



**Attorney General
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FOR IMMEDIATE RELEASE

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Following is the text of two letters Attorney General Jennifer Granholm sent to legislators and Governor John Engler regarding the Perrier proposal to bottle groundwater in Mecosta County:

September 13, 2001

Honorable John Engler
Governor
The Capitol
Lansing, Michigan 48933

Dear Governor Engler:

As you know, I have been asked by Senator Dingell and Representatives Dennis and O'Neil whether the federal Water Resources Development Act of 1986 (WRDA) applies to a private company's proposal to withdraw and bottle spring water in Mecosta County and transport it for use outside the Great Lakes Basin. This federal statute requires the consent of the governors of the Great Lakes states to any diversion or export of water from the Great Lakes and their tributaries for use outside the Great Lakes basin. After careful consideration of the competing legal arguments, it is my view that the statute does apply to the proposed water withdrawal project.

The proposal as described, if implemented, would result in the withdrawal of groundwater from a spring that feeds the Little Muskegon River, a tributary to Lake Michigan. I know you agree with me that groundwater hydrologically connected to the Great Lakes and their tributaries is covered by the WRDA. It is also my view that withdrawing groundwater and bottling it for sale in interstate commerce for use outside the Great Lakes basin constitutes a diversion or export "for use outside the basin" within the meaning of the federal law.

Section 1109 of the WRDA advances the efforts that you and your fellow governors and Canadian premiers have undertaken to promote the regional management of the Great Lakes. Under the Great Lakes Charter and the recently signed Annex to the Charter, all of the Great Lakes states and provinces have reinforced their commitment to a system of basin-wide protection of the Great Lakes. An interpretation of the federal statute that fosters this system is consistent with the legislative purposes expressed in the statute and serves the interests of the State of Michigan.

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. In keeping with this responsibility, I urge you to invoke the consultation process available under section 1109 of the WRDA (as well as under the Great Lakes Charter), and consult with the other Great Lakes governors and premiers to determine whether and to what extent this and similar water

removal proposals should be permitted. Such a review will best balance the State's commitment to regional protection of the Great Lakes, the public's concern that Great Lakes water not be turned into a commodity, and the undisputed need to permit productive and efficient use of the water resources of the Great Lakes basin.

Even if the WRDA does not strictly require approval by the governors for the proposed water withdrawal in question, the Great Lakes Charter contemplates consultation for any significant withdrawal even if it is below the mandatory consultation trigger of 5 million gallons per day. I believe you agree with me that a *de minimis* exemption for the consultation process is not appropriate. The executive director of the Great Lakes Commission also encouraged use of the consultation process for proposed diversions that fall significantly below the 5 million gallon per day trigger. During consideration of the Nova Group's 1998 proposal to withdraw and sell Lake Superior water, he testified:

In developing the Charter, it was the intent and expectation of all parties that -- beyond the absolute obligation of the trigger level -- notification would take place for any inter-basin transfer. The signatory parties had an overriding concern for cumulative impacts of diversions below the trigger level and for any unilateral approval that may set a legal precedent of concern. (Statement of Michael J. Donahue, Ph.D., *Concerning: Appeal by the Nova Group, Ltd.*, Board File No. 98-038, p 3).

This logic applies equally to the present water withdrawal proposal, a matter of widespread public concern that threatens to set a precedent for numerous future similar proposals.

I am concerned that if you decline the opportunity for consultation in this case, you may send a signal that there will be little or no scrutiny of new or increased uses of Great Lakes water that withdraw less than 5 million gallons of water per day, at a time when the governors and premiers are developing regional standards under the Annex. This signal could trigger a massive water grab as users seek to remove Great Lakes water before such removals can be scrutinized. The recent proposal by the Village of Webster, New York, is a good example. Swift opposition by the State of Michigan to that proposal sent a clear signal that we are willing to protect Great Lakes water. But that signal must not be interpreted as self-serving, aimed only at proposals to sell Great Lakes water removed from other states. Unless an effective decision-making system is utilized for dealing with such proposals, I foresee a huge increase in Great Lakes water withdrawals over the next few years.

This perception could be avoided, and the interests of the State of Michigan better protected, if an effective and consistent system is established within this State to address future proposals for the use of Great Lakes waters. Therefore, in my response to Senator Dingell and Representatives Dennis and O'Neil, I am urging them to consider legislation that would give the State greater control over the use of Great Lakes water. A copy of my letter to them is enclosed.

I appreciate your continued interest in this important matter and look forward to working with you and your staff to ensure the preservation and protection of our Great Lakes.

Sincerely yours,

JENNIFER M. GRANHOLM
Attorney General

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September 13, 2001

Honorable Christopher D. Dingell
State Senator
The Capitol
Lansing, MI 48913

Honorable Julie Dennis
State Representative
The Capitol
Lansing, MI 48913

Honorable William O'Neil
State Representative
The Capitol
Lansing, MI 48913

Dear Senator Dingell and Representatives Dennis and O'Neil:

You have asked whether a private company's proposal to pump and bottle groundwater from a spring in Mecosta County is subject to the provisions of the federal Water Resources Development Act, which requires the consent of the governors of the Great Lakes states for any diversion or export of water from the Great Lakes for use outside the basin. My staff and I have spent an enormous amount of time grappling with this issue. After careful analysis, it appears that the proposal you describe, if implemented, would constitute a diversion and export of Great Lakes water for use outside the basin. Unfortunately, however, Congress has drafted the federal statute in such a way as to leave the implementation of this statute primarily with the Great Lakes governors. For this reason, I strongly urge you to support the adoption of a state water use act to protect our State's waters from depletion: Michigan is one of only two Great Lakes states that lacks a statutory framework for protecting its greatest natural resource.

The federal statute at issue, namely section 1109 of the Water Resources Development Act of 1986 (WRDA), provides in pertinent part that:

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 Lakes states.

The WRDA, which confers the responsibility for the management of the Great Lakes waters on the governors of the Great Lakes states, is beneficial for at least two reasons: first, a regional approach ensures that no one state may exploit its access to the waters of the Great Lakes to the detriment of all; and second, it provides protection against efforts in Congress to initiate a legislative "water grab" to provide cheap fresh water to arid regions of the United States.

While the language of the statute may seem straightforward—it prohibits the diversion or export of "water" from "any tributary" of the Great Lakes "for use outside the basin" without the approval of the governors—its terms are broad and undefined. As I analyze the terms, I agree with Governor John Engler, former Attorney General Frank Kelley, and U.S. Senator Carl Levin and other members of Michigan's congressional delegation, all of whom have concluded that groundwater hydrologically connected to the Great Lakes and their tributaries is covered by the protections of this federal law. It is my understanding that the proposal in question, if implemented, will extract groundwater that feeds the Little Muskegon River, a tributary of Lake Michigan. The withdrawal and bottling of such water for sale in interstate commerce outside the Great Lakes basin would constitute a diversion or export "for use outside the basin" and therefore would be subject to the WRDA.

In reaching these conclusions, I acknowledge that many of the other Great Lakes governors have taken a contrary position on the question of whether groundwater is covered by WRDA. I also acknowledge that there is no clear consensus that the bottling of groundwater is an activity covered by the statute. Because there is no substantive legislative history and no reported judicial decisions that have interpreted section 1109, and because the governors have not acted collectively to establish a consistent and uniform interpretation of this section, there is room for reasonable persons to disagree on the correct construction of the statute. In my view, however, the language and purpose of the statute, and the critical need to protect this precious resource, compel the conclusion that the withdrawal and bottling of groundwater hydrologically connected to a Great Lakes tributary, for sale in interstate commerce outside the Great Lakes basin, is an activity that requires approval of the governors under the federal law.

The water withdrawal proposal you describe involves a substantial quantity of water and is one that raises important policy issues. For this reason, I have urged Governor Engler to invoke the consultation provisions of the Great Lakes Charter and to communicate with his fellow governors and the premiers of the Canadian Great Lakes provinces. Such consultation process is encouraged by the Great Lakes Charter, and was successfully invoked by the Great Lakes states to persuade Ontario to rescind the 1998 permit given to the Nova Group. I have urged Governor Engler to invoke the consultation process in the present case even if he disagrees that the WRDA applies to this particular water withdrawal proposal. As indicated above, there appears to be a lack of consensus among the governors on several critical questions raised by this particular proposal, including the question of whether they deem the extraction of groundwater to be covered by the WRDA and whether they recognize that it applies to the withdrawal and bottling of water for sale in interstate commerce. Consultation in this case would provide the governors with an opportunity to reach a consensus on these important questions, as the governors and premiers work to develop the decision-making standards called for in the recently signed Annex to the Great Lakes Charter.

Of course, even if Governor Engler agrees to invoke the consultation process, there is no guarantee that the governors of the Great Lakes states will subject the instant proposal to a substantive review, or that they will satisfactorily address the foreseeable increase in similar proposals while the Annex standards are being developed. Thus, reliance on the WRDA as the *only* means by which the State of Michigan can act to protect and conserve the water resources of our Great Lakes is simply unacceptable. If the governors are not able to achieve a consensus regarding the interpretation of the federal statute, it is difficult to foresee effective enforcement of its requirements in any but the most blatant cases. This important federal law, despite its broad terms and undefined concepts, provides a platform that guarantees regional, and not congressional, control of the Great Lakes, but it is up to Michigan to build upon this platform.

The State of Michigan should assume the responsibility to decide, for each significant new or increased use of water, how the delicate balance between conservation and responsible use should be struck. I am, therefore, urging you to introduce a water use act to allow Michigan to control its own natural resources and to fulfill its public trust responsibilities in protecting the waters of the Great Lakes and their tributaries. Unfortunately, Michigan is currently one of only two Great Lakes states without such a statutory framework in place.

We have a strong foundation for controlling our own water resources in Michigan already. Our courts have long upheld the principle that an unreasonable use of water that harms a neighboring user may be enjoined. Please be assured that if the proposed facility to pump and bottle groundwater is built, and afterwards causes or threatens to cause impairment to the natural resources of the State, I will promptly take appropriate action pursuant to Const 1963, art 4, § 52, and statutes enacted to protect the environment and our natural resources. My staff has already advised the proponent of the water withdrawal proposal of my intent to aggressively enforce existing state law.

I also believe, however, that we need to enhance our ability to protect our aquifers and springs *before* potentially irreparable harm takes place. A Michigan water use statute would allow us to place enforceable limits on the circumstances under which a diversion of our water could occur. For example, Chapter 103G of Minnesota's Water Law creates a permitting process for large water withdrawals. It is designed to protect both surface and ground waters from depletion. Wisconsin's law is another good example. Model

state water acts have been developed by experts and could be adopted for our use. My staff and I are eager to provide you with copies and analyses of the various statutes adopted in the other Great Lakes states.

In the carefully drafted statute I envision, the terms critical to protection of the resource are defined, the state retains control over its resources without displacing the consultation process envisioned by the Great Lakes Charter and Annex, and, very importantly, provisions are made for public and private enforcement of the statute. I believe the public anxiety caused by the current water withdrawal proposal, and the corresponding uncertainty over how the public interest would be protected, could have been avoided if our state had such a statute in place.

Thank you for your interest and enthusiasm in protecting our precious natural resources. I look forward to working with you in the drafting and passage of a statute that balances and protects both Michigan's waters and its vitality.

Sincerely yours,

JENNIFER M. GRANHOLM
Attorney General

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State of Michigan, Department of Attorney General

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