



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

January 27, 2015

To:

Hon. John P. Hoffmann
Circuit Court Judge
Waupaca County Courthouse
811 Harding Street
Waupaca, WI 54981

Terrie J. Tews
Clerk of Circuit Court
Waupaca County Courthouse
811 Harding Street
Waupaca, WI 54981

Bradley J. Motl
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Philip Nolan
E3362 Royalton Street
Waupaca, WI 54981

Michael L. Orr
E 3417 County K
Waupaca, WI 54981

You are hereby notified that the Court has entered the following opinion and order:

2013AP2345

Philip Nolan and Michael L. Orr v. Wisconsin Department of
Natural Resources (L.C. # 2013CV202)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Philip Nolan and Michael Orr appeal the circuit court's order dismissing their petition for judicial review of decisions of the Wisconsin Department of Natural Resources. They also appeal the order denying reconsideration. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Nolan and Orr filed a petition seeking judicial review of the department's decisions to issue two construction permits, permit numbers 13-JJW-031 and 469033730-P01. DNR filed a motion to dismiss the petition for failure to state a claim upon which relief could be granted. The circuit court granted the motion, concluding that, as to permit number 13-JJW-031, Nolan and Orr lacked standing to seek judicial review under WIS. STAT. § 285.81(2). As to permit number 469033730-P01, the court reasoned that Nolan and Orr's petition was untimely to challenge the original permit and, to the extent the petition sought to challenge the renewal permit, the renewal permit had not yet been issued and, therefore, was a non-final decision. Nolan and Orr now appeal. We review the circuit court's decision on DNR's motion to dismiss for failure to state a claim de novo. *See Turkow v. DNR*, 216 Wis. 2d 273, 280, 576 N.W.2d 288 (Ct. App. 1998).

Pursuant to WIS. STAT. § 227.52, “[a]dministrative decisions which adversely affect the substantial interests of any person are subject to review as provided in [WIS. STAT. ch. 227].” WISCONSIN STAT. § 227.53(1) provides that, “[e]xcept as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review of the decision,” subject to certain procedural requirements. In determining whether a party has been “aggrieved,” and thus has standing under §§ 227.52 and 227.53(1), we apply a two-part test. *Town of Delavan v. City of Delavan*, 160 Wis. 2d 403, 410, 466 N.W.2d 227 (Ct. App. 1991). First, the petitioner must demonstrate that he or she sustained an injury as a result of an agency decision. *Id.* at 411. The injury must not be “hypothetical or conjectural, but must be ‘injury in fact.’” *Id.* The petitioner must also show “that the injury is to an interest which the law recognizes or seeks to regulate or protect.” *Id.*

Nolan and Orr argue that they were injured by DNR's issuance of permit number 13-JJW-031. On appeal, they make allegations that were not part of their arguments at the circuit

court level. Generally, this court will not consider issues raised for the first time on appeal. *Zeller v. Northrup King Co.*, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985). Thus, we do not consider the allegations by Nolan and Orr that are made for the first time in their appellate brief.

Upon reviewing the petition filed in the circuit court, we agree with DNR that Nolan and Orr fail to allege any actual injury caused by issuance of permit number 13-JJW-031. At best, Nolan and Orr assert the potential for possible injury as a result of all emissions in Waupaca County, as residents of that county. The emissions data submitted to the circuit court with Nolan and Orr's petition relates to emissions in the county as a whole. Permit number 13-JJW-031 relates to a single foundry, which is only one source of emissions. The petition fails to allege facts showing a connection between this particular permit and actual injury to Nolan and Orr, and, thus, fails to establish that the petitioners are persons "aggrieved" under WIS. STAT. § 227.53(1). Therefore, we conclude that the circuit court properly dismissed the petition for lack of standing.

Nolan and Orr do not address in their brief the issue of whether permit number 469033730-P01 was non-final and, therefore, ineligible for judicial review. An issue raised in the circuit court but not raised on appeal is deemed abandoned. *A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998). Thus, we dismiss the issue pertaining to permit number 469033730-P01 as abandoned on appeal.

IT IS ORDERED that the orders are summarily affirmed under Wis. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals