematurely and should be dismissed.

The Commission has waived any objection as to the timing of this appeal. Under Wis. Stat. §807.07(1),

> When an appeal from any court…is attempted to any court and return is duly made to such court, the respondent shall be deemed to have waived all objections to the regularity or sufficiency of the appeal or to the jurisdiction over the parties of the appellate court, unless the respondent moves to dismiss such appeal before taking or participating in any other proceedings in said appellate court.

A "return is duly made" upon certification of "the official record of the body whose decision is being reviewed and which must be filed with the reviewing court in a certiorari action." *Bergstrom v. Polk Cnty.*, 2011 WI App 20, ¶29, 331 Wis. 2d 678, 795 N.W.2d 482 (internal citations and quotations omitted). The record in this proceeding was filed on August 15, 2022. On October 21, 2022, the Commission moved to extend time for its response brief. But the Commission did not raise any objection to the timeliness of this appeal until it filed its responding brief on November 28, 2022. The Commission has waived its objection and the matter should end there.

Even if the objection to the timing of the appeal were not waived, it would lack merit under the circumstances here. The circuit court consistently handled the merits and bias issues in this case on different tracks, with different briefing schedules. (*E.g.*, Doc.195.) The merits order was issued first, on May 17, 2022 (Doc.237, A-App.001), and Dairyland filed a notice of entry of order soon thereafter (Doc.238). Under these circumstances, it was reasonable for Environmental Petitioners to have filed their appeal of the merits decision, even while the separate bias issue was still pending, and even though the merits decision did not state it was final for purposes of appeal. "[A]bsent explicit language that the

document is intended to be the final order or final judgment for purposes of appeal, appellate courts should liberally construe ambiguities to preserve the right of appeal." *Wamboldt v. West Bend Mut. Ins.*, 2007 WI 35, ¶46, 299 Wis. 2d 723, 728 N.W.2d 670. Here, such a construction would be to allow appeal from the May 17 Order as final as to all but the bias issue.

Moreover, the Commission concedes that the circuit court has since issued an Order "that is a final and appealable decision" "on its face." (Commission Br. at 15-16 (citing Dkt.294)). Any prematurity in the filing of the appeal has therefore been cured. The Commission does not cite a single case where an appeal was dismissed as premature when a final order had been entered subsequent to the initiation of appellate proceedings. To the contrary, Wisconsin law expressly directs that such an appeal be heard. *See* Wis. Stat. §808.04(8) ("If the record discloses that the judgment or order appealed from was entered after the notice of appeal or intent to appeal was filed, the notice shall be treated as filed after that entry and on the day of the entry."); *see also Mayek v. Cloverleaf Lakes Sanitary Dist. No. 1*, 2000 WI App 182, ¶19, 238 Wis. 2d 261, 617 N.W.2d 235 (noting purpose of statute to ensure appeals can be heard and avoid delay, confusion, and prejudice from dismissing early-filed appeals). The Commission's attempt to brush aside this provision as "not applicable here" is unconvincing.

CONCLUSION

For the reasons above, Environmental Petitioners respectfully request that the Court reverse the Commission's Decision and remand it to the agency as appropriate.

Respectfully submitted this 20th day of December, 2022.

PINES BACH LLP

Electronically signed by: Christa O. Westerberg
Christa O. Westerberg, SBN 1040530
122 West Washington Avenue, Suite 900
Madison, Wisconsin 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com

SIERRA CLUB

Megan Wachspress*
2101 Webster Street, Suite 1300
Oakland, CA 94612
(773) 704-9310 (telephone)
megan.wachspress@sierraclub.org
*Appearing Pro Hac Vice

Attorneys for Petitioner–Appellant, Sierra Club

CLEAN WISCONSIN, INC.

Electronically signed by Brett Korte
Brett Korte, SBN 1126374
Staff Attorney
Clean Wisconsin
634 W. Main St. #300
Madison, WI 53703
(608) 251-7020 (telephone)
bkorte@cleanwisconsin.org

Attorney for Petitioner–Appellant, Clean Wisconsin

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. Pursuant to the Court's Order of December 9, 2022, the length of this brief is 4,482 words.

Dated this 20th day of December, 2022.

Electronically signed by Christa O. Westerberg
Christa O. Westerberg, SBN 1040530