**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 1, 2012**

**Diane M. Fremgen**
**Clerk of Court of Appeals**

**NOTICE**



**Appeal No. 2011AP505** **Cir. Ct. No. 2010CV35**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT III**

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**CITY OF KAUKAUNA,**

**PETITIONER-APPELLANT-CROSS-RESPONDENT,**

**V.**

**WISCONSIN DEPARTMENT OF NATURAL RESOURCES,**

**RESPONDENT-RESPONDENT,**

**TOWN OF HARRISON,**

**INTERVENING-RESPONDENT-RESPONDENT-CROSS-APPELLANT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Mangerson, JJ.

¶1 PER CURIAM. The City of Kaukauna appeals, and the Town of Harrison cross-appeals, a judgment affirming a decision by the Department of Natural Resources (DNR). On February 24, 2009, the DNR conditionally approved amendments to a regional sewer service plan proposed by Harrison and Darboy Sanitary District No. 1. Kaukauna, which lost the right to service 89 acres under the amendments, did not seek judicial review until January 7, 2010, well beyond the six-month time limitation established by our case law to petition for review of administrative decisions in uncontested cases. Accordingly, we conclude Kaukauna's petition for judicial review was untimely. We therefore reverse the circuit court's judgment adjudicating Kaukauna's petition on its merits, and remand to the circuit court to dismiss the petition for lack of jurisdiction.

## BACKGROUND

¶2 The Heart of the Valley Metropolitan Sewerage District is a special purpose governmental unit jointly created by Kaukauna and several villages to provide wastewater treatment to the various communities.[1] Heart of the Valley owns and operates the major interceptor sewer in the Fox River, which collects wastewater generated by upstream communities. The Heart of the Valley sewer service area plan is one of four Fox Cities area plans prepared by the East Central Wisconsin Regional Plan Commission and approved by the DNR in 2006. Heart of the Valley's sewer service area includes Kaukauna and parts of the Town of Harrison.

[1] *See* EAST CENT. WIS. REG'L PLANNING COMM'N, FOX CITIES 2030 SEWER SERVICE AREA PLAN UPDATE 149-50 (2006), http://www.eastcentralrpc.org/planning/community%20facilities/ssa_documents/reports/FoxCitiesSSA_2030.pdf.

¶3 The Commission's Community Facilities Committee designated certain areas in the plan as "hold areas." In these areas, ongoing land use or service provision issues make public sewer extensions unsuitable. Accordingly, the Commission does not approve any extensions in these areas and recommends against any development proposal until the issues are resolved. One such hold area is located in Harrison near county road KK and highway 55. The plan noted that it was undetermined whether Darboy or Kaukauna would serve the area.

¶4 Shortly after the plan was completed, Darboy, anticipating commercial development, requested that the Commission designate 134 acres in Harrison for sewer service. Darboy proposed that 45 acres be processed as a "swap," in which 45 acres would be added to the Heart of the Valley service area, while a separate 45 acres would be removed. Darboy also requested that the hold designation be lifted for the 37-acre area in Harrison near county road KK and highway 55. Implicitly, Darboy also sought to service a 52-acre area between the swap area and the hold area that had been previously designated for service by Kaukauna.

¶5 The Facilities Committee held a hearing on the proposal on March 14, 2007. Ultimately, the Committee approved Darboy's request, contingent on the developer's submission of a letter of commitment to Harrison. No letter was submitted, however, and the Committee later reconsidered and denied Darboy's amendment proposal. Darboy appealed to the full Commission, which upheld the Committee's decision.

¶6 On November 19, 2007, Darboy and Harrison petitioned the DNR to review the Commission's denial of the amendment proposal. The DNR held an informational public hearing, after which it issued a Notice of Intent to Disapprove

and Modify the Heart of the Valley Sewer Service Area. The notice largely approved Darboy's amendment proposal. Kaukauna then requested a public hearing, which was held on August 21, 2008. No contested case hearing was held.

¶7 On February 24, 2009, the DNR issued a decision conditionally approving Darboy's amendment proposal. The DNR noted it had not received comments on the proposal from Heart of the Valley, nor did it believe it had received a comprehensive analysis of the effects of the servicing options on downstream sewers. Accordingly, the decision contained the following condition:

> 1. That the amendment area identified in this approval be successfully annexed into the Heart of the Valley Metropolitan Sewerage District. If the annexation is denied, the Department will review the basis for the denial and subsequently issue a letter to either reaffirm this approval or to designate the entire (134 acre) amendment area as having a "hold status." As described in the *Fox Cities 2030 Sewer Service Area Plan Update*[,] a "hold status" means the area has unresolved planning issues and sewer extensions will not be approved until the issues are resolved.

The DNR's decision concluded, "If you believe you have a right to challenge this decision made by the Department, you should know that Wisconsin statutes, administrative codes and case law establish time periods and requirements for reviewing Department decisions."

¶8 In December 2009, Heart of the Valley approved annexation of the amendment area. Kaukauna petitioned for judicial review of the DNR's decision on January 7, 2010. The circuit court affirmed, and Kaukauna now appeals. Harrison cross-appeals.

## DISCUSSION

¶9 In its cross-appeal, Harrison contends that Kaukauna's petition was untimely and must be dismissed. Harrison argues the DNR's February 24, 2009 decision was final, giving Kaukauna until August 24, 2009 to petition for review. Kaukauna sees it differently. Because the DNR specifically acknowledged a potential need for future agency action, Kaukauna argues the decision was merely interlocutory. Kaukauna asserts the February 24 decision did not ripen into a reviewable decision until December 8, 2009, when the affected areas were annexed by Heart of the Valley. Under Kaukauna's theory, its petition was timely filed on January 7, 2010.

¶10 "The right to judicial review of an agency's decision is entirely statutory, and such decisions are not reviewable unless made so by statute." ***Madison Landfills, Inc. v. DNR***, 180 Wis. 2d 129, 138, 509 N.W.2d 300 (Ct. App. 1993). It is well settled that only final agency decisions are eligible for judicial review under WIS. STAT. § 227.52.[2] *See* ***Madison Landfills***, 180 Wis. 2d at 138; ***Pasch v. DOR***, 58 Wis. 2d 346, 353, 206 N.W.2d 157 (1973) (citing a previous version of § 227.52). "In determining whether an agency [decision] is final for purposes of judicial review, we focus on its substance and not its form or label." ***Sierra Club v. DNR***, 2007 WI App 181, ¶14, 304 Wis. 2d 614, 736 N.W.2d 918.

¶11 Whether an agency decision is final matters a great deal. Strict time limitations govern the filing of petitions for judicial review of agency decisions.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

In a case like this one, where no contested case hearing was held, a "default" six-month limitation period applies. ***Hedrich v. Board of Regents of Univ. of Wis. Sys.***, 2001 WI App 228, ¶25, 248 Wis. 2d 204, 635 N.W.2d 650; ***Collins v. Policano***, 231 Wis. 2d 420, 437, 605 N.W.2d 260 (Ct. App. 1999).[3] In the absence of a timely petition, the circuit court lacks jurisdiction to hear the case. ***Johnsonville Sausage, Inc. v. DOR***, 113 Wis. 2d 7, 11, 334 N.W.2d 269 (Ct. App. 1983) (per curiam); *see also* ***Soo Line R.R. Co. v. DOR***, 143 Wis. 2d 874, 876, 422 N.W.2d 900 (Ct. App. 1988).

¶12 The finality rule prevents "constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions." ***Pasch***, 58 Wis. 2d at 354-55 (quoted source omitted). Finality, and therefore reviewability, is not to be judged by an "overrefined technique"; instead, it is a practical inquiry designed to determine whether review is necessary to protect against irreparable harm. ***Id.*** at 356. In other words, agency decisions are final if "they determine the further legal rights of the person seeking review." ***Waste Mgmt. of Wis., Inc. v. DNR***, 128 Wis. 2d 59, 90, 381 N.W.2d 318 (1986).

[3] A "contested case" is an agency proceeding in which the assertion by one party of any substantial interest is denied or disputed by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order. ***Collins v. Policano***, 231 Wis. 2d 420, 427, 605 N.W.2d 260 (Ct. App. 1999). In contested cases, a petition for judicial review must be filed no later than thirty days after service or mailing of the agency decision. ***Hedrich v. Board of Regents of Univ. of Wis. Sys.***, 2001 WI App 228, ¶25, 248 Wis. 2d 204, 635 N.W.2d 650; *see also* WIS. STAT. § 227.53(1)(a)2. In ***Hedrich***, we noted that WIS. STAT. ch. 227 failed to provide another limitation period for noncontested cases, and instead applied a default six-month limitation period adopted in ***Collins***. *See* ***Hedrich***, 248 Wis. 2d 204, ¶25. The legislature has since remedied that oversight by enacting a thirty-day limitation period in noncontested cases, too. *See* WIS. STAT. § 227.53(1)(a)2m. However, § 227.53(1)(a)2m. became effective on May 27, 2010, well after the DNR rendered its decision in this case. *See* 2009 Wis. Act 324, §§2, 3. Accordingly, the six-month limitation period adopted in ***Collins*** and reaffirmed in ***Hedrich*** applies here.

¶13 With this framework in mind, we turn to the DNR's decision. The DNR conditionally approved Darboy's amendment proposal, which affected Kaukauna in at least two ways. First, the DNR disapproved of the Commission's decision to designate the 37-acre hold area for service by Kaukauna, instead designating it as a tributary of the Darboy interceptor sewer service area. The DNR also designated 52 acres for service by Darboy instead of Kaukauna. The DNR clearly stated the decision's practical effect: "A total area of 89 acres is removed from the City of Kaukauna interceptor sewer service area and is transferred to the Darboy interceptor sewer service area." This put Kaukauna on notice that its right to service portions of the amendment area was adversely affected by the DNR's decision.

¶14 Kaukauna argues the DNR rendered a nonfinal decision by conditioning it on annexation of the amendment area by Heart of the Valley. Kaukauna emphasizes that the DNR specifically contemplated the possibility of future action by stating it would review the approval if annexation was denied. In Kaukauna's view, judicial review before an annexation decision would have been premature and contrary to the "judicial proscription against actions to resolve abstract questions of law or issues based on hypothetical facts." *See* ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶28, 317 Wis. 2d 656, 766 N.W.2d 559; ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211; ***Hoey Outdoor Adver., Inc. v. Ricci***, 2002 WI App 231, ¶28 n.7, 256 Wis. 2d 347, 653 N.W.2d 763.

¶15 Notably, Kaukauna does not contend the unresolved condition left the circuit court unable to properly review the DNR's decision for error under WIS. STAT. § 227.57. Regardless of the amendment area's annexation status, the court could assess whether grounds existed for overturning the DNR's decision.

For example, the indeterminacy of annexation would not have prevented the court from determining whether the DNR exceeded its authority, committed a procedural error, erroneously interpreted a provision of law, or based its decision on facts unsupported by substantial evidence. *See* WIS. STAT. § 227.57(4)-(6), (8).

¶16 Thus, Kaukauna's argument boils down to its contention that it was not adversely affected by the DNR's decision until Heart of the Valley rendered an annexation decision. Kaukauna is wrong. Regardless of whether annexation was successful, the DNR's decision indefinitely precluded Kaukauna from servicing the 89 acres. If Heart of the Valley annexed the area, Darboy would provide sewer service pursuant to the DNR's decision. If it denied annexation, the DNR stated it would either reaffirm its decision or designate the area with a "hold status"—meaning no further sewer extensions would be approved. Either way, Kaukauna was adversely affected by the DNR's decision.

¶17 In any event, we do not regard the indeterminacy of the condition to undermine the finality inherent in the DNR's decision. The effectiveness of the DNR's decision was contingent on the action of a third party, not the DNR itself. "An order has been defined as interlocutory when the substantial rights of the parties involved in the action remain undetermined and *when the cause is retained for further action*." ***Pasch***, 58 Wis. 2d at 354 (emphasis added). Here, there was nothing more for the DNR to do unless Heart of the Valley refused to annex the amendment area. Because this event was not certain to occur, the condition does not compromise finality. The possibility of future action by the DNR is not equivalent to retention of current jurisdiction and, therefore, a lack of finality.

¶18 We additionally observe that accepting Kaukauna's argument would further muddy the water in an area already fraught with uncertainty. Given the

frequency with which our appellate courts have issued decisions regarding finality, the concept appears difficult enough for petitioners already. Determining when an administrative decision is reviewable would be all the more perilous if finality depended on the actions of a third party—in this case, Heart of the Valley. In addition, permitting a third party to determine finality, and therefore reviewability, seems to be an invitation for the type of gamesmanship we have repeatedly condemned—particularly where, as here, the case involves a political dispute between local government units. *See, e.g.*, ***RecycleWorlds Consulting Corp. v. Wisconsin Bell***, 224 Wis. 2d 586, 593, 592 N.W.2d 637 (Ct. App. 1999) (disapproving of the "manipulation of the strict rules of appellate review by a party").

¶19 Lastly, Kaukauna argues the DNR's decision was not rendered in the proper form. To be reviewable, "every final decision of an agency shall be in writing accompanied by findings of fact and conclusions of law." *See* WIS. STAT. § 227.47; ***Madison Landfills***, 180 Wis. 2d at 138; *see also* ***Waste Mgmt.***, 128 Wis. 2d at 91 (remanding for further proceedings because the DNR failed to set forth its findings of fact and conclusions of law). Kaukauna has not explained how the DNR's three-page letter decision violates this requirement. For this reason, we deem Kaukauna's § 227.47 argument inadequately developed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

¶20 Kaukauna suggests the DNR had an obligation to "notif[y] any recipient that DNR considered it to be a final decision," but WIS. STAT. § 227.47

does not contain any such requirement.[4] In fact, "neither the form of the order nor the label of 'final' or 'interlocutory' necessarily determines its character as to reviewability." ***Pasch***, 58 Wis. 2d at 356. Regardless, the DNR did advise Kaukauna to review the applicable law regarding time periods for review, further suggesting that its decision was final. Thus, we are not persuaded the DNR's decision was defective.

¶21 Because we conclude the DNR's decision was a final, reviewable decision, Kaukauna had six months from the date of the order to seek judicial review. *See* ***Hedrich***, 248 Wis. 2d 204, ¶25. Kaukauna's petition for judicial review was filed on January 7, 2010, more than four months late. Accordingly, we reverse the circuit court's judgment addressing Kaukauna's petition on its merits, and remand to the circuit court to dismiss the petition for lack of jurisdiction. *See* ***Johnsonville Sausage***, 113 Wis. 2d at 11.

*By the Court.*—Judgment reversed and cause remanded with directions.

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

[4] Kaukauna may be referring to WIS. STAT. § 227.48(2), which requires that an agency decision "include notice of any right of the parties to petition for rehearing and administrative or judicial review of adverse decisions, the time allowed for filing each petition and identification of the party to be named as respondent." The time period for filing a petition for judicial review is tolled until the agency has complied. However, this subsection does not apply if the administrative proceeding is not a contested case. ***Habermehl Elec., Inc. v. DOT***, 2003 WI App 39, ¶18, 260 Wis. 2d 466, 659 N.W.2d 463.