ENVIRONMENTAL LAW & POLICY CENTER
ILLINOIS INDIANA MICHIGAN MINNESOTA OHIO WISCONSIN

July 14, 1997

VIA FAX AND MAIL

Mr. John H. Zirschky
Acting Assistant Secretary for Civil Works
Room 2E570
The Pentagon
Washington, DC 20310-0102

Re: Proposed Diversion of Great Lakes Groundwater by Crandon Mining Co.
No. 94-01298-IP-DLB

Dear Assistant Secretary Zirschky:

The Environmental Law and Policy Center and our client, the Sierra Club, are extremely concerned regarding a proposed diversion of Great Lakes basin water to the Mississippi River basin. It is our understanding that your office is considering the applicability of the Water Resources Development Act of 1986, 42 U.S.C. § 1962d-20 ("WRDA"), to the proposal of Crandon Mining Company ("CMC") to divert to the Wisconsin River groundwater that is hydrologically connected to Lake Michigan. This question is extremely important to the environment of the entire Great Lakes basin because of the precedent which would be established for allowing a major new diversion of Great Lakes water that was not authorized under the procedure established by WRDA. In fact, the language and stated purpose of WRDA and application of settled principles of statutory construction establish that CMC's proposed diversion is covered by WRDA. You should determine that the proposal cannot go forward without approval of all of the Great Lakes Governors.

As Congress stated, WRDA is vital to protection of the environment and the economy of the Great Lakes region because:

> 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. § 1862d-20(a)(3). Faced with the threat of new diversions, Congress voted "to take immediate action to protect the limited quantity of water available from the Great Lakes system." 42 U.S.C. § 1962d-20(b)(1).

203 NORTH LASALLE STREET, SUITE 1390 CHICAGO, ILLINOIS 60601
PHONE (312) 759-3400 FAX (312) 332-1580

CMC proposes to build a zinc, lead and copper mine near Crandon, Wisconsin which will create various toxic pollutants and other wastes. Rather than treat the wastes completely on site, CMC proposes to use Great Lakes basin water to transport a portion of the wastes off site by pumping them 35 miles through a new pipeline to the Wisconsin River. The proposed diversion, if allowed, will do precisely what Congress sought to prevent through WRDA -- the quantity of water available for use within the Great Lakes basin would be diminished. Withdrawing and diverting groundwater that is hydrologically connected to Lake Michigan is both legally and environmentally the same as diverting Lake Michigan surface water. Nevertheless, CMC, through its counsel, Foley & Lardner, has argued that the proposed diversion does not fall under WRDA for two reasons. Neither of these reasons bears analysis.

I. WRDA is Applicable to Diversions of Tributary Groundwater

CMC has argued that the proposed diversion does not fall under WRDA because its proposed diversion of groundwater would not take water "from any portion of the Great Lakes within the United States, or from any tributary within the United States or any of the Great Lakes." See 42 U.S.C. § 1962d-20(d). Citing selected dictionaries and other sources, CMC claims that "lake" and "tributary" always refer to surface waters. [1]

CMC's argument fails for at least three reasons. First, CMC ignores the physical fact that CMC will literally be taking water from Great Lakes tributaries by drawing down groundwater which is connected to those tributaries. It cannot be denied that water needed in the basin could be depleted through substantial withdrawal of groundwater. Nothing in the statute or the history of WRDA suggests that it should make any legal difference how deeply the straw used to suck water out of the system is placed in the pool.

---

[1] CMC also postulates that WRDA was intended to cover fewer diversions than the Great Lakes Charter ("GLC"). CMC does not, however, cite any language from the legislative history suggesting that WRDA is narrower in scope than the GLC. Indeed, WRDA states the statute was intended to preclude "any diversion" that would lessen the quantity of the water in the Great Lakes system which was not approved by the Great Lakes Governors. That WRDA was enacted at the request of the Great Lakes Governors does not show WRDA was intended to cover fewer diversions than the GLC and, in fact, proves nothing unless it can be shown just what the Governors wanted and that Congress intended to do exactly what the Governors wished. CMC offers nothing on either point.

Moreover, even were it to be assumed that Congress intended that WRDA would not apply to certain diversions covered by the GLC, there is no reason to believe that Congress or the Governors would be so clumsy as to carve exceptions into WRDA that would allow unlimited diversions of Great Lakes water, as CMC suggests was done.

Second, it is untrue that "lake" and "tributary" invariably refer to surface waters. The term "tributary" has been used in the law to include groundwater that is hydrologically connected to a lake or other surface water. A number of federal courts have held that groundwater that is "tributary" to "waters of the United States" is covered by the Clean Water Act. See, e.g., Friends of Santa Fe County v. LAC Minerals, Inc., 892 F.Supp. 1333, 1358 (D.N.M. 1995); Washington Wilderness Coalition v. Hecla Mining Co., 870 F.Supp. 983, 990 (E.D. Wash. 1994); Sierra Club v. Colorado Refining Co., 838 F.Supp. 1428, 1432 (D. Colo. 1993).

Village of Oconomowoc v. Dayton Hudson Corp., 24 F.3d 962 (7th Cir. 1994), cited by CMC, is not relevant to the issue here. In Village of Oconomowoc, the Seventh Circuit held, contrary to the cases cited above, that the Clean Water Act did not cover groundwater based on its reading of the legislative history of the Clean Water Act which indicated that Congress was reluctant to interfere with state control of groundwater. In contrast, the legislative language and history of WRDA demonstrate that Congress intended to give the Great Lakes Governors control over any diversion which might affect the quantity of water in the basin.

The third reason to reject CMC's argument based on its interpretation of "tributary" is that "tributary," like all other terms in statutes, must be interpreted in light of the known purposes of the statute and the context in which the terms occur. See, Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S.Ct. 2407, 2413 (1995) (broad purpose of statute supports interpreting statute to extend protection "against activities that cause the precise harms Congress enacted the statute to avoid"); Deal v. United States, 113 S.Ct. 1993 (1993) (the meaning of a word must be drawn from the context in which it is used); Sutherland Stat. Const. § 57.04 (5th Ed) ("the ordinary meaning of language may be overruled to effectuate the purpose of the statute"). Here we are left in no doubt as to the purpose of the statute because Congress stated that the Act was intended to prevent "any new diversions" without consent of the Great Lakes State Governors. 42 U.S.C. § 1962d-20(b)(3). To allow diversions of groundwater hydrologically connected to the Great Lakes undermines the basic stated purpose of the statute to keep water within the "Great Lakes system." 42 U.S.C. § 1962d-20(b)(1). The purpose of the statute and context in which "tributary" occurs dictate that "tributary" in WRDA includes hydrologically connected groundwater.

WRDA cannot be interpreted properly to allow hydrologically connected groundwater to be diverted. Such an interpretation leads to the absurd result that the stated purposes of WRDA could be frustrated simply by designing the diversion so that water in the first instance was taken from the ground. Basic rules of statutory construction mandate that a statute should never be interpreted to lead to an absurd conclusion. Green v. Bock Laundry Machine, 490 U.S. 504, 510 (1989); Central States, S.E. & S.W. Areas Pension Fund v. Lady Baltimore Foods, 960 F.2d 1339, 1345 (7th Cir. 1992) (if result of literal interpretation of a statute is absurd, the "interpreter is free (we would say compelled) to depart in the direction of common sense").

II. CMC is Proposing to Divert Water For Use Outside of the Basin

CMC's alternative argument to circumvent the WRDA procedure for gubernatorial consent is that its proposed diversion is not "for use outside of the Great Lakes basin." But obviously CMC proposes to use water outside of the basin. CMC proposes to use water to transport waste, which it cannot legally discharge into the Wolf River, 35 miles to the Wisconsin River. Use of water to transport waste and other materials was on Congress' mind when it passed WRDA. Use of water for transport of waste is precisely the purpose of the Chicago diversion, which has been controversial for a century.[2] Use of water for transport of materials through a coal slurry pipeline was unquestionably one of the concerns that led Congress to pass WRDA. (See, Foley & Lardner letter of September 5, 1996, p. 8.) CMC is arguing that Congress enacted WRDA to prevent diversions but somehow meant to exclude new diversions of a type known to be a historical problem and which were explicitly known to be a potential source of future problems.[3]

CMC attempts to argue for an artificially narrow construction of "for use" by listing a parade of horribles that supposedly would result from a common sense reading of WRDA to include the use of water for transporting waste. CMC argues that all Great Lakes manufacturing will grind to a halt unless a broad exemption is carved into WRDA allowing diversion of water whenever the water is initially used for some purpose in the basin (even if the water is later used to ship waste out of the basin). CMC also argues that without this expansive exception being read into the statute, diversions by farmers and others allowed before the passage of the Act would be banned.

---

[2]Congress' exemption of previously authorized diversions, including the Chicago diversion, (see 42 U.S.C. § 1162d-20(f)) is further evidence that Congress assumed that use of Great Lakes water to transport waste was covered by the Act.

[3]CMC argues that use of the words "for use" in the statute must have been intended to exclude some diversions from WRDA. But, while statutes usually should be interpreted so that every substantial portion of the language of the statute is significant, the words "for use" cannot bear the huge weight CMC places on them. The operative phrase is "for use outside the basin." Congress meant to allow transport of water for use within the Great Lakes basin and to prohibit the diversion of water outside the basin. See, Prince, J. David, State Control of Great Lakes Water Diversion, 16 William Mitchell Law Review 107, 148 (1990). Still further, even if independent significance must be ascribed to the words "for use" standing alone, this can be done consistently with the legislative history of WRDA by interpreting the presence of these words in the statute to allow transport of water outside of the basin as long as the water travels back for use in the basin. For example, WRDA would not apply to a pipeline taking water from one part of the basin to another just because the pipeline traveled through areas outside the basin on part of its route.

CMC's parade of horribles is a chimera. CMC's interpretation of "for use outside the basin" is not necessary to save Great Lakes manufacturing. Shipping a finished product containing some water (e.g. beer) is not the same as diverting water. No one except a very imaginative attorney could argue that one transported water outside the Great Lakes basin by carrying a six pack from Milwaukee to Madison. It is certainly not necessary to adopt CMC's contorted interpretation of WRDA to avoid requiring the Governors to approve beer sales.

CMC's other horribles that supposedly would result from failing to read broad exceptions into WRDA were anticipated by Congress, and Congress made explicit provisions to avoid them. The statute applies only to new diversions and, thus, does not create any problem for the pre-existing diversions by farmers and others cited by CMC. Also, Congress did not ban diversions for movement of waste or other uses, but directed that the Great Lakes Governors can decide if such diversions are permissible. If CMC's proposed diversion is as harmless and universally acceptable as CMC claims, CMC's remedy under WRDA is to convince the Great Lakes Governors to allow it.

III. Conclusion

To smooth the way for its proposed mine, CMC asks the U.S. Army Corps of Engineers to create exceptions to WRDA that are contrary to the stated purpose of the Act and the expressed Congressional intent to restrict new diversions of water from the Great Lakes system. If accepted, CMC's strained interpretation would allow an infinite amount of drawdown from the Great Lakes as long as it was accomplished by taking water from the ground or was used only to move wastes or other materials out of the basin. This interpretation of WRDA mocks the clearly expressed intent of Congress to protect against loss of water from the Great Lakes system and should be rejected by the Corps.

Sincerely,

Albert Ettinger
Staff Attorney

AE:ndb
cc: Charles G. Curtis, Jr.
Ben A. Wopat