

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

CORRECTED
BRIEF OF *AMICUS CURIAE* FLOW FOR LOVE OF WATER REGARDING
MOTIONS FOR SUMMARY JUDGMENT

AMICUS CURIAE FLOW FOR LOVE OF WATER (“FLOW”), a Great Lakes Law and Policy Center,¹ by counsel, James M. Olson, Olson, Bzdok & Howard, P.C., submits the following brief in this matter:

OVERVIEW

This case contests the Wisconsin Department of Natural Resources’ (“WDNR”) approval of a proposal by the City of Racine, an in-basin community on shores of Lake Michigan, to transfer 7 million gallons of water (“mgd”) to an area outside the Great Lakes Basin (“Basin”) to be used for Foxconn’s, a large international corporation, production of liquid-crystal display (“LCD”) screens and sprawling manufacturing complex. The Great Lakes Compact² and nearly identical

¹ FLOW is a charitable education organization approved pursuant to Section 501(c)(3) of the Internal Revenue Code, with offices at 153 ½ East Front Street, Traverse City, Michigan 49684, FLOW serves governments, leaders, communities, citizens, and commerce with legal or scientific studies, reports, comments, or other information on matters of law and policy for the protection and sustainability of water, water use, health, quality of life, ecosystems, and economy within the Great Lakes Basin.

² Sections 4.8, 4.9.1, and 4.3.3 of the Great Lakes-St. Lawrence River Basin Compact, P.L. No. 110-342, 122 Stat. 3739(2008).

and closely related Wisconsin statutory provisions that adopted and implemented the Compact³ prohibit any diversion of water outside the Basin, unless the transfer or diversion falls within one of three narrow exceptions for use in an area outside the Basin: a “straddling community,”⁴ “straddling county,”⁵ or “intra-basin transfer.”⁶

The area of the Foxconn complex that will use the water to be transferred is in the Village of Mt. Pleasant (“Village”) but outside of the Basin. While the Village straddles the Basin, the Village does not have its own public water supply system. The Village is served by the City of Racine’s public water supply system, but the City’s system and the users in the Village are located entirely inside the Basin.⁷ So, as part of an agreement to aid Foxconn in locating its manufacturing complex in the Village but outside the Basin, the Village requested the City to apply to the WDNR to propose an extension of its public water supply to water for use by Foxconn in the area of the Village outside the Basin.

The City applied to the WDNR for authorization of a proposal to transfer the 7 mgd of water a day for Foxconn in the area outside the Basin under the “straddling community” exception of section 4.9.1 of the Compact and section (4n)(a) of Wis. Stat. 281.343(4n)(a). At the same time, the City filed an application for approval of the proposal under section (4)(b) and (4)(c) of Wis. Stat. 281.346(4)(b) and (c). After public notice, comments, and review, the WDNR authorized the exception.

³ Wis. Stat. 281.343(4m) and (4n)(a) (the exception); Wis. Stat. 281.346(c) (the authority to apply for the approval of the exception from the WDNR).

⁴ Compact, sec. 4.9.1; Wis. Stat. 281.343(4n)(a).

⁵ Compact, sec. 4.9.3; Wis. Stat. 281.343(4n)(c).

⁶ Compact, sec. 4.9.2; Wis. Stat. 281.343(4n)(b).

⁷ For reference, **FLOW Exhibit 1**, Map, surface water divide of Great Lakes Basin, “Regulation of Great Lakes water use by overlapping terms of Great Lakes Compact and state and provincial law,” (US Army Corps of Engineers), <https://www.wiscontext.org/foxconn-taps-plenitude-and-perils-great-lakes-water>, p. 2.

In order to find a basis to qualify for the exception to the diversion ban, the City sought to show that the Village straddled the Basin, the City’s public water supply system served the Village inside the Basin, and that the extension of its system would transfer water outside the Basin for use by Foxconn; based on this, the City claimed that “all of the water so transferred shall be used solely for public water supply purposes within the straddling community”⁸ –the Village. While the fundamental purpose of the transferred water is *solely* for the *private use* of Foxconn and its LCD complex, the City submitted that the use outside the Basin was “solely for public water supply purposes” as defined in section 1.2 of the Compact and Wis. Stat. 281.343(1e).5(pm), claiming its 34,037 customer-count inside the Basin met the “largely residential” language, and the “public water supply purposes” requirement.⁹

The WDNR agreed with the City’s position, and concluded that the City qualified for the exception because: (1) the applicant owns and operates a “public water supply system” which distributes Lake Michigan water inside the Basin to Racine and other communities, including the Village; (2) the Village straddles the Basin; (3) the diversion application proposes to expand the public water supply system to transfer water outside the Basin for Foxconn, and (4) the City’s system inside the Basin and Village would serve a “public water supply purpose,” since the customer base inside the Basin constituted a “group of largely residential customers.”¹⁰ However the WDNR’s finding did *not* find that the “*water so transferred shall be used solely for a public water supply system purpose.*” In other words, the WDNR failed to look at the purpose as a use, relying instead on the mere factual finding that on the basis of the number of customers, most customers were residents, not industries or businesses. But this

⁸ Compact, section 4.9.1; Wis. Stat. 281.343(4n)(a).

⁹ City of Racine Application to WDNR, Jan. 26, 2018, pp. 14-16; Compact,

¹⁰ WDNR, Findings of Fact and Conclusions of Law, paras. 3), 4), 5), and 6), p. 1.

totally failed to consider the *transfer of water for use in the area* (Foxconn’s site) outside the Basin, which is *the purpose of the diversion*. Most of the customers of the City and also the Village were “largely residential customers.” No attempt was made to demonstrate these customers used more water than Foxconn. In fact, as described more fully below in the Statement of Facts, the water transferred to Foxconn for industrial use outside the Basin, if allowed, would be 100 percent industrial, and if evaluated for inside and outside the Basin in the Village would account for approximately 70 percent of all of the water distributed by the City within the Village.

The Petitioners’ Brief argues that the City’s Foxconn diversion does not qualify for the “straddling community” exception, because the application involves a diversion of water to a private corporation for its private use, and will not be “distributed to the public” as required by the definition of “public water supply purposes.”¹¹ Further, Petitioners argue that the diversion does not qualify for the exception, because the water will not be distributed “through a system... serving a group of largely residential customers, because the purpose and clear intent of the definition of “public water supply purposes”. This means that the purpose based on customer count or use of the water outside the Basin is largely, if not entirely, industrial.¹² Respondents WDNR, City, and others have moved for summary judgement, arguing that the percentage of customers referenced dictates the finding of “largely residential” to meet the “solely public water supply purposes” requirement of the exception.

Amicus FLOW submits that the fundamental question in this contested case is whether the proposed Foxconn diversion approved by the WDNR even qualifies for the exception to the prohibition of diversions of water outside the Basin within the context, purpose, intent, and

¹¹ Petitioners’ Brief in Support of Motion for Summary Judgment (Petitioners’ Brief), A., pp. 1, 20, 23-24.

¹² *Id.*, B., pp. 21-23.

meaning of Section 4.9.1 of the Compact and sub Section (4n)(a), Wis. Stat. 281.343(4n)(a), when read as a whole in light of all closely related provisions and law. For the reasons set forth below, in this Brief, Amicus FLOW submits that the WDNR’s approval of the City’s proposal and application for the “straddling community” exception must be reversed:

(i) In reaching its decision, the WDNR improperly applied rules of statutory interpretation that are contrary to the intent, purpose, context and plain language of the exception Section 4.9.1 and Wis. Stat. 281.343 sub (4n) and meaning of “an area within a straddling community but outside the Great Lakes basin and “solely for public water supply purposes under 4.9.1 and Wis. Stat. 281.346(4)(a) and (c); it did so, because the Wisconsin’s legal rules of interpretation of Wis. Stat. 281 Water and Natural Resource Protection statutes closely related and taken as a whole, including provisions that require application and protection of navigable waters inside the Basin for public purposes related to navigation, fishing, boating, and recreation, demand that the “straddling community” exception must be construed liberally against the exception under the facts and circumstances of this case:

(ii) The Foxconn diversion into the area outside the Basin does not fall within the defined contours of the “straddling community” exception of section 4.9.1 and/or Wis. Stat. 281.343 sub. (4n) (a) and 281.346(a) and (c), because:

(a) The exception is limited to an analysis of the distribution of water in the area outside the Basin, not the areas inside the Basin;

(b) The total reliance on “largely residential customers” improperly overshadows the clear emphasis of the exception on “to *transfer water to an area* within a... community but *outside the Basin*” and “provided that that... all of the water so transferred” “shall be *used solely* for *public* water supply purposes” is contrary to the intent, purpose and meaning of the exception as a whole; the exception requires a determination of whether the “use” “outside the basin” is “largely residential,” and not merely a percentage of customer base, because the customer base would mean every in-basin community in the state could qualify as a “public water supply

purpose to fall within the exception to the prohibition of diversions, which is the purpose of the Compact and Wisconsin adopting statutes;

(c) When the exception is considered in the context of the Great Lakes, the water resource and ecosystem protection of the waters of the Great Lakes inside the Basin, including the express incorporation of the public trust doctrine private purpose limitation, the WDNR approval violated the Compact and the identical and closely related Compact and public trust law and standards.

(iii) The justification of its statutory interpretation of “for public water supply purposes” by WDNR and other Respondents by counting residential customers inside the Basin will lead to absurd results and precedents that are contrary to the purposes of the diversion ban, public trust law of the waters of the Great Lakes;¹³ and this will seriously, if not preposterously, undermine and weaken the protection and purposes of the prohibition on diversions of water outside of the Great Lakes Basin.

STATEMENT OF FACTS AND PROCEEDINGS

Amicus Curiae adopt the Statement of Facts of the Petitioner set forth at pages 9-17. In addition, FLOW summarizes the following undisputed facts.

The City of Racine is *not* a “straddling community” as defined by Section 4.9.1 of the Compact and Wis. Stat. s. 281.346(4)9a); the City’s public water supply system does *not* straddle the Basin divide. The Village does *not* own or control a public water supply system that delivers water or serves customers inside or outside of the Basin. The City’s public water supply system does *not* deliver or serve any residents, industrial, commercial, or other users outside the Basin.¹⁴ The Foxconn site is approximately 2,815 acers of mostly vacant farm land, all located in the Village.¹⁵ However, the WDNR issuance of its permit authorizes the City to

¹³ Compact, section 1.3.1.a.; Wis. Stat. 281.343(1m)(a)1. “[t]he Waters of the Basin are precious public natural resources shared and held in trust by the States.” See discussion of public trust law in Arguments, I and III, *infra*.

¹⁴ City of Racine Application, Executive Summary, p. 2.

¹⁵ See **Petitioner’s Ex 34, at Ex B.**

divert 7 million gallons a day (“mgd”) for use in an area outside the Basin¹⁶ solely for Foxconn’s production of liquid-crystal display (“LCD”) and manufacturing processes.¹⁷

The entire 7 mgd will be distributed by the City through a new segment of its public water supply system outside of the Basin to the property and manufacturing complex which shall be used solely by Foxconn. The fact that 90 percent of the City’s system may serve residential customers inside the Basin or 88 percent of the Village’s approximately 6,000 customers inside the Basin¹⁸ has nothing to do with *the transfer of water for the use in an area outside the Basin*. The City distributes approximately 17 mgd¹⁹ to approximately 34,000 customers in the Basin.²⁰ This means that currently 17 percent or 2.89 million gallons is used in the Village inside the Basin, but the City and WDNR did not determine or submit evidence on the relative percentage of residential use versus industrial or commercial uses; and, in any event, compared to the proposed diversion of 7 mgd for industrial and manufacturing or commercial use by Foxconn, on the basis of the use of water, the use of the water outside the Basin or even in the Basin is *not* “largely residential.”

STANDARD OF REVIEW

A question of law that requires the interpretation of relevant statutes and law is reviewed *de novo*. *Andersen v. Dep't of Natural Res.*, 2011 WI 19, ¶ 25, 332 Wis.2d 41, 796 N.W.2d 1. The interpretation of the scope or application of a statute, especially questions presented for the first time, there is no deference to the agency's interpretation of the statute. *Id.*

¹⁶ **FLOW Ex 3**, Wisconsin Department of Natural Resources Map and Legend.

¹⁷ The Foxconn complex water use reportedly could use as much as 15, 850,000 gallons a day, with proportionately far more loss of consumptive use, 281.343(1)(e), than 2 mgd, although the applicant City and DNR did not calculate the number.

¹⁸ **FLOW Ex 4**, <https://wiscontext.org/what-foxconn-means-great-lakes-compact>., pp. 7-8.

¹⁹ City of Racine Application, Jan. 26, 2018, pp. 7.

²⁰ *Id.*, Fig. C-1, p. 16.

When interpreting a statute, the court or tribunal must examine the language the statute or closely related statutes or law arising out of the subject matter; and if the meaning is plain when the closely related statutes and law are read as whole in light of the purpose of the statutes, the analysis ends. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, 271 Wis.2d 633, 681 N.W.2d 110. Statutory language is interpreted “in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Id.* This includes “the scope, context, and purpose” of the statute if it is evident from the statutory language. *Id.* If the interpretation “yields a plain, clear statutory meaning,” then the statute is unambiguous and it is not necessary to resort to other sources, such as legislative history, to aid our interpretation. *Id.* See *Lake Beulah Mgmt. Dist. v. State Dep't of Nat. Res.*, 2011 WI 54, 23-24, 335 Wis. 2d 47, 64–65, 799 N.W.2d 73, 81–82.²¹ Statutory language is read where possible to give reasonable effect to every word; that is, an interpretation cannot be read in a manner that would render some provisions superfluous. *Kalal, supra*, 2004 WI at 46.

For interpreting the scope and language of Compacts adopted between states and approved by Congress under the “compact clause,” U.S. Const., Art. Cl., the courts follow the same rules of statutory interpretation as Wisconsin. *Tarrant Reg'l. Water Dist. v. Hermann*, 569 U.S. 614, 628 (2013). The “plain meaning” or ambiguity of language requires a look at the context in which a compact is adopted and the context and relative provisions of the Compact as a whole. *Robinson v Shell Oil Co.*, 519 U.S. 337, 340 (1997).

²¹ In accord, *Lisney v LIRC*, 171 Wis.2d 499, 493 N.W.2d 14 (1992); *Parker v Sullivan*, 184 Wis.2d 668, 517 N.W.2d 499 (1994).

I. THE BACKGROUND AND LEGAL FRAMEWORK OF COMPACT AND CLOSELY RELATED WISCONSIN LAW

A. The Water and Natural Resources Protection Purpose of the Compact and Public Trust Law for the Great Lakes.

The eight Great Lakes states signed the Great Lakes Compact in 2005. Wisconsin enacted legislation to implement the Compact agreed to between the eight states in September 2007, once the Compact was adopted. Wis. Stat. 281.346, adopted the Compact into law in June, 2008, Wis. Stat. 281.343. After the eight states adopted the Compact, Congress adopted the Compact pursuant to the U.S. Constitution, Art. 1, Sec. 10, Cl. 3, and it was signed into law by President Bush in September, 2008.²² The overarching purpose of the Compact and adoption of the Compact in Wis. Stat. 281.343 is “to act together to protect, conserve, improve, and effectively manage the waters and water dependent resources of the basin.”²³ This purpose is based on the express findings that “[t]he Waters of the Basin are precious public natural resources shared and held in trust by the States,”²⁴ and that “[t]he parties have a shared duty to protect, conserve, restore, improve and manage the renewable but finite waters of the basin for the use, benefit, and enjoyment of citizens, including generations to come.”²⁵

Further, both the 2008 Wisconsin Compact law, Wis. Stat 281.343, and 2007 implementing law, 281.346, expressly state that “Nothing in this section may be interpreted to change the application of the public trust doctrine under article ix, section 1 of the Wisconsin...”²⁶ Under article IX, section 1 of the state constitution, the Wisconsin Supreme Court has consistently recognized, adopted, and applied the principles of the common law public trust doctrine.²⁷

²² Compact, section 4.9.1 (*italics ours*).

²³ *Id.*, section 1.3.2.a.; Wis. Stat. 281.343(1m)(b)1.

²⁴ Compact, section 1.3.1.a.; Wis. Stat. 281.343(1m)(a)1.

²⁵ *Id.*, section 1.3.1.f; Wis. Stat. 281.342(1m)(b)1.

²⁶ Wis. Stat. 281.343(1); Wis. Stat. 281.346(2)(g).

²⁷ *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892); *Ill. Steel Co. v Bilot*, 109 Wis. 418, 426, 84 N.W. 855 (1901); *Muench v Pub. Service Comm’n*, 261 Mich 492, 53 N.W.2d 514 (1952).

“Wisconsin has a long tradition of “protecting our valuable water resources.”²⁸ This is not surprising, given that all eight Great Lakes states have recognized and applied the public trusts doctrine to the Great Lakes and all navigable waters.²⁹ The public trust and related statutes should be “interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.”³⁰

B. The Compact and Wisconsin Adoption and Implementing Statutes

Section 4.8 of the Compact prohibits all new or increased diversions of water outside the Basin, unless approved within certain narrow exceptions for “straddling communities,” “intrabasin transfers,” and “straddling counties” set for in Section 4.9. Specifically, Section 4.9.1 provides:

1. Straddling Communities. A Proposal to *transfer Water to an area within a Straddling Community but outside the Basin* or the source Great Lakes Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party provided that, regardless of the volume of Water transferred, all the Water *so transferred shall be used solely for Public Water Supply Purposes within the Straddling Community*.*³¹

Section 4.3.3 of the Compact expressly prohibits Wisconsin, as a Party to the Compact, hence the WDNR, from approving an exception for a diversion to a “straddling community” that is “inconsistent with” the Compact.³² Wisconsin’s Compact law adopted the same language.³³

²⁸ *Lake Beulah Mgmt. Dist. v DNR*, 335 Wis. 2d 47, para. 31 (2011).

²⁹ Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waters and Submerged Lands in the Great Lakes*, 40 Mich J. L. Reform 907 (2007).

³⁰ *Shooting Club v Husting*, 156 Wis. 261, 271, 145 N.W. 816 (1914); *Lake Beulah Mgmt. Dist.*, *supra*, para. 31.

³¹ Compact, 4.9.1. If a proposed diversion qualifies under Sec. 4.9.1 as a “straddling community,” it must also satisfy specific standards related to return flow, water quality of discharged return flow, and new or increased withdrawals over 100,000 gpd, or a new or increased consumptive use of 5 million gpd or more. Sec. 4.9.1.a through 4.9.1.c.

³² *Id.*, section 4.3.3;

³³ Wis. Stat. 281.343(4d)(c).

Wisconsin’s law adopting the Compact is identical. “All new or increased diversions are prohibited, except as provided for in sub (4n).” Wis. Stat. 281.343(4m). Section sub (4n) (a) provides:

(4n) (a) *Straddling communities.* A proposal to *transfer water to an area within a straddling community but outside the basin ...* shall be excepted from the prohibition against diversions and be managed and regulated by the originating party provided that, regardless of the volume of water transferred, all of the water *so transferred shall be used solely for public water supply purposes within the straddling community.*³⁴

As noted above, Wisconsin passed its law implementing the Compact agreement signed by the eight states in 2007, nine months before Wisconsin adopted the Compact, effective June 11, 2008. Section 4.4.3 and Wis. Stat. 281.343(4d)(c) prohibit the WDNR from approving a diversion under the “straddling community” exception of section 4.9.1 and Wis. State 281.343(4n)(a) that is “inconsistent with” the Compact and Wisconsin’s law adopting the Compact.

Wisconsin’s 2007 implementing law, Wis. Stat. 281.346(4), also prohibits a diversion, except as authorized under (c), (d), or (e); Stat. 281.346(4)(c) provides:

(c) *Straddling communities.* The department may approve a proposal under paragraph (b) to begin a diversion... *to an area within a straddling community but outside the Great Lakes basin...* if the *water diverted will be used solely for public water supply purposes* and all of the following apply [standards for withdrawal, return flow, wastewater treatment, and water supply plan].³⁵

Finally, the definitions in Section 1.2 of the Compact and Wis. Stat. 281.343(1e) (pm) define “public water supply purposes” as:

(pm) “Public water supply purposes” means water distributed to the public through a physically connected system... serving a group of largely

³⁴ Wis. Stat. 281.343(n)(a). (*italics* ours).

³⁵ Note, the primary question presented here involves the threshold question of whether the City/Foxconn water diversion and use proposal even qualifies for the “straddling community” exception.

residential customers that may also serve industrial, commercial, and other institutional operators.

Accordingly, as more fully addressed in Argument II, below, the WDNR's approval decision in this contested case must consider the prohibition of diversions, exceptions, definitions, and the purposes of these laws, including the public trust doctrine, when interpreting and applying the "straddling community" exception in this contested case.

II. THE PURPOSE, CONTEXT, AND LEGAL FRAMEWORK OF THE COMPACT AND WISCONSIN WATER AND NATURAL RESOURCE PROTECTION LAW REQUIRE A LIBERAL OR BROAD INTERPRETATION OF THE DIVERISION BAN AND NARROW INTERPRETATION OF THE "STRADDLING COMMUNITY" EXCEPTION.

As stated by the Administrative Law Judge ("ALJ") in this matter, the fundamental legal question presented by the motions for summary disposition is:

Whether the WDNR's Approval of the City of Racine's Application violates Wis. Stats. §§ 281.343(4n) (a) and 281.346(4)(c) and Sections 4.3.3, 4.8, and 4.9 of the Great Lakes Compact with respect to WDNR's interpretation of "public water supply purposes" as that term is defined and intended to mean under these Wisconsin statutory provisions implementing the Compact and the Compact?³⁶

In order to fully answer the question presented, this Tribunal observed that "it would be inadvisable to prevent the participants [in this matter] from developing and offering relevant arguments." It is Amicus FLOW's position that this means the ALJ will consider the interpretation of Wis. Stat. 281.342(4n)(a) and 346(4)(c) and 4.3.3, 4.8, and 4.9.1 of the Compact as a whole; and that this necessarily includes the context that this matter involves a proposed diversion or transfer of the public trust waters of Lake Michigan³⁷ by a riparian landowner, the City of Racine, and its public water supply system, both of which are located

³⁶ Letter and ruling on scope of questions on appeal, Hon. Brian Hayes, Administrative Law Judge, December 7, 2018, citing *Lake Beulah Mgmt. Dist. v. State Department of Natural Resources*, 327 Wis. 2d. 222, 228 (Wis. Ct. App. 2010).

³⁷ Wisconsin Const., Art. IX, sec. 1; *Illinois Central R Rd v Illinois*, 146 U.S. 387 (1892);

entirely in the Great Lakes Basin to property and an area entirely outside the Basin but within the limits of a distant unincorporated town straddling the Basin, the Village of Mount Pleasant.

In *Lake Beulah Management District v State Department of Natural Resources*, *supra*, the Court of Appeals ruled that there is a necessary interplay between the Wisconsin's statutes and the public trust doctrine that carry out the management and regulatory programs necessary for implementing the policy and purpose of Wisconsin Statutes, Chapter 281 (Wis. Stat., Sec. 281). The court stated that “[W]e must construe statutes *in the context in which they are used, considering surrounding and closely related statutes.*” In so doing, the court stated,

We interpret these general statutes as expressly delegating regulatory authority to the DNR necessary to fulfill its mandatory duty to “protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private.”³⁸

On further appeal, the Wisconsin Supreme Court affirmed this mandate to construe statutes as a whole with closely related statutes and law, and to “interpret liberally” in favor of protecting the waters of Wisconsin, including the public trust in those waters.³⁹ The Court expressly held that the public trust doctrine under the Wis. Const. Art IX, sec. 1 and the common law of navigable waters (including Lake Michigan) impose a public trust duty to be read into or in conjunction with the mandate of Wis. Stat. 281 to manage, maintain and protect the waters of the state.⁴⁰

Accordingly, the context in which the WDNR must interpret or construe, *as a whole*, the statutes cited in the question presented in this case include the closely related Great Lakes Compact, the Wisconsin statutes implementing the Compact, the Wisconsin Constitution, Art.

³⁸ 327 Wis.2d. 222, 237; 787 N.W. 2d 926 Wis. Ct. App., 2010); reversed on other grounds, 335 Wis.2d 47, 799 N.W.2d 73 (Wis. S. Ct., 2011). “Public” would include public trust waters of the state. “Private” would include the riparian or littoral waters of the state, including Lake Michigan.

³⁹ *Id.*, 335 Wis.2d. at 70, *passim*, 66-73.

⁴⁰ *Id.*, at 70; in accord, *Rock-Koshkonong v WDNR*, 350 Wis2d 45, 77-78, 833 NW,2d 800 (2013).

IX, Section 1,⁴¹ riparian law,⁴² and the principles of the public trust doctrine. As described in the Background and Legal Framework section of this Brief above, the Compact and corresponding Wisconsin statutes must be considered as a whole and “interpreted liberally” in this case to protect the waters and natural resources of the Great Lakes Basin, and the public and private uses and rights that depend on these public trust waters.

III. THE FOXCONN DIVERSION INTO THE AREA OUTSIDE THE BASIN DOES NOT FALL WITHIN A PROPER INTERPRETATION OF THE “STRADDLING COMMUNITY” EXCEPTION.

Again, Section 4.9.1 and Wis. Stat. 281.343(4n) (a) apply only if the proposed diversion or “*transfer of water*” is “*to an area within a straddling community... but outside the Basin*” and “provided that... all the water *so transferred shall be used solely for Public Water Supply Purposes within the straddling community.*”

A. The WDNR and Respondents Interpretation that the “Straddling Community” Exception Must Focus on the Entire Area of the Community is Contrary to Law.

WDNR and Respondents simply looked at the whole area of the public water supply within the community—that is, they looked at the area in the Village both within and outside the Basin. The plain meaning of the exception is limited to a “transfer of water... within the community “*but outside the Basin.*”⁴³ The term “but” is not conjunctive. Clearly the requirement and entire focus of the exception is on the water to be transferred or diverted “outside the Basin.” The fatal error of

⁴¹ “The Mississippi River and the navigable waters leading to the Mississippi and the St. Lawrence, and the carrying places between the same shall be common highways and forever free. Wis. Const. art. IX, sec. 1. *Illinois Central R Rd., supra*, FN 3.

⁴² *Case v Hoffman*, 84 Wis. 438, 54 N.W. 793 (1893); *Lawson v Mowry*, 52 Wis. 21, 9 N.W. 280 (1881) (cases hold that a riparian landowner cannot divert water to a nonriparian tract or out of the riparian watershed).

⁴³ Respondent Manufactures and Commerce Brief, pp. 9 (“The Compact requires that a system... must serve largely residential customers.”) and p. 13 (“public water supply purposes” does not rest on the location of the diversion. Rather, it rests on whether the diversion area is within a ‘straddling community’”).

Respondents is their loose interpretation of “public water supply” to include the entire area of the straddling community.” “Public water supply purposes” can only be defined by looking to the meaning and limitation of the exception to the transfer of water into the area of the community outside the basin. Similarly, the phrase “water so transferred” can only refer to the requirement that the analysis of the exception is confined to “transfer of water... outside the Basin.

As noted above, the WDNR must consider its interpretation in the context, purpose, and within the language of the Compact, Wisconsin statute, and the protection of the waters of Great Lakes inside the Basin. Accordingly, the WDNR should have taken pains to consider and construe the “straddling community” exception “liberally,” that is, in favor of a narrow interpretation, *Lake Beulah Mgmt. District, supra*,⁴⁴ and not one that expands the exception by defining the public water supply system purpose to include both inside and outside the Basin. Accordingly, the WDNR finding and conclusion of law that the area of the “straddling community” for determining the purpose and use of the water is inside *and* outside the Basin is contrary to law.

B. The Total Reliance on the Language “Largely Residential Customers” Improperly and Unlawfully Overshadowed the Clear Intent of the Exception on the “Transfer Water to an Area within a... Community but Outside the Basin” and “provided that that... all of the water so transferred” “shall be used solely for public water supply purposes” is contrary to the intent, purpose, meaning, and application of the exception.

The clear legal error of interpretation of the “shall be used solely for public water supply” is laid bare by the Respondents’ argument, illustrated by Respondent Wisconsin Manufacturing and Commerce in the following statements:

The Compact requires that a system serving the water must serve the public through a system of physically connected infrastructure and generally, must serve “largely residential customers.”⁴⁵

⁴⁴ See Standard of Review section, *supra*.

⁴⁵ Respondent Manufactures and Commerce Brief, p. 9.

Evaluating the whether a diversion is for “public water supply purposes” does not rest on the location of the diversion. Rather, it rests on whether the diversion area is within a ‘straddling community” and the type of system through which the water is supplied.⁴⁶

By isolating the public water supply system as infrastructure and that the system “generally, must serve “largely residential customers,” Respondents ignore the overall emphasis of the exception that focuses on the transfer of water for use in an area outside the Basin, and the mandate that all of the water so transferred into the area outside the Basin “shall be used...”. While the exception requires a determination of whether the “use” “outside the basin” is “largely residential,” by merely relying on the percentage of customers as the base, the WDNR, City, and Respondent failed to consider and analyze the actual purpose of the use and transfer of water outside the Basin. If the number of residential customers or percentage of residential customers were allowed to dictate whether a “straddling community” like Mt. Pleasant or a city on the shore of Lake Michigan like Racine qualifies for the exception, the integrity of the diversion ban would be blown wide-open. Looking only at the definition of “public water supply purposes” apart from the language of the exception “all of the water so transferred shall be used solely for...” totally fails to look at the statutory language as a whole, and ignores the purpose of the Compact.

As described in Argument IV, *infra*, the WDNR and Respondents loose interpretation and reliance of the number of customers within the Village generally, bares no relationship to the actual use and purpose of extending the public water supply to the Foxconn site outside the Basin. Moreover, such a loose interpretation would lead to absurd, unintended results. Every City on Lake Michigan in the Basin serves more residential customers than industrial or commercial; just look at residential listings in the “White Pages” or their digital equivalent.

⁴⁶ Id., p. 13.

This means that any community that straddles the Basin or in the future is incorporated to straddle the Basin would qualify for the exception!

C. In any event, to qualify for the “straddling community” exception, the statutes require the WDNR to focus on the transfer or distribution of the water through the new extended public water supply system to the area outside the Basin.

As described in Argument A., above, the “straddling community” exception, when read as a whole, focuses on the “transfer of water... but outside the Basin.” Respondents did just the opposite, by expanding the exception to the transfer of water inside and outside the Basin. Respondents compounded their legal error in applying the definition of “public water supply purposes.” The exception applies to the diversion of water in the area outside the basin. Sec. 1.2 of the Compact and Wis. Stat. 281.343(1e)(pm) define this transfer of water as “distributed to the public” through a physically connected public water supply system.

Once again, the WDNR and Respondents want to focus on the broader public water supply system of the entire community. Respondents interpret “water distributed to the public” to include an area beyond the meaning and intent of the exception to focus on the transfer of water, its use, and purpose outside the Basin. Moreover, once the scope of the exception is confined to the area outside the Basin, it is obvious that the only purpose of the public water supply is to distribute water to Foxconn, a private corporation, that will use the 7 mgd in an area outside the Basin.

Accordingly, when Respondents interpretation is “liberally construed” in accordance with the purpose of the Compact and closely related statutes, the approval of the exception is contrary to law, because it is not a “distribution to the public” or for “solely public water supply purposes.”

D. The Interpretation of the Exception by Respondents Is Contrary to Law When Considered in the Context of the Great Lakes, the Water Resource and Ecosystem protection purpose of the Compact, and the Incorporation and Application of the Public Trust Doctrine.

The whole basis and purpose of the Compact and corresponding Wisconsin Statutes in Chapter 281 are for the protection of the water resources, ecosystem, and private and public rights of persons and institutions within the Basin.⁴⁷ Beginning with the legal-policy shock of the ill-fated Nova proposal to ship 160 million gallons of Great Lakes water to China in 1999, and continuing through a subsequent report of the International Joint Commission,⁴⁸ the overall threat from diversions in the context of the growing world crisis and demand for water resulted in recommendations, negotiations, and adoption of the Great Lakes Compact and corresponding state implementing statutes. The conclusions and recommendations of these reports pointed to a legal regime that would protect and conserve the waters of the Basin and assure ecosystem integrity.⁴⁹ The entire legal regime leading to the prohibition of diversions was implemented to prevent demands for diversions of waters of the Great Lakes outside the Basin, emphasizing that resource protection and a diversion ban applied evenly and strictly would accomplish these purposes. In the ICJ's 2016 15-year Report on the Protection of the Waters of the Great Lakes Basin, its first recommendation is to continue and "rigorously implement" the diversion ban and resource protection and conservation provisions of the Compact.⁵⁰

Moreover, the waters of Lake Michigan, like all navigable waters, are subject to the protection imposed by the public trust doctrine. The public trust imposes an affirmative duty to "not only to promote navigation but also to protect and preserve its waters."⁵¹ The required

⁴⁷ See FNS 23-26, *supra*.

⁴⁸ Protection of the Waters of the Great Lakes, (IJC 2001) <http://www.ijc.org/boards/cde/finalreport/html>.

⁴⁹ *Id.* at p. 24.

⁵⁰ Protection of the Waters of the Great Lakes; 15 Year Review (ICJ, Dec. 2015), p. 6.

⁵¹ *Wis. Env. Decade v DNR*, 85 Wis. 2d 518, 526 (1978), Principles, p. 24.

statutory interpretation in this case, like all navigable and public trust water and bottomland cases in Wisconsin, is guided by the purposes and principles of the public trust doctrine. Like the diversion ban in the Compact and Wisconsin implementing statutes, the public trust doctrine prohibits the transfer of public trust waters or bottomlands out of watersheds or for primarily private uses or public uses not related to the uses or purposes protected by the doctrine: navigation, fishing, swimming, boating, or other recreation.⁵² The only exception is where the transfer substantially advances a public purpose related to the public trust in navigable waters.⁵³

The right of the City of Racine in this case, as riparian,⁵⁴ to transfer or divert these public trust waters for its public water supply system for the development of the Foxconn LCD manufacturing complex outside of the Great Lakes basin is, necessarily, subject to the principles of the public trust doctrine.⁵⁵ Public trust waters and public rights cannot be diverted for primarily private purposes.⁵⁶ The Compact and statutes in this case cannot be interpreted in a manner that is inconsistent with the public trust doctrine.

As described under Background and Legal Framework, above, the Wisconsin Compact statutes expressly state, “Nothing in this section may be interpreted to change the application of

⁵² *Rock-Koskonong Lake Dist v DNR*, 350 Wis. 2d 45, 69 (2013); *Lake Beulah Mgmt. Dist, supra*;

⁵³ See *State v City of Milwaukee*, FN 60, *infra*

⁵⁴ It should also be noted that under the common law of riparian or littoral rights in Wisconsin, the diversion of the waters of a lake by a riparian, even if a public entity, for public water supply purposes is unlawful per se if it is out of the watershed or basin. E.g. *Lawson v Mowry*, 52 Wis. 219, 9 N.W. 280, 282 (1903) (unauthorized diversion by riparian out of watershed is unlawful use that does not require actual damages).

⁵⁵ *Ill. Steel Co. v Bilot, supra*, 109 Wis. at 426.

⁵⁶ *Priewe v Wis. State Land Co.*, 93 Wis. 534, 67 N.W. 918 (1896)(public trust lands and waters could not be transferred to benefit a private corporation); *State v City of Milwaukee*, 193 Wis. 423, 214 NW, 820 (1927) (a transfer or a portion of Lake Michigan by the city to a private steel corporation as part of a legislatively authorized public harbor project did not violate the private purpose limitation of the public trust doctrine, because the private corporation and city’s agreement was part of a public project to promote navigation and boating, a public trust purpose protected by the public trust doctrine). However, in *Illinois Central*, FN 10, *supra*, the U.S. Supreme Court voided a grant to the railroad company as an improper public purpose (that is, a private purpose advanced by grant or transfer of public trust property); it is beyond the power of the legislature to transfer public trust waters or bottomlands of the Lake Michigan to a private corporation for primarily private purposes. 187 U.S. at 452-453; *McClellan v Prentice*, 85 Wis. 427, 443 (Legislature or its delegated governmental bodies are not authorized to transfer public trust resources for private purposes).

the public trust doctrine under article ix, section 1 of the Wisconsin...⁵⁷ Wisconsin has a long tradition of “protecting our valuable water resources,”⁵⁸ especially the public trust doctrine and the doctrines principles.⁵⁹ The public trust and statutes involving the navigable waters of the Great Lakes “should be interpreted in the broad and beneficent spirit that gave rise to it in order that the people may fully enjoy the intended benefits.”⁶⁰

Section 4.3.3 of the Compact expressly prohibits Wisconsin, as a Party to the Compact, hence the WDNR, from approving an exception for a diversion to a “straddling community” that is “inconsistent with” the Compact.⁶¹ and Wisconsin’s identical provisions.⁶² The public trust doctrine limits the transfer of public trust water resources to public purposes. The transfer of water outside the Basin in this case for Foxconn is primarily for a private purpose. The interpretations by the WDNR and Respondents of the Exception are inconsistent with the closely public purpose requirement of the public trust doctrine and the directive in the Wisconsin statutes and case law that a provision (like the exception to the diversion ban) should not be interpreted contrary to the public trust doctrine.

IV. The statutory interpretation of “public water supply purposes” by WDNR and Respondents based on the number of the Village’s or City’s residential customers inside the Basin will lead to absurd results that are contrary to the purposes of the Compact and Wisconsin’s Implementing Statutes;⁶³ and Will Seriously Undermine and Weaken the Protection and Integrity of the Prohibition of the Diversion of Waters of the Great Lakes outside the Basin.

⁵⁷ Wis. Stat. 281.343(1); Wis. Stat. 281.346(2)(g).

⁵⁸ *Lake Beulah Mgmt. Dist. v DNR*, 335 Wis. 2d 47, para. 31 (2011).

⁵⁹ Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waters and Submerged Lands in the Great Lakes*, 40 Mich J. L. Reform 907 (2007).

⁶⁰ *Shooting Club v Husting*, 156 Wis. 261, 271, 145 N.W. 816 (1914); *Lake Beulah Mgmt. Dist.*, *supra*, para. 31.

⁶¹ *Id.*, section 4.3.3;

⁶² Wis. Stat. 281.343(4d)(c).

⁶³ Compact, section 1.3.1.a.; Wis. Stat. 281.343(1m)(a)1. “[t]he Waters of the Basin are precious public natural resources shared and held in trust by the States.” See discussion of public trust law in Arguments, I and III, *infra*.

As described in the Statement of Facts above, the City and WDNR relied on the number of the City’s residential customers divided by all of the City’s customers to determine whether the City’s public water supply purposes in the diversion of 7 mgd to Foxconn outside the Basin was for a “largely residential purpose.” Further, it has been shown that merely counting or relying on the number of residential customers to satisfy the requirement in the exception that a transfer of water into an area in the Village outside the Basin is for public water supply purposes is irrational and unrelated to the determination of whether the volume and use of the water is “solely for public water supply purposes”.

The City distributes approximately 17 mgd⁶⁴ to approximately 34,000 customers in the Basin.⁶⁵ Approximately 6,321 of those customers live within the Basin in the Village. This means that about 17 percent or 2.89 million gallons of water serve the Village inside the Basin. But when added to the proposed diversion of 7 mgd outside the Basin, this amounts to only about 30 percent of the water that would be distributed inside the Village and outside the Village to Foxconn. The overall purpose and use of the proposed diversion through the public water supply system is not “largely residential” at all.

If this interpretation is adopted by the State through the WDNR, the results will be absurd. The population of the Green Bay municipal area is 165, 139.⁶⁶ The population of Manitowoc and community is 33,736.⁶⁷ The population of Milwaukee and its municipal area is 953,085.⁶⁸ Based on the reasoning and interpretation by WDNR authorizing the diversion to Foxconn in the Village

⁶⁴ City of Racine Application, Jan. 26, 2018, pp. 7.

⁶⁵ *Id.*, Fig. C-1, p. 16.

⁶⁶ https://en.wikipedia.org/wiki/Green_Bay,_Wisconsin

⁶⁷ https://en.wikipedia.org/wiki/Manitowoc,_Wisconsin

⁶⁸ <https://www.census.gov/quickfacts/fact/table/milwaukeecountywisconsin/PST045217>

of Mt. Pleasant “but outside the Basin,” the exception could be authorized for any volume of water for any industrial, commercial or institutional uses until the number of the number of industrial, commercial and other users exceeded the population or residences being served in each of these communities. Moreover, because industrial and commercial users require large quantities of water, the interpretation and precedent in this case would lead to massive diversion of water and consumptive uses, with massive amounts of treated, but not necessarily pure or clean, return-water discharged into the waters of Lake Michigan.

A quick look at the Great Lakes Basin surface water divide through Wisconsin shows by the legend its river like contour is about 1,500 or more long.⁶⁹ There are a dozen or more towns, villages or communities along the divide. Any number of areas if proposed for development, (residential, industrial, or commercial) could be incorporated over and outside the divide. The same would be true for all of the eight Great Lakes States.

Accordingly, the City, WDNR Respondents’ position and basis for authorizing the exception for “straddling community” in this case will result in irrational, absurd and unintended results, clearly in conflict, inconsistent with, and contrary to the Compact and Wisconsin’s implementing statutes. The precedent, and ultimate development is so preposterous that the numbers of residential customers and volume of water that could be diverted outside of Lake Michigan and its basin or the Great Lakes Basin would be astronomical. This would, in turn, undermine the whole basis of the Compact diversion ban and protection of the waters of the Basin. The interpretation and decision authorizing the exception in this case by the Respondents are extreme, and should be reversed and voided.

⁶⁹ For demonstrative purposes, see Map, **FLOW Ex 5**.

Parenthetically, it should be noted that the first diversion in Wisconsin and under the Compact authorized for a “straddling community” was for the City of New Berlin.⁷⁰ The analysis and decision by the WDNR in that matter was applied to an existing city with its own existing public water supply that straddled the Basin, and the public water served more residential homes in that case than industrial.

CONCLUSION

For the foregoing reasons, Amicus Curiae FLOW submits that this Tribunal should set aside, reverse and invalidate the WDNR’s authorization for and approval of the applicant City of Racine’s proposed diversion to the Foxconn site in the Village of Mount Pleasant but outside the Great Lakes Basin; further, that the Tribunal should remand this matter back to the WDNR for further review pursuant to this Tribunal’s decision; and to grant such other relief as is appropriate and in accordance with law.

Respectfully submitted,

OLSON, BZDOK & HOWARD, P.C.

Date: March 5, 2019

By: _____
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⁷⁰ City of New Berlin, Wisconsin, Application for Water Diversion (April 28, 2000)(© 2006 copyright, Ruekert and Mielke, Inc.) pp. 1-3.