STATE OF WISCONSIN CIRCUIT COURT BRANCH 1 WAUKESHA COUNTY

WISCONSIN MANUFACTURERS AND COMMERCE, INC., and LEATHER RICH, INC.,

Plaintiffs,

v.

Case No. 21-CV-0342
Hon. Michael O. Bohren

WISCONSIN DEPARTMENT OF NATURAL RESOURCES, WISCONSIN NATURAL RESOURCES BOARD, and PRESTON COLE, in his official capacity as Secretary of the WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

Defendants.

BRIEF SUPPORTING MOTION TO INTERVENE AND ALTERNATIVE MOTION TO FILE NON-PARTY BRIEF AND CONDITIONAL MOTION TO INTERVENE

Citizens for a Clean Wausau, Clean Water Action Council of Northeast Wisconsin, River Alliance of Wisconsin, Wisconsin Environmental Health Network, and Doug Oitzinger (collectively, "Proposed Intervenors"), through their undersigned counsel, have moved the Court for leave to intervene in this lawsuit pursuant to Wis. Stat. § 803.09(1).[1] Should the Court deny that motion, Proposed Intervenors in the alternative have moved the Court for leave to file a non-party brief pursuant to Wis. Stat. §§ 802.01(2) and 809.19(7), and have conditionally moved this Court for leave to intervene in this lawsuit pursuant to Wis. Stat. § 803.09(1). As indicated in the Notice of Motions, Motion to Intervene, and Alternative Motion to File Non-Party Brief and

[1] All citations are to the 2019-20 version of the Wisconsin Statutes unless otherwise noted.

Conditional Motion to Intervene, this brief provides the grounds for these motions and establishes Proposed Intervenors' right to participate as full parties in this case.

This case is not just about the application of the Spills Law, Wis. Stat. § 292.11, to a specific contaminated site in Oconomowoc, Wisconsin. Broadly speaking, this case is about whether the Wisconsin Department of Natural Resources ("DNR") can continue to implement the Spills Law as it has for more than 40 years to protect public health and the environment. The DNR's current implementation of the Spills Law in general is the product of decades of work by both governmental actors and the public through the enactment of the enabling statute, originally codified at Wis. Stat. § 144.76 (1977-78), promulgation of the NR 700 Series of the Wisconsin Administrative Code, statutory and rule revisions, legal challenges leading to Wisconsin Supreme Court decisions, and advocacy efforts by individuals and non-governmental organizations—including Proposed Intervenors—both with respect to the Spills Law generally and the application of the Spills Law to specific contaminants and contaminated sites.

More specifically, this case is about whether the DNR will retain its most effective—and arguably only meaningful—regulatory authority to address contamination from per- and polyfluoroalkyl substances ("PFAS"), highly toxic human-made chemicals that are increasingly being detected in the environment and drinking water sources, including right here in Wisconsin. That authority comes from the Spills Law, which requires parties responsible for discharges of hazardous substances to restore the environment to the extent practicable. *See* Wis. Stat. §§ 292.01(5) and 292.11. The DNR's application of the Spills Law to PFAS, like its implementation of the Spills Law generally, is not a product of mere agency decision making, but also the result of years-long advocacy on the part of individuals and non-governmental organizations, including Proposed Intervenors.

Wisconsin Manufacturers & Commerce and Leather Rich, Inc. (collectively, "WMC") effectively ask this Court to repeal substantial portions of the Spills Law and deprive the DNR of its ability to protect the public from discharges of substances that, based on the specific circumstances involved, pose a hazard to public health and the environment. And WMC asks all that based in large on a couple of sentences from a law that amended Wisconsin's general administrative procedure statute but failed to mention to the Spills Law whatsoever. *See* 2011 Wis. Act 21.

The Spills Law is very much a statute designed to protect the public interest in a clean environment; however, the interests of Proposed Intervenors are much more immediate and direct than those of members of the general public and are therefore distinguishable from the DNR's interests. Proposed Intervenors and their members live and recreate in and around areas contaminated with hazardous substances, including PFAS, and directly benefit from the DNR's current implementation of the Spills Law in a variety of ways. *See e.g.*, Kilian Aff. ¶¶4-5, 9; Hoegger Aff. ¶¶7, 12; Oitzinger Aff. ¶¶6, 12. Proposed Intervenors have also invested significant time and resources advocating for the regulation and cleanup of hazardous substance contamination, including the application of the Spills Law to PFAS contamination. Kilian ¶6; Hoegger Aff. ¶11; Werner Aff. ¶¶6-7; Neary Aff. ¶7; Oitzinger Aff. ¶12.

If WMC succeeds, Proposed Intervenors will be indefinitely deprived of those benefits and their successful advocacy efforts will be not only undermined, but perhaps undone altogether. Promulgating an administrative rule is not a mere formality. The rulemaking process is arduous, and there is no guarantee of success. *See* Exhibit A (outlining the 35 steps required to promulgate an administrative rule); Wis. Stat. ch. 227, subch. II. It takes years to navigate, requires the expenditure of significant time and resources by state agencies and participating members of the

public like Proposed Intervenors, and proposed rules may not survive legislative review even if the agency can complete all the steps before the 30-month deadline. *Id.* Other instances like when costs of compliance with that rule would exceed more than $10 million over any two-year period require the Wisconsin Legislature to enact another law authorizing that rule to proceed. Wis. Stat. § 227.139. As such, the ramifications of the Court's decision in this case are quite consequential. There may be no going back.

Proposed Intervenors therefore move the Court for leave to intervene in this case to protect their direct and immediate interests in preserving the DNR's authority to fully implement the Spills Law. If the Court is not inclined to grant intervention at this time, Proposed Intervenors in the alternative move the Court to file a non-party brief on the pending summary judgment motion and any other dispositive issues that arise during this case. Proposed Intervenors also move the Court for conditional intervention, which, if granted as requested, would automatically admit Proposed Intervenors as full parties in this case if there is a settlement or proposed settlement of this case that would be adverse to Proposed Intervenors' interests, if the DNR pursues a litigation strategy in this case that is adverse to Proposed Intervenors' interests, or if the Court disposes of the case in any way that limits the DNR's ability to continue fully implementing the Spills Law and the DNR fails to appeal that decision within the applicable deadline.

For those reasons and as established below, the Court should grant Proposed Intervenors' Motion to Intervene or, in the alternative, grant both Proposed Intervenors' Motion to File a Non-Party Brief and their Conditional Motion to Intervene.

BACKGROUND

The Spills Law, originally enacted in 1978, imposes responsibilities on "[a] person who possesses or controls a hazardous substance which is discharged or who causes the discharge of a hazardous substance." Wis. Stat. § 292.11(3).[2] Hazardous substance is defined as:

> [A]ny substance or combination of substances including any waste of a solid, semisolid, liquid or gaseous form which may cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness or which may pose a substantial present or potential hazard to human health or the environment because of its quantity, concentration or physical, chemical or infectious characteristics. This term includes, but is not limited to, substances which are toxic corrosive, flammable, irritants, strong sensitizers or explosive as determined by the department.

Wis. Stat. § 292.01(5). A discharge includes, "but is not limited to, spilling, leaking, pumping, pouring, emitting, emptying or dumping." Wis. Stat. § 292.01(3). A discharge also includes "the outflow of a hazardous substance from contaminated soil into neighboring properties." *State v. Mauthe*, 123 Wis. 2d 288, 299, 366 N.W.2d 871 (1985). The ability of the DNR to regulate this latter type of discharge, also known as seepage, has enabled it to address historical contamination throughout the state. *See, e.g., State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, ¶¶67-76, 580 N.W.2d 203 (1998) (discussing the intended retroactive and prospective application of the Spills Law).

Except for those instances exempted in Wis. Stat. § 292.11(9), the Spills Law requires "responsible parties"[3] to notify DNR immediately. Wis. Stat. § 292.11(2). Responsible parties are then required to "take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state." Wis. Stat. § 292.11(3). Those actions include performing a site investigation, determining applicable

[2] Person "means an individual, owner, operator, corporation, limited liability company, partnership, association, municipality, interstate agency, state agency or federal agency." Wis. Stat. § 292.01(13).
[3] "Responsible parties" is a term of art defined in Wis. Admin. Code NR § 700.03(51).

cleanup standards, and identifying and implementing appropriate remedial actions. Wis. Admin. Code NR chs. 716 (site investigation), 720 (cleanup standards), 722 (selecting remedial actions), and 724 (implementing remedial actions). Should those actions prove inadequate, the DNR is also authorized to order responsible parties to take preventative measures or other emergency actions. Wis. Stat. § 292.11(4)(a), (7)(c).

Importantly, Chapter NR 720 of the Wisconsin Administrative Code does not include a list of cleanup standards for hazardous substances regulated under the Spills Law, but rather establishes the method by which those cleanup standards for a specific contaminated site are to be determined. However, the DNR still retains the discretion to require further remedial action even when those cleanup standards are met if the contamination in question "[p]resents a threat to public health, safety, or welfare or the environment at the site or facility." Wis. Admin. Code NR § 720.05(3)(a). Based on this broad authority, the DNR has determined that when PFAS are discharged to the environment, they meet the definition of hazardous substance and are subject to regulation under the Spills Law and implementing regulations. Exhibit B at 2.

On February 23, 2021, WMC filed the above-captioned action for declaratory and injunctive relief against the DNR. Compl. ¶ 1. The Complaint includes four separate claims related to the DNR's administration of the Spills Law, both generally and with respect to PFAS:

1. Pursuant to Wis. Stat. §§ 806.04 and 227.40(4)(a), WMC seeks a declaration that DNR's regulation of emerging contaminants such as PFAS as "hazardous substances" under the Spills Law, Wis. Stat. § 292.11, and particularly as part of the Remediation and Redevelopment ("RR") and Voluntary Party Liability Exemption ("VPLE") programs "is an unlawfully adopted rule, and is invalid and unenforceable." *Id.* ¶¶91-100.

2. Pursuant to Wis. Stat. §§ 806.04 and 227.40(4)(a), WMC seeks a declaration that the DNR's "enforcement of any numeric standard, requirement, or threshold related to an emerging contaminant, including PFAS, in the RR and VPLE programs is an unlawfully adopted rule and otherwise beyond [DNR's] statutory authority, and is invalid and unenforceable." *Id.* ¶¶101-09.
3. Again, pursuant to Wis. Stat. §§ 806.04 and 227.40(4)(a), WMC seeks a declaration that the DNR's "interim decision" policy to no longer grant blanket liability protection covering hazardous substances that were not investigated as part of the VPLE program is an unlawful rule. *Id.* ¶¶53-63, 110-19.
4. This time only pursuant to Wis. Stat. § 806.04, WMC seeks a declaration that "under Wis. Stat. § 292.01(5), [the DNR is] required to promulgate as a rule a list of Hazardous Substances, and quantities or concentrations of the substances which make them hazardous." *Id.* ¶¶120-25.

As part of the Prayer for Relief, WMC also seeks an order enjoining the DNR from taking allegedly unlawful regulatory actions related to the above claims. *Id.* at 23-24.

Unlike private litigants, who only have 20 days to file an answer to a complaint, state agencies have 45 days to file an answer when being sued in a civil action. Wis. Stat. § 802.06(1)(a). On April 2, 2021, the parties stipulated to further extend that deadline, and the Court ordered that the time to file an answer be extended to April 23, 2021. Order for Extension of Time (Apr. 6, 2021). The DNR filed an answer on April 23, 2021. Accompanying that answer was a partial motion to dismiss (1) all claims brought pursuant to Wis. Stat. § 806.04 for failure to state a claim upon which relief can be granted; and (2) all claims against the Natural Resources Board. Notice of Def.'s Mot. to Dismiss (Apr. 23, 2021). WMC filed a response on May 24, 2021 and the DNR

filed a reply on June 3, 2021. A hearing on the partial motion to dismiss has been scheduled for June 14, 2021 at 2:30pm. Not. of Hearing (June 8, 2021).

On June 7, 2021, WMC and DNR filed a joint letter regarding scheduling, which the Court reviewed the following day and made a note to schedule a motion and that brief limits will be enforced for each motion. Letters & Correspondence (June 7, 2021). On June 10, 2021, Attorney Lucas Webber, counsel for Wisconsin Manufacturers & Commerce, filed a Jointly Submitted Notice of Motion and Notice of Cross Motion for Summary Judgment. Not. of Mot. (June 10, 2021). A Summary Judgment Hearing has been scheduled for November 2, 2021 at 9:00am. Not. of Hearing (June 9, 2021).

Proposed Intervenors were not aware that their interests could be directly and immediately impacted by the outcome of this case until April 2, 2021. Kilian Aff. ¶10; Hoegger Aff. ¶13; Werner Aff. ¶¶9-14; Neary Aff. ¶10; Oitzinger Aff. ¶15. Proposed Intervenors have a significant interest in the DNR's ability to continue administering the Spills Law as designed and as it has been administered for more than 40 years—i.e., with the flexibility to determine when the spill of any substance poses a hazard to the public or environment based on the specific circumstances involved. Those interests include the preservation of direct benefits Proposed Intervenors' and their members who live in and around areas contaminated with hazardous substances, including PFAS, receive from the DNR's current implementation of the Spills Law. *See e.g.*, Kilian Aff. ¶¶4-5, 9; Hoegger Aff. ¶¶7, 12; Oitzinger Aff. ¶¶6, 12. Such direct benefits include the identification of those responsible for the contamination, the requirement that the contamination be investigated, the requirement that remedial options be identified and implemented, the provision of bottled water for impacted residents, and DNR-hosted informational meetings. Oitzinger Aff. ¶¶12-13. Furthermore, unless the DNR can fully exercise its authority under the Spills Law to

promptly order the investigation and subsequent remediation of hazardous substance contamination, Proposed Intervenors and their members' interests will be adversely impacted due to an increased risk in potential exposure to contaminated natural resources such as soil, drinking water, and surface water that will not be remediated or for which remediation will be delayed. Kilian Aff. ¶9; Werner Aff. ¶8; Oitzinger Aff. ¶7.

Other adverse impacts on Proposed Intervenors' interests include limitations on or altogether elimination of recreational opportunities, limitations on the ability to safely consume fish, and diminishment of scenic beauty. Hoegger Aff. ¶12; Werner Aff. ¶8; Oitzinger Aff. ¶7. These interests pertain to all Wisconsin waterway generally but also to specific waterways such as the Wisconsin River in Wausau, Kilian Aff. ¶6, Starkweather Creek in Madison, Werner Aff. ¶13, and surface waters impacted by PFAS contamination from Tyco Fire Products' facilities in the Marinette and Peshtigo area, Oitzinger Aff. ¶7. Exposure through use of contaminated water for irrigation and consumption of food from impacted gardens is also a concern. Oitzinger ¶9. Undermining the Spills Law could also potentially jeopardize the public health and environment in areas where principal remedial efforts have concluded but residual contamination remains and continuing obligations apply. Kilian Aff. ¶9. The inability of the DNR to fully implement the Spills Law may also exempt those responsible for certain discharges of hazardous substances from the notification requirement contained in Wis. Stat. § 292.11(2) and site investigations requirements contained in Chapter NR 716 of the Wisconsin Administrative Code, and thereby deprive Proposed Intervenors and their members of information about the location and scope of hazardous substance contamination that occurs in their communities. Kilian Aff. 9; Hoegger Aff. ¶12.

In addition, Proposed Intervenors have a significant interest in preserving the successes of their advocacy efforts. Each of the Proposed Intervenors has invested substantial time and

resources advocating for the protection of public health and the environment from hazardous substance contamination, including the robust application of the Spills Law to PFAS. Kilian Aff. ¶6; Hoegger Aff. ¶11; Werner Aff. ¶¶6-7; Neary Aff. ¶7; Oitzinger Aff. ¶10. Doug Oitzinger even came out of retirement to run for public office again to bolster his ability to do so. Oitzinger Aff. ¶12. If WMC's attempt to undermine the Spills Law in this case is successful, those advocacy efforts will be significantly undermined, if not altogether thwarted. Kilian Aff. ¶9; Hoegger Aff. ¶12; Werner Aff. ¶8; Neary Aff. ¶9.

Proposed Intervenors now move the Court for leave to immediately intervene in this lawsuit and to defend their direct and immediate interests in the outcome of this case. Should the Court deny the principal Motion to Intervene, Proposed Intervenors also move the Court in the alternative for leave to file a non-party brief and for conditional intervention pending further development of this case.

ARGUMENT

I. PROPOSED INTERVENORS HAVE A RIGHT TO IMMEDIATELY PARTICIPATE IN THIS LAWSUIT AS A FULL PARTIES TO DEFEND THEIR INTERESTS.

A movant is entitled to intervene as of right when it meets four requirements: (1) that the movant's motion to intervene is timely; (2) that the movant claims an interest sufficiently related to the subject of the action; (3) that disposition of the action as a practical matter will impair or impede the movant's ability to protect that interest; and (4) that the existing parties do not adequately represent the movant's interest. Wis. Stat. § 803.09(1). *See also Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶38, 307 Wis. 3d 1, 745 N.W.2d 1. There is no "precise formula for determining whether a potential intervenor meets the requirements" for intervention. *Helgeland*, 2008 WI 9, ¶40.

Courts evaluate motions to intervene "practically, not technically, with an eye toward 'disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.'" *Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 742-43, 601 N.W.2d 301 (Ct. App. 1999) (citing *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 548-49, 334 N.W.2d 252 (1983)).

> This practical evaluation must accommodate two potentially conflicting objectives underlying the intervention statute: On the one hand, the original parties should be allowed to conduct and conclude their own lawsuit, without having that suit unduly complicated by the addition of intervening parties. On the other, judicial efficiency requires that, where possible, related issues should be resolved in a single lawsuit. Thus, as we evaluate whether the potential intervenor meets the requirements of the intervention statute, we must examine the facts and circumstances of this case against the background of the policies underlying the intervention rule.

Wolff, 229 Wis. 2d at 743 (citing *Bilder*, 112 Wis. 2d at 548-49). Accordingly, "[t]he analysis is holistic, flexible, and highly fact-specific." *Helgeland*, 2008 WI 9, ¶40. The requirements are not "analyzed in isolation from one another"—rather, "the requirements must be blended and balanced." *Id.* ¶39. Due to this interplay, "a strong showing with respect to one requirement may contribute to the movant's ability to meet the other requirements." *Id.*

Finally, "Wis. Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Helgeland*, 2008 WI 9, ¶37 (citing *Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983)).[4]

As demonstrated below, a practical application of the relevant facts to the four intervention requirements, properly blended and balanced, and keeping in mind the underlying policies of the intervention statute, compel a finding that Proposed Intervenors may intervene in this case.

[4] In accordance with Waukesha County Circuit Court Local Rule 3.3, copies of any federal cases cited in this brief have been filed with the Clerk of the Circuit Court at the same time as the brief.

A. The Motion to Intervene is Timely.

As with the overall analysis, "[t]here is no precise formula for determining whether a motion to intervene is timely." *Bilder*, 112 Wis.2d at 550. Courts have identified two factors relevant to this determination: (1) whether the movant acted promptly; and (2) whether the intervention will prejudice the original parties. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶15, 296 Wis. 2d 337, 723 N.W.2d 131 (citing *Bilder*, 112 Wis. 2d at 550). The first of these can be broken down into two subfactors: (1) when the proposed intervenor discovered its interest was at risk; and (2) how far litigation has proceeded. *Id.* (citing *Bilder*, 112 Wis. 2d at 550 and *Roth v. LaFarge School Dist. Bd. of Canvassers*, 2001 WI App 221, ¶17, 247 Wis.2d 708, 634 N.W.2d 882). Wisconsin courts have found motions to intervene timely when filed before lawsuits reach a "critical stage." *See State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 168 n.2, 168-69, 400 N.W.2d 1 (Ct. App. 1986) (affirming order denying motion to intervene as untimely when filed more than seven months after a *habeas corpus* action was commenced, testimony had been substantially completed, the public defender gave no reason for delay, and the existing parties would be prejudiced) *aff'd*, 141 Wis. 2d 710, 416 N.W.2d 883 (1987). *See also Armada Broadcasting, Inc. v. Stirn*, 183 Wis.2d 463, 516 N.W.2d 357 (1994) (finding motion to intervene timely when filed on the day of the first hearing in the case).

Given the circumstances surrounding Proposed Intervenors' Motion to Intervene, it is timely filed. Here, Proposed Intervenors first discovered that their interest could be impacted by the outcome of this case on April 2, 2021. Kilian Aff. ¶10; Hoegger Aff. ¶13; Werner Aff. ¶¶9-14; Neary Aff. ¶10; Oitzinger Aff. ¶15. Development of the case was also delayed given the extended deadline for the DNR to file an answer. As in *Armada Broadcasting*, 182 Wis. 2d at 469, Proposed Intervenors filed the Motion to Intervene on the same day of the first hearing in this case—June 14, 2021. Not. of Hearing (June 8, 2021). Unlike in *Gerhardstein*, 135 Wis. 2d 161, 168 n.2, 168-

69, this case has not proceeded to a "critical stage" and, in any event, Proposed Intervenors have a good reason for any perceived delay.

The existing parties will not be prejudiced. Proposed Intervenors understand that an existing party has filed a Jointly Submitted Notice of Motion and Notice of Cross Motion for Summary Judgment, Not. of Mot. (June 10, 2021), and that the Court has scheduled a Summary Judgment Hearing for November 2, 2021, Not. of Hearing (June 9, 2021). Proposed Intervenors commit to adhering to the Court ordered summary judgment briefing schedule so as not to delay these proceedings. As such, granting Proposed Intervenors' Motion to Intervene will not prejudice the existing parties, and judicial efficiency will be promoted by allowing related issues to be resolved in a single lawsuit. *See Wolff*, 229 Wis. 2d at 743 (citing *Bilder*, 112 Wis. 2d at 548-49).

For these reasons, the Court should find that Proposed Intervenors timely filed their Motion to Intervene and grant that motion accordingly.

B. Proposed Intervenors Have Direct and Immediate Interests in the Outcome of This Case.

Again, like the overall analysis, "no precise test exists 'for determining which type of interest is sufficient.'" *Id.* ¶43. Wisconsin courts instead "employ a 'broader, pragmatic approach to intervention as of right,' viewing 'the interest sufficient to allow the intervention practically rather than technically.'" *Id.* The interest test is therefore treated "primarily as a practical guide to disposing lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Id.* ¶44. A movant claims an interest sufficiently related to the subject of the action when the interest is "of such direct and immediate character that the intervenor will either gain or lose by direct operation of the judgment." *Helgeland*, 2008 WI 9, ¶45. Importantly, the movant's interest need not be "judicially enforceable in a separate proceeding." *Wolff*, 229 Wis. 2d at 744 (internal quotations omitted).

There is no question that Proposed Intervenors and their members will gain or lose by direct operation of any judgment here and thus satisfy the interest requirement for intervention. If WMC's requested relief is granted, the DNR will not be able to implement the Spills Law as it has since the law's inception without promulgating a new law in the form of an administrative rule, which has no guarantee of success given the difficulties involved. The direct outcome of this lawsuit may therefore substantially prevent the DNR from addressing discharges of hazardous substances. That necessarily means Proposed Intervenors and their members will no longer receive the benefits of the DNR's application of the Spills Law to specific sites contaminated with hazardous substances, including PFAS. *See e.g.*, Kilian Aff. ¶¶4-5, 9; Hoegger Aff. ¶¶7, 12; Oitzinger Aff. ¶¶6, 12. *See also supra* p. 8. Proposed Intervenors and their members are also put at increased risk of exposure to hazardous substances, including PFAS, because ongoing investigation and remediation of existing contamination may be delayed or cease altogether. Kilian Aff. ¶9; Werner Aff. ¶8; Oitzinger Aff. ¶7. Other adverse impacts on the interests of Proposed Intervenors and their members include but are not limited to limitations on or altogether elimination of recreational opportunities, limitations on the ability to safely consume fish, and diminishment of scenic beauty. Hoegger Aff. ¶12; Werner Aff. ¶8; Oitzinger Aff. ¶7.

Furthermore, while interpreting the federal analog to Wis. Stat. § 803.09, Rule 24(a)(2) of the Federal Rules of Civil Procedure, federal courts have found that preserving the benefits derived from advocacy efforts are a cognizable interest for the purposes of intervention. For example, in *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1165-66 (10th Cir. 2017), environmental non-profit organizations were granted intervention as of right because they had spent years advocating for a policy that came under threat from a lawsuit filed by an industry group. Similarly, in *WildEarth Guardians v. National Park Service*, 604 F.3d 1192, 1200 (10th Cir. 2010), the court found that

the interest requirement was satisfied when a hunting group asserted an interest in preserving the interpretation of law that permitted culling. And in *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995), the court found that "[a] public interest group is entitled to intervene as a matter of right in an action challenging the legality of a measure it has supported."

Proposed Intervenors have an interest in preserving the benefits derived from their advocacy efforts related to hazardous substance contamination in general and with respect to the DNR's application of the Spills Law to PFAS contamination in particular. Each of the Proposed Intervenors has invested substantial time and resources advocating for public health and environmental protections from hazardous substance contamination, including from PFAS. Kilian Aff. ¶6; Hoegger Aff. ¶11; Werner Aff. ¶¶6-7; Neary Aff. ¶7; Oitzinger Aff. ¶10. If WMC's attempt to repeal significant portions of the Spills Law in this case is successful, Proposed Intervenors' advocacy efforts will be significantly undermined, if not altogether thwarted as a direct consequence. Kilian Aff. ¶9; Hoegger Aff. ¶12; Werner Aff. ¶8; Neary Aff. ¶9. That is because the DNR will have to engage in rulemaking in order to regulate all the hazardous substances to which the Spills Law currently applies, including PFAS. Proposed Intervenors would then be forced to expend additional resources and time advocating in favor of administrative rules to replace the authority the DNR would lose.

The rulemaking process that could follow any adverse decision in this case would also not adequately protect Proposed Intervenors' interests in any event. As established above, promulgating an administrative rule is not a mere formality—it is arduous and there is no guarantee of success. *See supra* pp. 3-4. Administrative rules have "the force of law." Wis. Stat. § 227.01(13). Therefore, if the Court accepts all WMC's arguments, the DNR must effectively promulgate additional laws—perhaps even on a contaminant-by-contaminant basis given constraints in the

rulemaking process—to even attempt to implement the Spills Law as it has since the law was enacted. Put another way, WMC's construction of the relevant statutes amounts to an implicit repeal of significant portions of the Spills Law, which Wisconsin courts have long disfavored. *See, e.g, Milwaukee Cty. v. Milwaukee Western Fuel Co.*, 204 Wis. 107, 112, 235 N.W. 545 (1931). But the DNR's ability to promulgate those rules is somewhat beside the point because WMC's proffered interpretation undercuts the broad yet explicit authority the Spills Law clearly grants the DNR to use its expertise to determine when the discharge of any substance poses a hazard to public health or the environment, regardless of whether the DNR has predicted that hazard in advance and navigated the rulemaking process accordingly. That flexibility is no more apparent than in the statutory definition of hazardous substance. *See* Wis. Stat. § 292.01(5). Without that flexibility, the DNR will never be able to implement the Spills Law as it has since the law was enacted.

Taking the pragmatic approach, Proposed Intervenors are "apparently concerned" and granting intervention to involve them is therefore "compatible with efficiency and due process." *Helgeland*, 2008 WI 9, ¶44. For these reasons, the Court should find that Proposed Intervenors have direct and immediate interests in the outcome of this case a grant the Motion to Intervene accordingly.

C. The Outcome of This Case Will Impair and Impede Proposed Intervenors' Ability to Protect Their Direct and Immediate Interests.

When determining whether the disposition of an action as a practical matter impairs or impedes a movant's ability to protect its interests, courts again "take a pragmatic approach and focus on the facts of each case and the policies underlying the intervention statute." *Helgeland*, 2008 WI 9, ¶79. A movant's ability to protect its interest is impaired when it will otherwise be unable to protect its interests in court. *See, e.g., Wolff*, 229 Wis. 2d at 747 (finding that a movant did not have an ability to otherwise protect its interest because it would not have an opportunity to

offer reasons why a local government decision was proper). A movant's ability to protect its interests may also be impaired because of *stare decisis* when a court is considering a question of first impression or when "an adverse holding in the action would apply to the movant's particular circumstances." *Helgeland*, 2008 WI 9, ¶¶80-81. Although courts "examine the inability of movants to protect their interests separately, it is part and parcel of analyzing the interest involved and determining whether an existing party adequately represents the movant's interest." *Id.* ¶79.

Proposed Intervenors will not be able to fully protect their interests if they are not allowed to intervene in this case. As in *Wolff*, 229 Wis. 2d at 747, Proposed Intervenors may not have another opportunity in court to offer reasons why the DNR does have the authority to continue implementing the Spills Law as it has been for more than 40 years. Importantly, the Spills Law does not create "a private cause of action for individuals who suffer damages from hazardous substance spills." *Grube v. Daun*, 210 Wis. 2d 681, ¶¶9, 15, 563 N.W.2d 523 (1997). Proposed Intervenors therefore cannot sue private entities for violations of the Spills Law regarding specific sites contaminated with hazardous substances to obtain the full benefits derived from the DNR's implementation and enforcement of the Spills Law. Other means of protecting those interests in court, outside of participation as full parties in this case, may not achieve similar outcomes and may only come at considerable expense.

Furthermore, even if Proposed Intervenors did have another opportunity to protect their interests in court, that court may be bound by the outcome of this case due to *stare decisis*, which may impair Proposed Intervenors' ability to protect their interests. *See Helgeland*, 2008 WI 9, ¶¶80-81. The Court is certainly considering a question of first impression, i.e., the application of 2011 Wis. Act 21 and other select provisions from Chapter 227 of the Wisconsin Statutes to the Spills Law. The Court's decision would also apply to the DNR's implementation of the Spills Law

generally and would therefore apply to contaminated sites Proposed Intervenors have a particular interest in, such as the Thomas Street Neighborhood in Wausau, Kilian Aff. ¶6, Starkweather Creek in Madison, Werner Aff. ¶13, and the Marinette and Peshtigo area, Oitzinger Aff. ¶¶7-8.

For these reasons, the Court should find that the outcome of this case will impair or impede the ability of Proposed Intervenors to protect their direct and immediate interests and grant the Motion to Intervene.

D. Proposed Intervenors' Interests May Not Be Adequately Represented By Existing Parties.

The requirement for showing inadequate representation of a movant's interests by existing parties is generally treated as "minimal." *Armada Broadcasting*, 183 Wis. 2d at 476 (citing *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)). Movants are only required to show that the representation of their interests *may be* inadequate. *See Trbovich*, 404 U.S. at 538 n.10. However, adequate representation may be presumed "when a movant and the existing party have the same ultimate objective in the action." *Helgeland*, 2008 WI 9, ¶90. In that instance, Wisconsin courts look for "a showing of collusion between the representative and the opposing party; if the representative fails in the fulfillment of his duty; or if the representative's interest is adverse to that of the proposed intervenor." *Id.* ¶87. *See also Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996). Adequate representation may also be presumed "when the putative representation is a governmental body or office charged by law with representing the interests of the absentee." *Helgeland*, 2008 WI 9, ¶91 (citing *Edwards*, 78 F.3d at 1005). The presumption of adequate representation can be overcome when a movant shows that its interests in the case differ from that of the applicable governmental entity. *Edwards*, 78 F.3d at 1005.

The DNR's statutory obligation to the general public under the Spills Law does not fully extent to the Proposed Intervenors' specific interests. Although the DNR is charged with

administering the Spills Law, which "was designed to provide general protection to the public," *Grube*, 210 Wis. 2d 681, ¶15, it does not follow that the DNR has been charged with representing Proposed Intervenors' asserted interests in this case. Proposed Intervenors' interests are much more immediate and direct than members of the general public and are therefore substantially distinguishable from the interests of the DNR. As established above, Proposed Intervenors and their members live and recreate near areas contaminated with hazardous substances, including PFAS, and benefit from the DNR's current implementation of the Spills Law in a number of ways. *See e.g.*, Kilian Aff. ¶¶4-5, 9; Hoegger Aff. ¶¶7, 12; Oitzinger Aff. ¶¶6, 12. Proposed Intervenors have also invested significant time and resources advocating for the adequate regulation and cleanup of hazardous substance contamination, including the application of the Spills Law to PFAS contamination and other hazardous substances. Kilian ¶6; Hoegger Aff. ¶11; Werner Aff. ¶¶6-7; Neary Aff. ¶7; Oitzinger Aff. ¶12.

In contrast, the Spills Law only charges the DNR to ensure that responsible parties "restore the environment *to the extent practicable* and *minimize* the harmful effects from the discharge to the air, land or waters of this state." Wis. Stat. § 292.11 (emphasis added). Practicability in turn "means capable of being implemented, taking into account . . . [t]he economic feasibility of a remedial action option, considering the cost of the remedial action option compared to its technical feasibility." Wis. Admin. Code NR § 700.03(45). As such, the Spills Law charges the DNR with balancing potentially competing interests of restoring the environment and the economic feasibility of doing so, which some courts have recognized as a basis for finding inadequate representation. *See, e.g., W. Energy Alliance*, 877 F.3d at 1168 (distinguishing between the public interest governmental entities must represent and the interests of individual intervenors). Proposed Intervenors do not have similar competing interests—they are defending the very communities in

which they and their members live fight to protect. This divergence of interests may lead to the DNR inadequately representing the Proposed Intervenors interests in this case, potentially through seeking outcomes that do not entirely align with Proposed Intervenors' ultimate objective in the action, which is all that is necessary to satisfy that requirement of the intervention statute. *See Kleissler v. U.S. Forest Service*, 157 F.3d 964, 974 (3d Cir. 1998); *Trbovich*, 404 U.S. at 538 n.10.

For these reasons, the Proposed Intervenors' interests in the outcome of this case will not be adequately represented by the existing parties, and Proposed Intervenors' Motion to Intervene should be granted.

II. ALTERNATIVELY, PROPOSED INTERVENORS' MOTION TO FILE A NON-PARTY BRIEF AND CONDITIONAL INTERVENTION SHOULD BE GRANTED.

Should the Court deny Proposed Intervenors' Motion to Intervene, Proposed Intervenors move in the alternative for leave to file a non-party brief on pending motions for summary judgment and any other dispositive issue that arises during this case pursuant to Wis. Stat. § 802.01(2) and Wis. Stat. § 809.19(7). Simultaneously, and without conceding any arguments made in support of their principal Motion to Intervene, Proposed Intervenors also move for conditional intervention. Were the Court to grant this Conditional Motion to Intervene, the occurrence of any of the three conditions identified in Argument § II.B below would automatically trigger Proposed Intervenors' admittance as a full party in this case. *See infra* p. 22-23.

A. Motion to File Non-Party Brief

Circuit courts have previously invited parties seeking to intervene in a lawsuit to participate as *amicus curiae*. *See, e.g.*, *Helgeland*, 2008 WI 9, ¶32, n.20. In *Helgeland*, the Wisconsin Supreme Court described the benefits of non-party briefs, a.k.a. friend of the court briefs:

> Amicus curiae (friend of the court) refers to a procedure whereby a court may be informed by persons not parties to a legal action, who are nonetheless particularly informed or interested in the outcome (or at least in the law being declared). Briefs by amicus curiae can provide assistance to a court by presenting an argument or citing authority not found in the parties' briefs or by providing important technical or background information which the parties have not supplied.

Id. (internal quotations and citations omitted).

While the Wisconsin Rules of Civil Procedure do not expressly provide a means for non-parties to request leave to file a friend of the court brief, the Wisconsin Rules of Appellate Procedure do. Wis. Stat. § 809.19(7)(a) allows non-parties to request by motion leave to file non-party briefs in appellate proceedings and that such motions "shall identify the interest of the person and state why a brief filed by that person is desirable." Under that procedure, "the brief shall be filed within the time specified by the court." Wis. Stat. § 809.19(7)(c).

Courts have also found that various civil procedure statutes apply to judicial review proceedings brought pursuant to Wis. Stat. § 227.52 "as long as there is no conflict between the civil procedure statute and ch. 227." *See, e.g., State ex rel. Town of Delavan v. Cir. Ct. for Walworth Cty.*, 167 Wis. 2d 719, 731, 482 N.W.2d 899 (1992). There is no apparent conflict between Wis. Stat. § 809.19(7)(a), the Wisconsin Rules of Civil Procedure, or Chapter 227 of the Wisconsin Statutes.

Proposed Intervenors therefore request that the Court grant their Motion to File a Non-Party Brief on the pending motions for summary judgment and any other dispositive issues that arise during this case. The interests of the Proposed Intervenors have been clearly stated earlier in this brief. *See supra* pp. 13-16. A non-party brief is desirable from Proposed Intervenors given their substantial experience with the Spills Law. Proposed Intervenors have contended with contamination where they live, have seen the impacts that contamination has on their communities, and have advocated for the assistance they have received under the Spills Law to date. As such,

Proposed Intervenors are uniquely positioned to articulate for the Court the real-world impacts of limiting the DNR's authority to protect public health and the environment from hazardous substance contamination

For these reasons, the Court should grant Proposed Intervenors Motion to File a Non-Party Brief at a time consistent with the briefing schedule for the pending motions for summary judgment. Proposed Intervenors request that the Court allow for the same 25-page limit for moving party principal briefs and responding party briefs under Waukesha County Circuit Court Local Rule 3.3.

B. Conditional Motion to Intervene

Conditional motions to intervene allow prospective intervenors can avoid violating the timeliness requirement of Wis. Stat. § 803.09 by moving for intervention early enough in a case to preserve their ability to intervene should subsequent developments indicate that their interests are no longer being adequately represented by existing parties, particularly when the existing party purporting to represent those interests is a government agency. *See, e.g., Solid Waste Agency v. U.S. Army Corps of Engineers*, 101 F.3d 503, 509 (7th Cir. 1996). Subsequent developments, or conditions, that could trigger prospective intervenors' ability to demonstrate inadequate representation include but are not limited to the representative party failing to appeal an adverse decision, the representative party pursuing an adverse litigation strategy, or the existing parties entering into a settlement that is unfavorable to prospective intervenors' interests.

Proposed Intervenors therefore move the Court, pursuant to Wis. Stat. § 803.09(1) for leave to intervene in this case if any of the following three conditions precedent occur:

1. The DNR pursues a litigation strategy for any of WMC's four claims that is adverse to Proposed Intervenors' interest;

2. The parties propose or reach settlement that is adverse to Proposed Intervenors' interests; or
3. The DNR fails to timely appeal a disposition that is adverse to Proposed Intervenors' interests.[5]

In the event any of those three conditions occur, the DNR would no longer represent Proposed Intervenors' interests in this case. Regarding the grounds for the other three requirements that must be met for intervention under Wis. Stat. § 803.09(1), those are established in Argument § 1.A-C of this brief and are incorporated herein by reference. *See supra* pp. 10-18.

Despite its ingenuity, some courts have decided to go ahead and grant intervention instead of taking this "wait and see" approach since movants are only required to show that the representation of their interests *may be* inadequate. *See, e.g., Kleissler v. U.S. Forest Service*, 157 F.3d at 974. *See also, Trbovich*, 404 U.S. at 538 n.10. Accordingly, Proposed Intervenors again submit that they currently meet the intervention standard, request that the Court grant their Motion to Intervene.

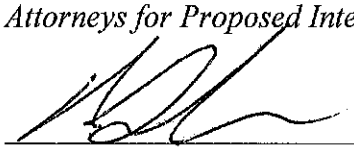
CONCLUSION

For the foregoing reasons, Proposed Intervenors request that the Court, in the first instance, grant their Motion to Intervene and immediately admit them as full parties to defend their direct and immediate interests in the outcome of this case. In the alternative, and without conceding any arguments made in support of their principal Motion to Intervene, Proposed Intervenors request that the Court grant their Motion to File a Non-Party Brief and their Conditional Motion for Intervention.

[5] If the Conditional Motion to Intervene is granted, Proposed Intervenors will file a conditional notice of appeal pursuant to Wis. Stat. § 809.10(1) prior to the deadline established in Wis. Stat. § 808.04 to preserve their ability to appeal if the DNR fails to appeal a disposition that is adverse to Propose Intervenors' interests prior to that same deadline.

Respectfully submitted this 14th day of June, 2021.

MIDWEST ENVIRONMENTAL ADVOCATES
Attorneys for Proposed Intervenors



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