

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 23, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP1106

Cir. Ct. No. 2004CV3934

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

SIERRA CLUB,

PETITIONER-APPELLANT,

S.C. JOHNSON & SON, INC.,

PETITIONER,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

RESPONDENT-RESPONDENT,

CITY OF OAK CREEK,

INTERESTED PARTY,

**WISCONSIN ELECTRIC POWER COMPANY AND
WISCONSIN PUBLIC POWER, MADISON GAS AND
ELECTRIC AND MGE POWER ELM ROAD, LLC,**

INTERESTED PARTIES-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
JOHN C. ALBERT, Judge. *Affirmed.*

Before Lundsten, P.J., Higginbotham and Kessler, JJ.

¶1 PER CURIAM. Sierra Club appeals an order dismissing its action for judicial review of an agency decision on jurisdictional grounds.¹ The issue is whether Sierra Club's late service on two entities identified by the agency as parties to the administrative proceeding deprived the circuit court of subject matter jurisdiction under WIS. STAT. § 227.53(1)(c) (2003-04).² We affirm the circuit court's determination that it did.

BACKGROUND

¶2 Sierra Club challenged an application submitted by Wisconsin Electric Power Company for a permit from the Department of Natural Resources needed for the construction of two new generating units at its power plant situated on the shore of Lake Michigan. On November 22, 2004, the department issued the permit over Sierra Club's objection, and provided a certified list of the parties to the proceeding. Sierra Club filed a petition for judicial review on December 16, 2004. However, it inadvertently used a service list from a related case involving most but not all of the same parties. Consequently, two of the certified parties were not served with the petition until January 24, 2005, after the deadline for service had passed. Wisconsin Electric Power Company moved to dismiss the

¹ S.C. Johnson & Son, Inc. also joined the appeal, but was voluntarily dismissed.

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

judicial review action for lack of subject matter jurisdiction under WIS. STAT. § 227.53(1)(c), and the circuit court granted the motion. Sierra Club now appeals, challenging the circuit court’s interpretation of the statute.

STANDARD OF REVIEW

¶3 Statutory interpretation presents a question of law, which we review *de novo*. *State v. Waushara County Bd. of Adjustment*, 2004 WI 56, ¶14, 271 Wis. 2d 547, 679 N.W.2d 514. Statutes are to be interpreted to give effect to their language. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. Thus, except where specially defined words or technical phrases are used, “[s]tatutory language is given its common, ordinary, and accepted meaning.” *Id.*, ¶45. Extrinsic sources, such as legislative history, should only be consulted if the text of the statute is ambiguous, taking into account its context, scope, and purpose. *Id.*, ¶¶46-48. However, once a published decision interprets an ambiguous statutory provision, that judicial construction “becomes part of the statute unless [the statute is] subsequently amended by the legislature.” *Wenke v. Gehl Co.*, 2004 WI 103, ¶31 n.17, 274 Wis. 2d 220, 682 N.W.2d 405; *see also State v. Rosenberg*, 208 Wis. 2d 191, 196, 560 N.W.2d 266 (1997).

DISCUSSION

¶4 WISCONSIN STAT. § 227.53(1)(c) requires service of a petition seeking judicial review of an agency decision “upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party’s attorney of record” within thirty days after the proceeding is initiated. In *Wisconsin’s Environmental Decade, Inc. v. PSC*, 84 Wis. 2d 504, 267 N.W.2d 609 (1978), the Wisconsin Supreme Court held that

the failure to strictly comply with the nearly identical service requirement of a predecessor statute³ deprived the circuit court of subject matter jurisdiction to review an agency's decision. *Id.* at 515. The supreme court's construction of the service requirement as a prerequisite for subject matter jurisdiction thus became part of the statute. *See Wenke*, 274 Wis. 2d 220, ¶31 n.17. Sierra Club contends that a subsequent amendment of the statute by the legislature altered that jurisdictional requirement. We disagree.

¶5 In *Wisconsin's Environmental Decade*, over 100 people had appeared before the administrative agency by placing their names on sign-up sheets. *Wisconsin's Environmental Decade*, 84 Wis. 2d at 519-20. At that time, the Chapter 227 service provision contained a sentence stating:

For the purpose of such service the agency upon request shall certify to the petitioner the names and addresses of all such parties as disclosed by its records, which certification shall be conclusive.

WIS. STAT. § 227.16(1)(c) (1975). Because the agency had not certified who the parties were, the court remanded the matter to have the agency determine who was actually a "principal party" with a demonstrated interest in the proceeding for purposes of Chapter 227 review before dismissing the action for failure to serve all necessary parties. *See Wisconsin's Environmental Decade*, 84 Wis. 2d at 534.

¶6 The legislature subsequently replaced the sentence dealing with the certification of parties with another sentence, stating:

³ WISCONSIN STAT. § 227.16(1)(c) (1975) provided, in relevant part: "Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made."

A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

1987 Wis. Act 313, § 1 (effective April 28, 1988). The changed language relates solely to the method for identifying which parties need to be served. It does not affect the holding of *Wisconsin's Environmental Decade* that, under the statute, a failure to serve the proper parties deprives the court of subject matter jurisdiction.⁴

¶7 Sierra Club also argues that the holding of *Wisconsin's Environmental Decade* has been modified by subsequent cases. Sierra Club asserts that dismissal here is inconsistent with cases such as *Omernick v. DNR*, 94 Wis. 2d 309, 287 N.W.2d 841 (Ct. App. 1979), and *Shopper Advertiser, Inc. v. DOR*, 117 Wis. 2d 223, 344 N.W.2d 115 (1984). However, even assuming these and other cases brought to our attention by Sierra Club create exceptions to the general service requirement, none of the exceptions apply here. All of the cases are distinguishable both on their facts and their reasoning.

¶8 Here, the parties who were not timely served were on the list certified by the Department of Natural Resources in its decision. The challenged decision leaves no doubt as to the identity of the parties Sierra Club needed to serve. Therefore, the circuit court properly dismissed the proceeding for lack of subject matter jurisdiction.

⁴ Sierra Club's argument that at least one legislator sought or intended to modify the jurisdictional holding in *Wisconsin's Environmental Decade, Inc. v. PSC*, 84 Wis. 2d 504, 267 N.W.2d 609 (1978), does not persuade us. The legislation ultimately enacted made no change to the requirement that the petitioner serve all parties.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

