

To: John Stolzenberg and Rachel Letzing, Wisconsin Special Committee on the Great Lakes Compact

From: Jodi Habush Sinykin, Of Counsel, Midwest Environmental Advocates

Re: Recommendations Regarding Treatment of Bulk Water Transfers and Bottled Water for Inclusion in a Legislative Council Option Memo

Date: December 6, 2006

MEMORANDUM

I. SPECIFIC POLICY RECOMMENDATION: ELIMINATION OF THE BOTTLED WATER EXEMPTION

The Great Lakes Compact clearly prohibits the bulk transfer of water out of the Basin if it is transferred in a container larger than 5.7 gallons.¹ However, it leaves it up to each state to decide whether exporting water in containers less than 5.7 gallons is a prohibited diversion.²

Specifically, the Compact provides at Section 4.12 (10) (see also Wisconsin draft legislation 281.343 section (4t)(j)) (emphasis added):

Bulk Water Transfer: A Proposal to Withdraw Water and to remove it from the Basin in any container greater than 5.7 gallons shall be treated under this Compact in the same manner as a Proposal for a Diversion. *Each Party shall have the discretion, within its jurisdiction, to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons or less.*

Given Party discretion in this respect and in recognition of the global trends and legal duties discussed in Section III below, Wisconsin's Compact implementing legislation should eliminate the bottled water loophole that allows the diversion of Great Lakes water based on the size of the container being used (i.e. less than 5.7 gallons). Consistent with other Compact provisions, this recommendation would not apply to water that is incorporated into products such as beer, soda, canned goods, or juice.

¹ Great Lakes Compact at § 4.12(10).

² *Id.*

Legislative Means to Accomplish the Policy Recommendation:

Consistent with Party discretion to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container of 5.7 gallons or less, Wisconsin implementing legislation should (1) include a definition of “Diversion” that includes “water bottled for sale” and (2) clarify that all proposals to remove water from the basin are prohibited diversions irrespective of container size.

Suggested language to effect these means could be:

Consistent with Wisconsin’s discretion under 281.343 section (4t)(j) to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container 5.7 gallons or less in size, Wisconsin determines that water bottled for sale in any container 5.7 gallons or less will be defined as a diversion; as such, a proposal to withdraw water and remove it from the basin in any size container shall be treated under this compact in the same manner as a proposal for a diversion.

This provision would not apply to de minimus removals of water in containers intended for personal use.

II. ALTERNATIVE RECOMMENDATION: PROVIDE NECESSARY CLARIFICATION THAT BOTTLED WATER IS REGULATED AS AN IN-BASIN USE AND SUBJECT TO THE COMPACT’S DECISION-MAKING STANDARD

If Wisconsin rejects the policy recommendations of eliminating bulk transfers of water and/or massive exports of water in bottles less than 5.7 gallons, Wisconsin should act to clarify in its implementing legislation that bottled water is regulated as an in-basin use and, as such, must meet the decision-making standard for in-basin uses set forth in Wisconsin’s preliminary legislation draft section 281.343(4r). This can be accomplished as follows:

Consistent with Wisconsin’s discretion under 281.343 section (4t)(j) to determine the treatment of Proposals to Withdraw Water and to remove it from the Basin in any container 5.7 gallons or less in size, Wisconsin determines that a proposal to withdraw water and to remove it from the basin in any container less than 5.7 gallons shall be regulated in accordance with the decision-making standard set forth in 281.343(4r).

III. SUPPORT FOR POLICY RECOMMENDATION

With the continuing growth of the world's population and increasing water scarcity, global consumption of water is doubling every twenty years. As often repeated, "water promises to be to the 21st century what oil was to the 20th century: the precious commodity that determines the wealth of nations."³ A small group of multinational corporations currently control much of the international water market by privatizing water through the control of water distribution systems or the bottling of "public trust" waters for sale in the private sector.

As markets for privately-supplied water grow, so do concerns over whether we will be able to protect and conserve water in its natural state. It follows that the Great Lakes, with its 20 percent of the World's fresh surface water resources, could well become an opportunity for the benefit of a few private corporations at the expense of the Basin's citizenry and public trust waters.

Because water is and always has been a public resource, each of the Great Lakes states holds navigable waters in trust and are charged with managing these waters for the benefit of the public under the time-honored Public Trust Doctrine, providing that the state is the trustee and the waters are the trust property. Interestingly, each state in the Northwest Territory of the United States, including Wisconsin, was allowed into the Union on the condition that it incorporate the Public Trust Doctrine into the laws of the newly formed state. Like the Great Charter Annex 2001 and the Great Lakes Charter of 1985 before it, the Great Lakes Water Resources Compact reaffirms the Public Trust Doctrine in its pronouncement that Great Lakes Basin waters are "precious public natural resources shared and held in trust" by the states and that "[a]s trustees of the Basin's natural resources, the Great Lakes States and Provinces have a shared duty to protect, conserve, and manage the renewable but finite waters of the Great Lakes Basin for the use, benefit and enjoyment of all their citizens..."⁴

Thus, in order to carry out this role as trustee, Wisconsin should act to implement Compact legislation that prohibits the unregulated taking of public trust waters out of the public domain for sale by bottled water companies.

³ VANDANA SHIVA, WATER WARS: PRIVATIZATION, POLLUTION, AND PROFIT 24 (South End Press 2002) at 88 (citing Fortune Magazine, May 2000).

⁴ Great Lakes Compact at § 1.3(1)(a).