

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS

Department of Natural Resources, Environmental
Management Division, Findings of Fact,
Conclusions of law, and Diversion Approval

Case No. DNR-18-0006

***AMICUS CURIAE* BRIEF ON BEHALF OF WAUKESHA COUNTY
ENVIRONMENTAL ACTION LEAGUE**

INTRODUCTION

Waukesha County Environmental Action League (“WEAL”) is a Wisconsin non-profit corporation that was established in 1978 and is dedicated to protecting Waukesha County’s natural resources. WEAL was among the environmental organizations which worked together to advocate for the development of the Great Lakes Compact, to support its ratification and the enactment of Wisconsin’s implementing statutes, and to educate Wisconsinites about the protections it provides to the Great Lakes. WEAL’s members include those who use and enjoy the waters of the Lake Michigan basin for recreational and aesthetic enjoyment.

WEAL submitted comments dated March 21, 2018 to the Wisconsin Department of Natural Resources during the public comments period relating to the water diversion request which is the subject of this proceeding. WEAL’s comments reflected the organization’s unique perspective, arising from its longstanding expertise and advocacy through the years preceding the City of Waukesha water diversion application under the Great Lakes Compact. WEAL conveyed concerns focused upon the harmful precedent of the DNR’s diversion approval in this proceeding. Of primary importance is WEAL’s concern that approval of this diversion to supply Lake Michigan water to the proposed Foxconn industrial/commercial complex is contrary to the Compact’s prohibition on

diversions of water outside of the Great Lakes Basin except for limited, strictly regulated exceptions.

WEAL believes that the DNR's Findings of Fact, Conclusions of Law, and Diversion Approval should be reversed, since the agency's interpretation of "public water supply purposes" is erroneous. The DNR's interpretation, and thus the Approval, is contrary to the unambiguous express language of the Compact; it is contrary to the intent and purpose of the Compact; and it is inconsistent with previous decision-making regarding diversions.

THE APPLICABLE COMPACT AND STATUTORY LANGUAGE

The language of the Compact regarding diversions to an area within a Straddling Community but Outside the Basin explicitly and unambiguously requires that "**all the Water so transferred** shall be used **solely** for Public Water Supply Purposes within the Straddling Community." Compact, Section 4.9.1 (Emphasis added)

The Compact's definition of "Public Water Supply Purposes" explicitly requires that water to be distributed **to the public**:

Public Water Supply Purposes means water distributed to the public through a physically connected system of treatment, storage and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water Withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.

Compact, Section 1.2. Definitions

Wisconsin law similarly defines "public water supply" as:

Water distributed to the public through a physically connected system of treatment, storage, and distribution facilities that serve a group of largely residential customers and that may also serve industrial, commercial, and other institutional customers.

Wis. Stat. § 281.346(1)(pm).

APPLICABLE RULES OF STATUTORY CONSTRUCTION

The first step in constructing an interstate compact or an implementing statute is to examine “the express terms . . . as the best indication of the intent of the parties.” *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013); *see also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (the first step in interpreting federal statute is to examine the plain language); *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, 45, 271 Wis. 2d 633, 681 N.W.2d 110 (interpretation of Wisconsin statutes “begins with the language of the statute”). Express terms should be examined in light of the Compact and Wisconsin’s implementing legislation as a whole, not in isolation but in the context in which the terms are used and considering the structure of the statutory scheme. *Kalal*, 271 Wis. 2d 633, ¶ 46. The language in a statute or compact should also be construed so as to give reasonable effect to all the terms and avoid surplusage or unreasonable results. *Corley v. United States*, 556 U.S. 303, 314 (2009); *Kalal*, 271 Wis. 2d 633.

Exceptions to general rules within a statute are usually construed narrowly. *Maracich v. Spears*, 570 U.S. 48, 60 (2013); *Comm’r of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *McNeil v. Hansen*, 2007 WI 56, ¶ 10, 300 Wis. 2d 358, 731 N.W.2d 273; *cf. Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (holding that exceptions will be construed “fairly” unless there is a textual indication that exceptions should be construed narrowly).¹ Where the express terms of an interstate compact or statute are clear and unambiguous, that meaning is determinative. *Robinson*, 519 U.S. at 340; *M & G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926, 938

¹ The DNR agrees that the exceptions should be “limited and strictly regulated.” DNR Br. at 27.

(2015) (Ginsburg, J., concurring) (citing 11 R. LORD, WILLISTON ON CONTRACTS § 30:6, p. 98-104 (4th ed. 2012)); *Kalal*, 271 Wis. 2d 633, ¶ 45.²

DNR'S ANALYSIS

DNR approved the City of Racine's application to divert water to the Foxconn Project Area on April 25, 2018. Joint Ex. 1. The Approval does not analyze, or even acknowledge, the purposes for which the diverted water will be used. In fact, DNR's Approval makes no mention whatsoever of the customers that will be served by the diversion. Instead, DNR points to the Racine Water Utility's existing customers, focusing on customers located in the City of Racine and also its existing in-basin customers in the Village of Mount Pleasant. Joint Ex. 1, Findings of Fact 5-14. On the basis of DNR's analysis of these two entirely *in-basin* residential areas, and **without examination of whether the water being transferred out of the basin is being distributed "to the public,"** DNR approved the application. The Approval contends that the Racine Water Utility's regional water system, as a whole, satisfies the requirement that the diverted water will be used "solely for public water supply purposes." *Id.*, Conclusion of Law 5.

THE APPROVAL IS CONTRARY TO THE EXPRESS LANGUAGE OF THE COMPACT, AS WELL AS ITS INTENT

As noted above, the Compact exception allowing for applications to divert water to the out-of-basin portions of straddling communities requires that "**all the Water so transferred** shall be used **solely** for Public Water Supply Purposes within the

² The Wisconsin Supreme Court has "decided to end [the] practice of deferring to administrative agencies' conclusions of law." *Tetra Tech EC, Inc. v. Dept. of Revenue*, 2018 WI 75, ¶ 108, 382 Wis. 2d 496, 914 N.W.2d 21. Questions of law, such as the proper interpretation of a statute, should now be reviewed under the *de novo* standard in every case. *Id.*, ¶ 84

Straddling Community.” Compact, Section 4.9.1 (Emphasis added). What the Compact explicitly requires an applicant to demonstrate and an approving authority to evaluate is how the **transferred water** is to be used. Unfortunately, the DNR misdirected its focus entirely on the areas of Racine and Mount Pleasant that are **within** the Basin and on the water that is **not transferred** out of the Basin. As a result, DNR failed to focus at all on the **transferred** water. The definition of “Public Water Supply Purposes” requires that that transferred water be distributed “**to the public.**”

Here, **none** of the transferred water is to be distributed to the public – all of it is destined for properties which have been acquired and rezoned for Foxconn’s ownership and industrial/commercial use and from which existing members of the public have been or are being removed to make way for Foxconn’s project.³ It is undisputed that neither the applicant nor DNR identified any residential customers to be served by the water transferred out of the Great Lakes Basin. Jt. Ex. 5 at 21. Regardless of the “public” nature of the distribution system used to get Lake Michigan water to the boundary of the Basin, **none of the transferred water is to be distributed to the public.** Under the Compact, the DNR has no authority to approve such a transfer.

The intent of the Compact’s straddling community exception is clear. It is to allow an opportunity for such communities to address **public** water supply needs that may exist within their community but outside of the basin. However, a transfer of water outside of the basin that excludes the public and is distributed only to industrial or commercial users cannot be squared with the Compact’s central tenets – that Basin

³ In view of the repeated and continuing changes to the nature, scope and timing of what Foxconn may or may not eventually develop on the properties that have been acquired for its use, the actual need for this out-of-basin diversion is speculative at best. However, the DNR has approved the diversion, and whether or not it ends up ever being utilized, it stands as a dangerous precedent for the entire basin.

water can only be transferred to the public and that exceptions to the ban on diversions are to be strictly limited. Moreover, both the Compact itself and the Wisconsin implementing legislation confirm that the protection of the Great Lakes is “the overarching principle for reviewing proposals.” Compact, Section 4.5.1.d; Wis. Stat. §281.343(4h)(a)4.

The DNR’s misinterpretation of the public water supply purposes requirement here is likely to lead to comparable attempts by other municipalities to obtain diversions that serve purposes entirely unrelated to “largely residential” customers. DNR’s view of the requirement would allow innumerable in-basin communities and their public water supply systems throughout the Great Lakes basin to serve as ready conduits for water-intensive industries, mining operations, power plants or other purely private uses located outside the basin. In short, if DNR’s interpretation of the public water supply purposes requirement is correct, each and every straddling community throughout the entire basin could be entitled to entirely fill their out-of-basin areas with water intensive industrial and commercial users, and supply them with in-basin water, subject only to limits on consumptive uses and return flows. That is clearly contrary to the Compact’s purpose of protecting the Great Lakes and in-basin communities.⁴

DNR’S APPROVAL OF THIS DIVERSION IS INCONSISTENT WITH PREVIOUS DIVERSIONS

DNR’s experience with previous diversions demonstrates that the exceptions to the Compact’s prohibition on diversions are intended to serve public, largely residential

⁴ Since the Compact and statutory language is clear and unambiguous, WEAL believes there is no need to refer to secondary indicators of their meaning, such as legislative history. To the extent that this tribunal disagrees, WEAL adopts the arguments of Petitioners’ Briefs regarding such indicators.

uses, and that the evaluation of applications for diversions requires a primary focus on the nature of the uses to which the out-of-basin transferred water will be put. DNR's focus here on the Racine Water Utility—the in-Basin entity diverting the water—and the Racine Water Utility's current in-Basin customer base is in stark contrast to its prior diversion approvals.

New Berlin

The City of New Berlin is a straddling Waukesha County community that had a public water supply system supplied with Lake Michigan water from the City of Milwaukee serving the portion of the City east of the Basin boundary and a failing supply of radium-contaminated groundwater serving a portion of the City west of the boundary. New Berlin applied for a diversion of Lake Michigan water to be supplied by the City of Milwaukee to replace the groundwater sources supplying the public west of the boundary. Pet'rs Exs. 37; Ex. 38. DNR's analysis of the Public Water Supply Purposes requirement focused squarely on the customers of the public water supply utility to be served by the out-of-Basin transfer, not on the Milwaukee utility providing the water. The diversion served primarily residential users, leading WDNR to conclude that the diversion was “solely for public water supply purposes.” *Id.*

DNR's decision on New Berlin's diversion explicitly recognized that whether the diversion is for public water supply purposes turns on the use of the water in the out-of-basin portion of the community. “[W]ater diverted pursuant to this approval shall be used solely for public water supply purposes **within the approved diversion area.**” (Emphasis added). Pet'rs Ex. 39 at 2. The “approved diversion area” to which the Approval refers was that out-of-basin portion of the City of New Berlin that would be receiving diverted water.

Moreover, it is striking that the Approval required the City of New Berlin to monitor and report quarterly the number and types of customers in the diversion area to which the City distributes water. The New Berlin Approval created an extensive set of requirements in this regard:

The approved diversion amount shall be monitored by the City by measuring water usage by customers of the water utility. Within 60 days from the date this approval is signed, the City shall update its database of water utility customers to assign each customer of the utility to either the Lake Michigan basin or the Mississippi River basin. Where the basin line passes through a single parcel, the City shall assign the water customer or customers that occupy that parcel to the basin in which the junction of the water main and the service line to the parcel is located. Any alternative method of assigning water customers to either the Lake Michigan basin or the Mississippi River basin must be approved by the DNR. Within 90 days from the date this approval is signed, the City shall assign each water utility customer within the approved diversion area to one of the following Public Service Commission (PSC) categories of water user (from PSC's Water Utility Reference Manual, Revised February 6, 2009):

- Residential
- Commercial. The City shall further divide this category into the following subcategories for reporting to the Department:
 - Multi-dwelling residential, which includes condominiums and apartments.
 - Commercial non-residential.
- Industrial
- Public authority
- Other, including bulk water sales

The City shall maintain records of quarterly sales to each water customer within the approved diversion area. The City shall read all meters within two weeks of the close of each quarter. The City may reassign a customer to another category to reflect water user changes.

Pet'rs Ex. 39 at 2. If, as DNR and the City of Racine now argue, the types of customers within the Diversion Area are irrelevant to determining whether the water transfer is for “public water supply purposes,” these requirements would have been completely unnecessary for DNR to include in the New Berlin Diversion Approval.

Waukesha

The City of Waukesha, a community in the straddling county of Waukesha, applied for a diversion of Lake Michigan water from the City of Oak Creek to replace the radium-contaminated groundwater which supplied its public water utility serving its approximately 60,000 residents as well as industrial and commercial customers. In approving the application, the DNR focused on the customers in Waukesha, the out-of-Basin community where the transferred water was to be distributed, not on the in-basin customers of the supplying Oak Creek utility. In its approval of the diversion, the Compact Council noted the Waukesha public water utility's existing inability to meet Safe Drinking Water Act standards and the unsustainability of its existing groundwater sources. It made no mention at all of the nature or customers of the proposed in-Basin supplier, Oak Creek. Pet'rs. Ex. 37.⁵ Ultimately, Waukesha decided to obtain access to Lake Michigan water from the City of Milwaukee, rather than from Oak Creek. The ease with which that shift was made utterly puts the lie to the claim that what is relevant under the Compact in determining "public water supply purposes" are the in-basin customers, rather than the out-of-Basin customers to which the transferred water is to be distributed.

CONCLUSION

⁵ DNR had approved a diversion area that greatly extended the geographic area to be served by the Waukesha water utility beyond its existing water supply service area, based on DNR's interpretation of the interaction between Wisconsin's sewer service and water supply service laws. The Compact Council however, rejected DNR's approval of the larger diversion area, stating that the larger area "did not meet the Compact criteria." (Pet'rs Ex. 37, p. 6). The Compact Council also reduced the volume of water DNR had approved for diversion by approximately 20%. (*Id.*) DNR's misdirection in its analysis of the "public water supply purposes" requirement with respect to the Foxconn diversion here may be akin to DNR's misinterpretation of the meaning of "community" when it dealt with the Waukesha diversion application. In both cases, WEAL is concerned that the independent exercise of DNR's "expertise" may simply have given way to immense political pressure. Here, that pressure resulted from Foxconn's decision to locate its water-intensive facilities west of the Great Lakes Basin Boundary, rather than in the substantial areas within Areas I, II or III of the Project site east of the boundary. (*See* Pet'rs Ex. 43).

WEAL submits that DNR's determination that the Compact's "public water supply purposes" requirement is satisfied by the nature of the City of Racine's in-basin utility system and customers is contrary to the plain and unambiguous language of the Compact itself (and to the corresponding language of Wis. Stat. §281.346(1)(pm). It is also contrary to the purpose of the Compact and its intent that exceptions to the prohibition on diversions be limited and narrowly construed. The history of diversion applications in Wisconsin also belies DNR's current interpretation of the Compact's requirements. For these reasons, the DNR's Approval of the City of Racine's application for a diversion for the Foxconn project is erroneous. Because this erroneous Approval represents a dangerous precedent for future diversion applications and for harm to the Compact and to the Great Lakes, WEAL respectfully submits that it should be reversed.

Respectfully submitted on this 4th day of March, 2019.

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