



ROBERT W. WIRCH
STATE SENATOR TWENTY-SECOND DISTRICT

January 16, 2007

TO: John Stolzenberg
Rachel Letzing

FR: Senator Wirch

RE: Great Lakes Diversions Attorney General Opinion

Last month, I was asked to obtain an opinion from the Attorney General regarding “whether the proposed diversions of Lake Michigan water by the City of New Berlin and the City of Waukesha require the approval of Great Lakes governors, in addition to approvals needed from the Wisconsin Department of Natural Resources”.

As a legislative courtesy, I made the request for the opinion and provided the subsequent response from the Attorney General to the requestor.

Given the opinion pertains to the work of the Special Committee on the Great Lakes Water Resources Compact, it is appropriate for committee members to have a copy of this opinion for their review and consideration.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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December 27, 2006

The Honorable Robert W. Wirch
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Dear Senator Wirch:

In your letter received by my office December 19, 2006, you ask whether the proposed diversions of Lake Michigan water by the City of New Berlin and the City of Waukesha require the approval of the Great Lakes governors, in addition to approvals needed from the Wisconsin Department of Natural Resources. For the following reasons, I believe the answer is yes.

Background

New Berlin diversion proposal

By letter dated April 28, 2006, to the Wisconsin Department of Natural Resources (DNR) the City of New Berlin submitted an "application for a diversion of Great Lakes Basin water to those portions of New Berlin lying west of the sub continental divide" The full application is published at a DNR web site: <http://dnr.wi.gov/org/water/dwg/lakes.pdf>.

According to the letter and application, New Berlin estimates daily pumpage in year 2050 will be 2.03 million gallons per day for areas in the Lake Michigan basin, "and 2.48 million gallons for out of basin areas, for a total of 4.51 million gallons per day." The city claims, "New Berlin will be returning all water withdrawn from the basin, back to the basin, so there will be zero loss of water." This claim is made even though New Berlin states in its support document that the "amount of water lost in the proposed service area through Consumptive use is conservatively estimated at 13.1 percent of the total pumpage by New Berlin."

According to the letter, "This application is based upon guidelines established in the Great Lakes - St. Lawrence River Basin (Basin) Sustainable Water Resources Agreement (Agreement) and the Great Lakes - St. Lawrence River Basin Sustainable Water Resources Compact (Compact) signed on December 13th, 2005." The city, however, "recognizes that these agreements are not binding upon the States or Provinces but rather [are] guides for developing future agreements."

On September 26, 2006, DNR opened a 60-day public comment period "on New Berlin's proposal to withdraw additional water from Lake Michigan to serve part of the city outside the Great Lakes drainage basin. . . ." See <http://dnr.wi.gov/environmentprotect/water.html>. According to the DNR press release accompanying its web notice,

The Great Lake-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact (the Compact) was signed Dec. 13, 2005, by Gov. Jim Doyle, seven other Great Lakes states governors, and two Canadian prime ministers. The agreement includes a ban on pumping water outside the basin, but includes exceptions for communities like New Berlin that straddle the basin. To become official, Great Lakes states lawmakers must pass legislation carrying out the Compact and Congress must approve it – a process that could take several years.

Under existing federal law, New Berlin's proposal could be determined to be a non-diversion because no water will be lost from the Lake Michigan basin. The city plans to return all of the water it draws from the lake, plus additional groundwater processed through its wastewater treatment system, back into the Basin.

See http://dnr.wi.gov/org/caer/ce/news/rbnews/BreakingNews_Lookup.asp?id=334.

Since the time of the application and public notice, concerns have been raised about the New Berlin diversion proposal. One of the most notable is the October 31, 2006, letter from Michigan Attorney General Mike Cox to the DNR asserting,

The Water Resources Development Act of 1986 (WRDA) requires approval from all Great Lakes Governors before Great Lakes water may be diverted in this manner By federal law, New Berlin cannot proceed with the diversion without obtaining approvals from each of the Governors. And the Wisconsin Department of Natural Resources cannot authorize the diversion by granting New Berlin's "application."

See http://www.michigan.gov/documents/ag/New_Berlin_Letter_177067_7.pdf.

According to recent news articles, DNR dismisses Attorney General Cox's concerns:

Bruce Baker, deputy administrator of the Wisconsin DNR water division, said Cox doesn't understand that Wisconsin is allowed to let New Berlin take more Lake Michigan water because the city will eventually return the same amount - or more - to the lake.

Baker said Wisconsin can still regulate withdrawal of Lake Michigan water under the agency's interpretation of existing federal law that allows projects outside of the Great Lakes basin to draw water, provided those projects don't funnel the resulting wastewater elsewhere.

....

"They're historically just against any diversions, and it's been a popular political decision in Michigan," Baker said. "Announcing it just before the election raises some questions about the timing."¹

D. Enriquez, "Michigan warns about water", Milwaukee Jnl Sent. (Nov. 3, 2006), <http://www.jsonline.com/story/index.aspx?id=526697>.

Nevertheless, reportedly, "Baker stressed that the DNR has yet to decide its own stand on the New Berlin issue, and it's undecided if using its interpretation of existing federal law would be the proper policy to follow." *Id.* Baker's assertions reportedly were repeated in Ramde, D., "Group urges Wis. DNR to follow rules on Great Lakes water request," Associated Press (Nov. 27, 2006), http://www.examiner.com/a-422966~Group_urges_Wis_DNR_to_follow_rules_on_Great_Lakes_water_request.html.

Waukesha diversion proposal

By letter dated March 28, 2006, from Attorney Arthur Harrington of Godfrey & Kahn, S.C., to the Governor's Chief Legal Counsel Amy Kasper, the Waukesha Water Utility provided a "position statement . . . for the Governor's consideration" as part of negotiations with the State of Wisconsin "regarding the utility's proposed use of Lake Michigan surface water as a source for drinking and other uses of water in the City of Waukesha."² According to Harrington, "The statement supports the position of Waukesha Water Utility that its request for use of the Lake Michigan surface water is consistent with the terms of the December 13, 2005, Annex agreement and the Water Resources Development Act."

According to its Introductory Statement,

Waukesha Water Utility ("WWU") currently withdraws groundwater from a deep aquifer that is hydrologically connected to Lake Michigan and therefore a part of

¹ This criticism of the Michigan Attorney General appears unwarranted given that DNR invited comments on the diversion proposal within the time frame the comments were provided.

² Although labeled "PRIVILEGED AND CONFIDENTIAL," the materials were distributed to the Legislative Council Committee on Great Lakes Water Resources Compact on October 4, 2006 at the request of Dan Duchniak of the Waukesha Water Utility. See http://www.legis.state.wi.us/lc/3_COMMITTEES/Special%20Committees/2006/GLAKE/oct04agenda_glake.pdf. The materials are also available on the web at <http://wisopinon.com/index.html?mdl=article.mdl&article=5113>, <http://www.wispolitics.com/1006/060908utilitylegal.pdf>.

the Great Lakes basin. The treated wastewater resulting from this withdrawal is discharged to the Fox River, which is a part of the Upper Mississippi River basin (the "Current Diversion"). WWU proposes to replace its withdrawal of groundwater from the deep aquifer with the withdrawal of surface water from Lake Michigan (the "Proposed Action"). WWU's proposed use of surface water from Lake Michigan will not exceed the capacity previously authorized for its groundwater withdrawal. WWU proposes to continue its discharge to the Fox River after withdrawal from Lake Michigan.

The March 22, 2006, position statement contains a Section II at 4, in which it asserts, "WRDA exempts all pre-authorized diversions, including those from groundwaters of the Great Lakes basin." The position paper takes the stance that WRDA applies only to diversions after November 17, 1986, and that the proposed diversion of Lake Michigan water to replace Waukesha's existing "diversion" from Great Lakes basin groundwater is a mere replacement of the same diversion and, therefore, does not require approval under WRDA.³

Discussion

Importance of the Issue

I start with the observation that the issue – whether approval of the Great Lakes governors is needed for the proposed diversions of Great Lakes water to the cities of New Berlin or Waukesha – is an especially important one that potentially affects the rights of the State of Wisconsin and all its citizens. A state agency approval of either proposal, without Great Lakes governors' approval, could set a conflicting precedent that would be detrimental to uniform and effective enforcement of WRDA, to interstate cooperation on Great Lakes matters, and to the rights, obligations, and sovereignty of the State of Wisconsin over Great Lakes waters.

Because the Congress did not define "diversions" in WRDA, while at the same time it gave the Great Lakes states' governors veto power over diversions, I agree with former Michigan Attorney General Jennifer M. Granholm that, "Since there exists no substantive legislative history and since no courts have interpreted the WRDA, there is little guidance with which to define the full range of activities covered by the statute. Moreover, by giving the governors the ability to veto any diversion or export of Great Lakes water, Congress placed the responsibility for interpretation and implementation of this statute primarily with the governors of the Great Lakes States." September 13, 2001, letter from Attorney General Granholm to Michigan Governor John Engler; <http://www.waterissweet.org/pdf/granholmletter.pdf>. "If the governors are not able to achieve a consensus regarding the interpretation of the federal statute, it is

³ For a history of the City of Waukesha proposal, see Peter Annin, *The Great Lakes Water Wars*, Island Press, Washington, D.C. (2006), pages 240-255.

difficult to foresee effective enforcement of its requirements in any but the most blatant cases." September 13, 2001, letter from Granholm to Representative Christopher Dingell, et al. *Id.*

In part for this reason, the State should be careful for what it asks. A successful assertion in court by the State of Wisconsin that a diversion of water is not subject to WRDA, either in cases where the diversion does not result in significant loss of water from the basin, or in cases where the diversion is to replace groundwater withdrawals within the basin, could be construed in subsequent litigation as a waiver by the State of Wisconsin to object to or veto similar proposals in other Great Lakes States.⁴ Regardless, Wisconsin hardly would be in a savory position to object to such diversions by other States after having approved one without regard to the objections or attempted vetoes by other States.

This is a veto power no other Great Lakes States appear willing to concede. Such a position by Wisconsin could prejudice Wisconsin's right to object to similar proposals in other States, while other States would retain the right to object to and veto similar ones in ours. Thus, this veto authority should not be given up without considerable deliberation and caution.

Moreover, because Wisconsin holds the beds and waters of Lake Superior and Lake Michigan within its territory in trust for the benefit and use of the public, it has a public trust obligation to guard its duty and authority to protect those waters. *See R.W. Docks & Slips v. State*, 2001 WI 73, ¶ 19, 244 Wis. 2d 497, 628 N.W.2d 781. *See also* Great Lakes—St. Lawrence River Basin Water Resources Compact, Section 1.3.1.a. (Dec. 13, 2005), ("The Waters of the Basin are precious public natural resources shared and held in trust by the States. . . ."), Compact, discussed *infra*. Wisconsin's waiver of its veto authority over certain types of Great Lakes diversions would not be consistent with that obligation.

The meaning of diversion in WRDA

With respect to the New Berlin diversion, the issue whether approval of the Great Lakes governors is needed for the proposed diversion of Great Lakes water to the city of New Berlin turns on whether the proposed diversion and return of unconsumed water to the basin is indeed a "diversion" as that term is used in the Water Resources Development Act (WRDA), entitled Prohibition on Great Lakes diversions, 42 U.S.C. § 1962d-20 (Pub.L. 99-662, Title XI, § 1109, Nov. 17, 1986, 100 Stat. 4230; Pub.L. 106-541, Title V, § 504(a), (b), Dec. 11, 2000, 114 Stat. 2644).

⁴ For a discussion of potential application of judicial estoppel and equitable estoppel, see *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."), quoting 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000); *Matter of Cassidy*, 892 F.2d 637, 641-642 and n.2 (7th Cir. 1990); *Konstantinidis v. Chen*, 626 F.2d 933 (D.C. Cir. 1980).

With respect to the Waukesha diversion, the issue whether approval of the Great Lakes governors is needed for the proposed diversion of Great Lakes water to the city of Waukesha turns on whether the proposed diversion of water from Lake Michigan is a new diversion under WRDA.

As quoted in the Michigan Attorney General's letter, WRDA provides in pertinent part,

No water shall be diverted or exported from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion or export is approved by the Governor of each of the Great Lake[s] States.

According to Wis. Leg. Council Memo No. 5 to Special Committee on the Great Lakes Water Resources Compact (hereafter Compact Committee), entitled, *Comparison of Review and Approval Authorities for New or Increased Withdrawals and Diversions* (September 26, 2006; revised October 10, 2006); [http://www.legis.state.wi.us/lc/3_COMMITTEES/Special%20Committees/2006/GLAKE/memono5\(revised\)_glake.pdf](http://www.legis.state.wi.us/lc/3_COMMITTEES/Special%20Committees/2006/GLAKE/memono5(revised)_glake.pdf):

WRDA provides minimal standards and has had minimal case law interpreting it. . . . On its face, WRDA is silent on whether it applies to consumptive uses within the basin and whether it applies to groundwater. Since WRDA was enacted, there has been disagreement among the states about whether WRDA applies to both surface water and groundwater.

. . . DNR staff expressed their [sic] view that given WRDA's lack of detail regarding the definition of "diversion," or a standard for determining when WRDA applies, and the absence of a decision-making process, the Great Lakes Governors currently have the ability to decide how and under what circumstances to implement WRDA. . . . However, there is no unity among the Great Lakes Governors on how WRDA does or does not apply. For example, proposals including return flows have been approved and others with return flows have been denied under WRDA. Until there is further guidance from Congress or the courts on the applicability of WRDA, it is difficult to assert with certainty if WRDA applies to future proposals with return flow.⁵

The Wisconsin Legislative Council staff did not attempt to apply the judicial rules of statutory interpretation to determine the meaning of WRDA. In the absence of court decisions settling these questions, we can apply the same rules applied by the courts to make judgments on how the courts would settle them.

⁵ See also Annin, at 130-131, 137.

I start with the language of WRDA itself, a full copy of which is enclosed. "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States v. Turkette*, 452 U.S. 576, 580 (1981), quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

The word "diversion" is not defined in the statute. "This silence compels us to 'start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used.'" *Russello v. United States*, 464 U.S. 16, 21 (1983), quoting *Richards v. United States*, 369 U.S. 1, 9 (1962). "In the absence of a statutory definition, it is generally assumed that the legislative purpose is expressed by the ordinary meaning of the words used, in light of the statute's object and policy." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 31 (1989). The ordinary meaning of words typically is derived from the dictionary. See *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997); *Muscarello v. U.S.*, 524 U.S. 125, 127-128 (1998).

The ordinary meaning of the term "diversion" at the time of the act is, "the act or an instance of diverting from a course, activity, or use: DEVIATION." Webster's 9th New Collegiate Dictionary, Merriam-Webster, Springfield, Mass. (1984). The term "divert" is defined as "to turn in opposite directions, . . . to turn aside: DEVIATE . . . to turn from one course or use to another: DEFLECT . . ." *Id.* The common legal definition of "diversion" at the time of act is, "A turning aside or altering the natural course or route of a thing." Black's Law Dictionary, Abridged 5th ed. West Pub., St. Paul, Minn. (1983). In turn, the definition of "divert" is "To turn aside; to turn out of the way; to alter the course of things. Usually applied to water-courses or to the unauthorized use of funds." *Id.* Although diversions that result in disputes and legal actions typically involve an "unauthorized change or alteration of a water course to the prejudice of a lower riparian," *id.*, prejudicial diversions are not exclusive to the meaning used in statutes. For example, see Wis. Stat. § 30.18, which prohibits all diversions for restoring lake levels or agricultural irrigation without a permit.

The meaning of the term "diversion" in WRDA appears clear enough from its ordinary meaning. The withdrawal or transfer of water from a lake, in any sense of the term, is "the act or an instance of diverting from a [water-]course," regardless of whether the water is eventually returned to the watercourse in the same or altered state, or the diversion is intended to replace another existing diversion from the same source. Consistent with both its common and WRDA meaning, both New Berlin's and Waukesha's applications repeatedly make clear they are expressly requesting a "diversion" from a water course – Lake Michigan.

Nevertheless, Congress was not concerned in WRDA with providing a Great Lakes governors' veto for all Great Lakes diversions. Here, the law appears concerned not with diversions of any kind, but with any diversions of water "for use outside the Great Lakes basin." This does not change the meaning of "diversion" as used in the law. However, it does qualify the

kind of diversion covered by the law – diversions of water for use outside the basin. Both the New Berlin and Waukesha diversions squarely fit within the coverage of the act because the cities propose diversions of water for use outside the basin.

In New Berlin's case, this interpretation is consistent with the fact that many water diversions involve withdrawals and transfers of waters that eventually are returned to their original water courses. Commonly, water diversions are not limited to those in which all or most of the water is consumed, lost, or permanently diverted. For example, Wis. Stat. § 281.35(5)(a)4., as applied to Wis. Stat. § 30.18(2)(b), (3)(b), clearly contemplates diversions that involve "return flow," as do the provisions of Wis. Stat. § 281.35(3)(am)2. and (6)(a)5., governing diversion approvals, the latter in consideration of "amount and quality of return flow required." Also, compare Great Lakes – St. Lawrence River Basin Water Resources Compact Section 1.2 Definition of "Consumptive Use" with Section 4.9.1.a. Exceptions to the Prohibition of Diversions (Dec. 13, 2005).

In Waukesha's case, a diversion of water from a surface water is different and distinct from a "diversion" from groundwater, perhaps more so than a diversion via a ditch is a different diversion of water via a pipeline. In Waukesha's case, the proposed surface water diversion is not even from the same water body as the existing groundwater "diversion" and is different in time.

If Congress intended the term "diversion" to mean only those diversions that result in significant loss of water from the Great Lakes or to replace surface or groundwater withdrawals within the basin, it was incumbent on it to adopt a definition or qualification clearly at variance with its ordinary meaning and coverage in the statute. *Muscarello*, 524 U.S. at 131-134.

The meaning of a term can be determined by its use and context in relation to other terms in the statute. "Statutory language must be read in context and a phrase 'gathers meaning from the words around it.'" *Jones v. U.S.*, 527 U.S. 373, 389 (1999), quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961). WRDA states, "No water shall be diverted or exported" for use outside the basin without governors' approval. 42 U.S.C. § 1962-20(d). If the definition of "diversion" required water to be lost from the basin, the word "exported" would be rendered almost completely superfluous.⁶ Such an interpretation would violate the rule that, "[i]t is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-539 (1955), quoting *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879). "[C]ourts should disfavor interpretations of statutes that

⁶ See exchange between Senators Abraham and Levin over this very issue, in which the law's coverage was extended to water export by amendment in 2000, in part because "[q]uestions over the definition of 'diversion' made this clarification necessary." 146 Cong.Rec. S9142-01, at S9149-S9150 (Sept. 25, 2000); see also *Little Traverse Bay Bands v. Great Spring Waters*, 203 F. Supp. 2d 853, 859-860 (W.D. Mich. 2002).

render language superfluous." *U.S. v. American Library Ass'n, Inc.*, 539 U.S. 194, 233 (2003), quoting *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992).

In the act, Congress made the broad finding that "*any new* diversions of Great lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes states and Canadian provinces." 42 U.S.C. § 1962-20(a)(3) (emphasis added). The stated policy of WRDA is "to prohibit *any* diversion of Great Lakes water . . . for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States." § 1962d-20(b)(3) (emphasis added). Thus, "*No* water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lake basin unless such diversion or export is approved by the Governor of each of the Great Lakes States." 42 U.S.C. § 1962-20(d). The breadth of the act's express coverage over diversions of water for use outside the basin is breath-taking. For example, "WRDA also 'contains no quantity requirement for triggering a need for member approval.'" Wis. Leg. Council Memo No. 5 at 2, citing *Little Traverse Bay Bands*, 203 F. Supp. 2d at 858.

The word "any" in a statute requires broad coverage of the words it modifies. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *U.S. v. Gonzales*, 520 U.S. 1, 5 (1997), quoting Webster's Third New International Dictionary 97 (1976). Still, those modified words retain their meaning. *Any diversion* of Great Lakes water "for use outside the Great Lakes basin" includes diversions of lake water that involve either return or permanent loss of diverted water. Clearly, any and all diversions of water for use outside the basin are covered by the act, regardless of whether water is returned to or lost from the basin. It follows that "any new" diversion would include a diversion proposed to be done at a different place and time as a previous diversion, even if intended to "replace" an existing "diversion" or withdrawal.

There is no support in the language of WRDA or its history for the idea that Congress intended to exclude from WRDA's coverage diversions of Great Lakes water for use outside the basin where diverted water would be returned to the basin, with or without considering consumed water, or to replace withdrawals from surface or groundwater within the basin. Congress's addition in 2000 of the prohibition on exportation of Great Lakes water only reinforces the original ordinary meaning of diversion as including those with return flows. The power granted to the Great Lakes governors over diversions of water for use outside the basin is very broad, and is not limited by the exceptions suggested by the cities of New Berlin or Waukesha.

Congress did qualify the types of diversions covered and did provide one express exception from the requirement that diversion of Great Lakes water for use outside the basin requires authorization from the Great Lakes governors. Under § 1962d-20(f), "This section shall

not apply to any diversion of water from any of the Great Lakes which is authorized on the date of the enactment of this Act." Congress provided this exception to the requirement for governors' approval, without providing others, and certainly none to cover the New Berlin and Waukesha proposals. Congress could have established other qualifications and exceptions to cover the New Berlin and Waukesha situations. It did not.

This broad interpretation of WRDA has a plausible basis. Generally, Congressional acts will be upheld under the due process and equal protection clauses of the U.S. Constitution "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.' . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 309, 313-315 (1993) (citations omitted), quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). See also, *Turner v. Glickman*, 207 F.3d 419, 426 -427 (7th Cir. 2000).

The Congress obviously saw danger in allowing *any* new diversions of water for use outside the basin, regardless of amount, without deliberation by the Great Lakes States' highest authorities. The broad finding in WRDA that – "any new diversions of Great lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes states and Canadian provinces" – has an eminently rational and plausible basis. These dangers may include the danger of diversion decisions being made without regard to diverse state and local standards being used, precedents being set, cumulative effects, changes in quality of water returned to the basin, amounts of water consumption and loss of water from the basin, and feasibility and location of water return within the basin, its watersheds and to groundwater, as well as other factors. Even if all diverted water were intended to be returned to its source, its feasibility, the rate of return, and its quality can raise significant concerns. Diverted lake water "returned" to the basin's groundwater may take hundreds of years to replenish exhausted groundwater aquifers before it might return to the lake. Such "return" of diverted lake water to the basin and lake could take hundreds of years while diverted water continues to be "lost" from the lake system during that time. Under Waukesha's proposal, no water will be returned to the lake basin at all. All diverted water will be "lost" to the basin while the "replaced" groundwater aquifers take hundreds of years to recover, if they do at all. Water quality is not excluded as a consideration for a Great Lakes governor's veto under WRDA. Not coincidentally, these factors are recognized in the newly adopted Great Lakes Compact, which still awaits States' ratification and implementation (discussed below). Until the Compact is implemented and these issues addressed, Congress gave the governors collective power to cooperate and coordinate diversion policy and decisions under WRDA. Absent agreement, any one governor has a veto to maintain the status quo.

Lastly, supporting the readily apparent meaning of "diversion" in WRDA is its application by the Great Lakes governors to municipal diversions requiring all diverted water to

be returned to the Great Lakes. One diversion was approved, one denied. "As of 2003, the only diversion to receive formal WRDA approval allows the City of Akron, Ohio, to divert 4.8 million gallons per day from Lake Erie to serve three unincorporated areas outside of the Great Lakes watershed. The Akron project is required to return an equivalent quantity of water to Lake Erie from the Ohio River watershed." Mark Squillace & Sandra Zellmer, "*Managing Interjurisdictional Waters Under The Great Lakes Charter Annex*," Nat. Resources & Env't, Fall 2003 (hereafter Squillace, et al.), at 10. In that 1998 case, the Great Lakes States applied the statute to require the governors' unanimous approval of a "diversion" that returned all water to the Great Lakes basin. *Id.* See also, Annin at 172-190.

In 1992, the Great Lakes governors denied their approval under WRDA for a diversion of water proposed by Lowell, Indiana, even though the city eventually agreed to return the withdrawn water to the basin. Annin at 147, 149. Although three Great Lakes governors did not approve of the Town of Pleasant Prairie's proposed diversion of Lake Michigan water in 1990 that required return flows to the lake, other governors did. Annin at 134. Although the legality of the diversion has been questioned, there was never a concession that the diversion was not subject to WRDA. *Id.*, 125-138.

These applications of WRDA are additional persuasive authority that the Great Lakes governors have agreed that such diversions require their unanimous approval. If diversions that do not return all water to the basin are not diversions under WRDA, there would have been no need for WRDA approval in the Akron, Lowell, or Pleasant Prairie cases. These applications of WRDA are consistent precedents, in line with its plain meaning and a consensus by the Great Lakes governors on the meaning of WRDA. A break with this precedent and consensus could lead to inconsistent decisions, confusion over WRDA's meaning, and potential discord between the Great Lakes States that could result in costly litigation between those States and other parties. In addition, it could constitute a waiver of Wisconsin's power to object to and veto similar diversions in other States and the provinces. This would place Wisconsin in an inferior bargaining and legal position with other States on similar diversions elsewhere.

As stated previously, there is no legislative history suggesting the definition of "diversion" under WRDA is different from its common and ordinary meaning within the contemplation of legislators who voted for it. Although diversions clearly include those that result in permanent loss from the basin due to out of basin transfers and exportation, as well as to replace other polluted or exhausted sources of water, the legislative history does not cast doubt on the meaning of the more expansive meaning of the word "diversion" as used in WRDA. See *Little Traverse Bay Bands v. Great Spring Waters*, 203 F. Supp. 2d 853, 856-860 (W.D. Mich. 2002) (holding citizen plaintiffs did not have standing to enforce WRDA).

Both the City of New Berlin and City of Waukesha proposals to divert Lake Michigan water outside the basin fits within the plain meaning of WRDA, and therefore require Great Lakes governors' approval.

For the foregoing reasons, I do not find it necessary to address the issues whether the existing withdrawal of groundwater by the City of Waukesha is a "diversion" of "Great Lakes water" under WRDA, or whether discharge of used groundwater to Lake Michigan would be a "return" of Great Lakes water. As discussed, Waukesha's proposed diversion of Lake Michigan water would be a "new diversion" within the plain meaning of WRDA that requires Great Lakes governors' approval.

Law of Great Lakes diversions

The diversion proposals by New Berlin and by Waukesha either invoke, make reference to, or include attachments containing discussions of Great Lakes laws and agreements which they assert bear on the question of WRDA's application to their proposals. Those laws include the Boundary Waters Treaty of 1909, the Great Lakes Charter and its Annex Agreement, and Great Lakes Compact of 2005. Thus, review of those applicable laws and agreements is warranted to fully address whether and how they may affect WRDA's application to their proposals.

The following history of related Great Lakes laws and agreements supports the interpretation that the term "diversion" as used in WRDA is not substantially different than that used in other Great Lakes laws and agreements, is not limited to diversions causing significant water loss to the Great Lakes basin, and provides no exception for diversions to "replace" existing diversions or groundwater withdrawals within the basin.

In Squillace, et al., one will find a useful summary of the law of the Great Lakes governing diversions.

Boundary Waters Treaty of 1909

"In 1909, the United States and Canada entered into the Boundary Waters Treaty to address diversions while ensuring that each nation's sovereign interests remained intact." Squillace, et al., at 9. "The Boundary Waters Treaty established the IJC [International Joint Commission], a six-member joint tribunal with jurisdiction over obstructions or diversions on either side of the border affecting the natural level or flow of boundary waters." *Id.*

The treaty, found at the IJC website at <http://www.ijc.org/rel/agree/water.html>, yields little in the way of defining "diversion" differently than its common meaning. The term "diversion" is not defined in the treaty. Treaty Article III States in part, "no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line shall be ma[d]e except by authority of the United States or the Dominion of Canada within their

respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission."

Effect of (not location, type, source, or return flow from) a diversion triggers treaty obligations. Under the treaty, whether or not a diversion of water is made within or outside the Great Lakes basin, any diversion "affecting the natural level or flow of boundary waters on the other side of the line" is subject to governmental and IJC approval.

The dictionary definition of "diversion" at the time was substantially no different than the definition at the time of WRDA. According to Webster's International Dictionary of the English Language, G. & C. Merriam Co., Springfield, Mass. (1906), "diversion" is defined as, "The act of turning aside from any course, occupation, or object; as, the *diversion* of a stream from its channel" (emphasis in original).

Great Lakes Basin Compact of 1968

"The Great Lakes Basin Compact, initially adopted in the 1950s and subsequently endorsed by Congress and signed into law in 1968, commits the Great Lakes states to collaborate on regional issues. Pub. L. No. 90-419, 82 Stat. 414 (1968). Among the compact's more significant provisions was the creation of the Great Lakes Commission, an interstate compact agency that assists in coordinating decisions pertaining to Great Lakes diversions and water use." Squillace, et al. at 9. See Great Lakes Commission web site: <http://www.glc.org/about/glbc.html>. However, the only reference to the term "diversion" is in Compact Article VII, which provides, "Each party state agrees to consider the action the Commission recommends in respect to . . . [d]iversion of waters from and into the Basin." No definition or qualification is provided. The ordinary and plain meaning of diversion is assumed.

Great Lakes Charter of 1985

"In 1985, in response to the perceived threat posed by a proposal to divert Great Lakes water for a coal slurry pipeline from the Powder River Basin in Wyoming, the Great Lakes governors and premiers signed the Great Lakes Charter to address diversions and consumptive uses. . . . The charter provides for notification and consultation among the governors and premiers for proposals to divert more than five million gallons per day (gpd) over a thirty-day period. In order to participate in the charter's consultation process, the states and provinces are required to adopt a registration requirement for all new or increased consumptive uses greater than one hundred thousand gpd, and a permit system for all new or increased diversions or consumptive uses that exceed two million gpd." Squillace, et al. at 10. See Great Lakes Charter at <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf>.

Significantly, the Great Lakes Charter defines "diversion" and other related terms. The Charter contains provisions strongly suggesting that even though diversions of concern are those

that transfer water outside the basin, the term "diversion" is not defined by losses of water from the Great Lakes basin.

According to the Charter's Definition section, "**Diversion** means a transfer of water from the Great Lakes Basin into another watershed, or from the watershed of one of the Great Lakes into that of another." On the other hand, "**Consumptive use** means that portion of water withdrawn or withheld from the Great Lakes Basin and assumed to be lost or otherwise not returned to the Great Lakes Basin due to evaporation, incorporation into products, or other processes." "**Withdrawal** means the removal or taking of water from surface or groundwater." Loss of water, consumptive use of water, or failure to return water are not mentioned in the definition of diversion.

Under the Charter's "Consultation Procedures,"

THE PRINCIPLE OF PRIOR NOTICE AND CONSULTATION WILL APPLY TO ANY NEW OR INCREASED DIVERSION OR CONSUMPTIVE USE OF THE WATER RESOURCES OF THE GREAT LAKES BASIN which exceeds 5,000,000 gallons (19 million litres) per day average in any 30-day period.

(Emphasis added, capitalization in original).

"However, the right of any individual State or Province to participate in the prior notice and consultation process, either before or after approval of formal procedures by the Governors and Premiers, is contingent upon its ability to provide accurate and comparable information on water withdrawals in excess of 100,000 gallons (380,000 litres) per day average in any 30-day period and its authority to manage and regulate water withdrawals involving a total diversion or consumptive use of Great Lakes Basin water resources in excess of 2,000,000 gallons (7,600,000 litres) per day average in any 30-day period."

Charter's "Progress Toward Implementation" section #4 (emphasis added).

It is apparent from the above that the terms "diversion" and "consumptive use" are distinct, and a diversion is not defined or limited as including "consumptive use" or water loss. The sheer magnitude of a diversion, regardless of water loss, was contemplated as requiring review and consultation. The Wisconsin implementation of the Charter clearly contemplates diversions that involve "return flow." Wis. Stat. § 281.35(5)(a)4., as applied under Wis. Stat. § 30.18(2)(b), (3)(b). *See also* Wis. Stat. § 281.35(3)(am)2. and (6)(a)5.

In addition, the Findings of the Charter state, "The Great Lakes States and Provinces reaffirm the mutual rights and obligations of all Basin jurisdictions to use, conserve, and protect Basin water resources, as expressed in the Boundary Waters Treaty of 1909, the Great Lakes

Water Quality Agreement of 1978, and the principles of other applicable international agreements." Thus, water quality of return flow to the Great Lakes is a legitimate issue for consideration by the Great Lakes States with respect to diversions, even where all water is returned.

Water Resources Development Act of 1986

WRDA followed a year later in 1986 (discussed above).

Great Lakes Charter Annex of 2001

Following WRDA, the 2001 Annex to the Great Lakes Charter, available at <http://www.cglg.org/projects/water/docs/GreatLakesCharterAnnex.pdf> "commits the Great Lakes governors and premiers to improve their management of Great Lakes water resources through binding agreements." Squillace, et al. at 8. The 2001 Charter Annex commits the States to a "new set of binding agreement(s) [that] will establish a decision making standard that the States and Provinces will utilize to review new proposals to withdraw water from the Great Lakes Basin as well as proposals to increase existing water withdrawals or existing water withdrawal capacity." Charter Directive #3. Also, according to this Directive, "[t]he new standard shall be based upon the following principles:

- Preventing or minimizing Basin water loss through return flow and implementation of environmentally sound and economically feasible water conservation measures; and
- No significant adverse individual or cumulative impacts to the quantity or quality of the Waters and Water-Dependent Natural Resources of the Great Lakes Basin; and
- An Improvement to the Waters and Water-Dependent Natural Resources of the Great Lakes Basin; and
- Compliance with the applicable state, provincial, federal, and international laws and treaties."

In short, the Charter Annex is an agreement to agree. It is not an agreement that results in substantive changes in the law. Nevertheless, it clearly applies to all withdrawals of Great Lakes waters, not just to out-of-basin diversions resulting in loss of Great Lakes water. In addition, it recognizes the goal of protecting water quality that may be affected by diversions, such as by return flows of used water.

Great Lakes Compact and Agreement of 2005

The States and Provinces did reach agreement as contemplated in the Charter Annex. See <http://www.cglg.org/projects/water/annex2001Implementing.asp>. "On December 13, 2005, the

Great Lakes Governors and Premiers signed historic agreements to put the Annex into action and protect the Great Lakes—St. Lawrence River Basin for future generations. The agreements include the following:

1. The Great Lakes—St. Lawrence River Basin Sustainable Water Resources Agreement (the Agreement), a good-faith agreement among the Great Lakes States, Ontario and Québec; that will be implemented in Ontario and Québec through Provincial laws, and in the States, through
2. The Great Lakes—St. Lawrence River Basin Water Resources Compact (the Compact), an agreement among the Great Lakes States that will be passed into law through an interstate compact."

Frequently Asked Questions, Annex 2001 Implementing Agreements; http://www.cglg.org/projects/water/docs/12-13-05/Annex_Implementing_Agreements_Frequently_Asked_Questions_1-23-06.pdf. Significantly,

The Great Lakes States and Provinces have entered into a good-faith agreement incorporating their commitments to one another. They will now seek to implement into law what they have promised in the agreement.

The Provinces intend to seek to implement the agreement through modifications to their applicable legislative/regulatory measures. The States will implement the agreement by passing an interstate compact into law. In the United States, Congress will be asked to consent to the compact.

Id.

As recognized by both New Berlin and Waukesha in their submissions of application, the Compact and the Agreement are not in effect, and will not be until ratified by legislation in the respective States and Provinces. See Compact Article 9, Section 9.4. As also implicitly recognized in the FAQ, the WRDA remains in effect until Congress acts to expressly or implicitly revise it in conformance with new federal legislation to implement these agreements.

Although the agreements, if and when implemented upon ratification, will govern diversions in a way to require conservation and return of diverted water to the basin, even the new compact between the States defines "diversion" consistent with the laws and common meaning that precede it. Under Compact Section 1.2, Definitions,

Diversion means a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail

tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed. **Divert** has a corresponding meaning.

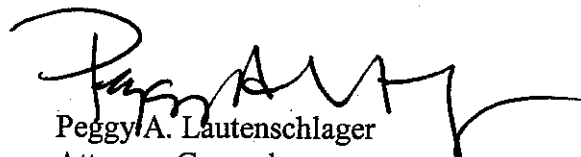
Arguably, while New Berlin and Waukesha *may* be able to meet the terms of the Compact – if and when adopted by the States and the Congress – this is not yet the law. Until WRDA is altered by Congress, it applies to the current applications.

Conclusion

For the above reasons, it is my opinion that any new diversions from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lake basin are diversions within the meaning of WRDA regardless of whether the diversions will result in return flows to the basin or are to replace groundwater withdrawals from within the basin.

Therefore, under the Water Resources Development Act of 1986, such diversions require the approval of all Great Lakes governors, and the proposals by the cities of New Berlin and Waukesha require such approval by the Great Lakes governors as well as by the Wisconsin Department of Natural Resources in order to be valid.

Very truly yours,



Peggy A. Lautenschlager
Attorney General

PAL:TJD/drm

Enclosure

WATER RESOURCES DEVELOPMENT ACT OF 1986

As amended September, 2000

1962d-20. Prohibition on Great Lakes Diversions

(a) The Congress finds and declares that -

1. The Great Lakes are the most important natural resource to the eight great Lakes States and two Canadian provinces, providing water supply for domestic and industrial use, clean energy through hydropower production, an efficient transportation mode for moving products into and out of the great Lakes region, and recreational uses for millions of United States and Canadian citizens;
2. the Great Lakes need to be carefully managed and protected to meet current and needs within the Great Lakes basin and Canadian provinces;
3. any new diversions of Great lakes water for use outside of the Great Lakes basin will have significant economic and environmental impacts, adversely affecting the use of this resource by the Great Lakes states and Canadian provinces; and
4. four of the Great Lakes are international waters and are defined as boundary waters in the Boundary Water Treaty of 1909 between the United States and Canada, and as such any new diversion of Great Lakes water in the united States would affect the relations of the Government of the United States with the Government of Canada.

(b) It is therefore declared to be the purpose and policy of the Congress in this action -

1. to take immediate action to protect the limited quantity of water available from the Great Lakes system for use by the Great Lakes States and in accordance with the Boundary Waters Treaty of 1909;
2. to encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin;
3. to prohibit any diversion of Great Lakes water by any State, Federal agency, or private entity for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States; and
4. to prohibit any Federal agency from undertaking any studies that would involve the transfer of Great Lakes water for any purpose for use outside the Great Lakes basin.

(c) As used in this section, the term "Great Lakes State" means each of the States of Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin.

(d) No water shall be diverted or exported from any portion of the Great Lakes within the United States, from any tributary within the United States of any of the Great Lakes, for use outside the Great Lake basin unless such diversion or export is approved by the Governor of each of the Great Lakes States.

(e) No Federal agency may undertake an study, or expend any Federal funds to contract for any study, of the feasibility of diverting water from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the great Lakes, for use outside the Great Lakes basin, unless such study or expenditure is approved by the Governors of each of the Great Lakes States. The prohibition of the preceding sentence shall not apply to any study or data collection effort performed by the Corps of Engineers or other Federal agency under the direction of the International Joint Commission in accordance with the Boundary Waters treaty of 1909.

(f) This section shall not apply to any diversion of water from any of the Great Lakes which is authorized on the date of the enactment of this Act.

(Nov. 17, 1986, P.L. 99-662, Title XI, 1109, 100 Stat. 4230.)