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GODFREY & KAHN, S.C.
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WAUKESHA

March 28, 2006

PRIVILEGED AND CONFIDENTIAL

LAFOLLETTE GODFREY & KAHN
MADISON

Ms. Amy Kasper
Chief Legal Counsel
Office of the Governor
PO Box 7863
Madison WI 53707

RE: Waukesha Water Utility and Use of Great Lakes Water

Dear Ms. Kasper:

Godfrey & Kahn, S.C. represents the Waukesha Water Utility in connection with negotiations between the state of Wisconsin and Waukesha Water Utility 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. The purpose of these negotiations is to explore a resolution of this dispute as a means to avoid litigation in this matter.

In connection with the negotiations, we have attached to this letter a position statement of Waukesha Water Utility submitted for the Governor's consideration as part of these negotiations. 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 Resource Development Act.

Since this information is submitted as part of these settlement negotiations, we believe that the information submitted with this letter is protected from disclosure under the Open Record Law's balancing tests that applies to the records of this type.

In any event, we would be willing to meet with appropriate representatives of the Governor's office and the Department of Natural Resources to discuss this matter further at your convenience. Best regards.

Very truly yours,

GODFREY & KAHN, S.C.

A handwritten signature in black ink that reads "Arthur J. Harrington". The signature is written in a cursive style with a large, stylized "H" and "J".

Arthur J. Harrington

Ms. Amy Kasper
March 28, 2006
Page 2

AJH/alm
Enclosure

cc: Dan Duchniak – Waukesha Water Utility
Curt Meitz – City Attorney, City of Waukesha

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**STATEMENT BY WAUKESHA WATER UTILITY
SUPPORTING ITS POSITION THAT ITS REQUEST
FOR LAKE MICHIGAN SURFACE WATER
IS AUTHORIZED BY
THE PROPOSED ANNEX 2001 AGREEMENT AND WRDA**

Submitted this 22nd day of March, 2006

Arthur J. Harrington
John L. Clancy
Sara Drescher
Godfrey & Kahn, S.C.
780 North Water Street
Milwaukee, Wisconsin 53202
414-273-3500

Attorneys for Waukesha Water Utility

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 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.

Since the Proposed Action will be limited to WWU’s existing capacity and will not constitute an increase in use over its Current Diversion, both the Current Diversion and the Proposed Action are authorized by existing federal and state law as well as the terms of the December 13, 2005 Great Lakes-St. Lawrence River Basin Water Resources Compact (the “Annex”). In addition, the Proposed Action would significantly benefit the Lake Michigan as well as the Upper Mississippi watersheds. In fact, according to the United States Geological Survey, a federal agency within the Department of Interior that is “the primary source of data on the Nation’s surface-water and ground-water resources,”¹ ceasing all pumping from the deep aquifer would allow its water level to recover by 300 feet within seven years. This would not only be of substantial benefit to the aquifer, but would dramatically reduce the existing negative impacts of groundwater drawdown on surface streams and wetlands.

I. WWU’S PROPOSED ACTION CONSTITUTES A CONTINUATION OF ITS EXISTING WITHDRAWAL AND DIVERSION AND THEREFORE IS NOT SUBJECT TO THE RESTRICTIVE TERMS OF THE ANNEX FOR NEW/INCREASED DIVERSIONS.

WWU’s Proposed Action is the continuation of an existing diversion under the terms of the December 13, 2005 Annex and therefore is not subject to regulation under the Annex.² The Annex only regulates new or increased diversions, withdrawals and consumptive uses (“New/Increased Activity”). Existing diversions are not subject to the terms of the Annex. Since WWU’s Current Diversion and Proposed Action constitute an existing diversion and not a New/Increased Activity under the Annex, it is not subject to the Annex prohibitions that apply to such New/Increased Activity.

A. Under the Terms of the Annex, the Great Lakes Basin Includes Tributary Groundwater.

¹ United States Geological Survey, Mission Statement, Wisconsin Water Science Center, <http://wi.water.usgs.gov/overview/mission1.html> (Page viewed March 15, 2006).

² At the outset, it is important to note that the Annex is not legally effective. The Annex must be approved by each of the Great Lakes States and Congress. The prohibitions and regulations within the Annex are not operative until such approvals are received. Nonetheless, assuming that valid approvals are obtained and the Annex in fact becomes effective in its present form, the proscriptive provisions of the Annex would not be applicable to WWU’s Proposed Action even if the Proposed Action were considered after the effective date of the Annex.

The Annex defines “Waters of the Basin or Basin Water” as “the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, *including tributary groundwater*, within the Basin.”³ In addition, the Annex makes clear that “[t]he Waters of the Basin are interconnected and part of a single hydrologic system.”⁴ For this reason, the Annex makes no distinction between withdrawals and diversions of groundwater or surface water. For example, the Annex defines “Water” as “*ground and surface water contained in the Basin.*”⁵ Likewise, “Withdrawal” is defined to mean “the taking of water from surface water or *groundwater.*”⁶ “Diversion” is defined as “a transfer of water [which is defined to include *ground and surface water*] from the Basin into another watershed....”⁷

B. As a Political Compromise, the Annex Uses the Surface Water Divide to Regulate New/Increased Activity.

The Annex states that “the Basin surface water divide shall be used for the purpose of managing and regulating *New or Increased Diversions, Consumptive Uses or Withdrawals* of surface water and groundwater.”⁸ This defining of the Basin’s groundwater divide as being the same as its surface water divide is contrary to scientific evidence and, in particular, the findings of the United States Geological Survey.⁹ Nonetheless, this “legal fiction” was put in place because of a political concern of the state of Indiana. Indiana was concerned that if the proper groundwater divide was used, regulation of New or Increased Withdrawals could require expensive return flows for several of its communities.

C. In Contrast to the Approach for Regulation of New/Increased Activity, the Annex does Not Limit Existing Authorized Withdrawals to Those Originally Located Within the Surface Water Divide.

As noted above, the Annex includes in its definition of the Great Lakes Basin the tributary groundwater of the Basin. With respect to existing withdrawals and diversions, the Annex makes no attempt to limit the reach of the Basin to waters within the surface water divide.¹⁰ Pursuant to state approvals, WWU presently draws 100% of its water supply from

³ Annex §1.2. (emphasis added).

⁴ Annex §1.3.1.b.

⁵ Id.

⁶ Annex §1.2.

⁷ Id. (Emphasis added.)

⁸ Annex §4.12(5). (Emphasis added.)

⁹ Attachment 1 (GeoSyntec report entitled The Regional Groundwater Flow System in Southeastern Wisconsin)..

¹⁰ Compare §4.12.5 (which states that the surface water divide shall be used for purposes of managing and regulating New/Increased Activity) with §4.12.2 (which calls for the listing of existing withdrawals and diversions and which does not provide for any limitation of the Basin to waters within the surface water divide).

groundwater that is tributary to Lake Michigan.¹¹ In addition, in accordance with state approvals, WWU discharges all of its treated wastewater to the Fox River, which is a surface water outside of the Basin. Accordingly, WWU's use constitutes an existing authorized withdrawal and diversion.

D. Because of WWU's Existing Withdrawal Qualifies as an Authorized Diversion, its Proposed Action does not Constitute a New/Increased Activity.

The Annex calls for the listing of existing Great Lakes Basin withdrawals and diversions by each of the Great Lakes states.¹² The existing withdrawals and diversions are to be based on the existing approvals and/or the capacity of the existing water systems. The existing capacity of WWU's water system is 24 MGD. Accordingly, the State of Wisconsin should list WWU as having an existing capacity of 24 MGD as part of the existing baseline for authorized Withdrawals and Diversions.

Under the Annex, this existing baseline is used for determining whether there is a New/Increased Activity.¹³ In WWU's case, the conversion of its use of deep aquifer groundwater to surface water would not trigger any New/Increased Activity, since WWU will not increase the amount of its withdrawal or diversion and since the Annex makes no distinction between withdrawals or diversions of groundwater or surface water.

E. WWU's Proposed Action would Significantly Benefit the Lake Michigan and Upper Mississippi Water Sheds.

In addition to being consistent with the Annex, WWU's Proposed Action would significantly benefit the Lake Michigan as well as the Upper Mississippi water sheds. In fact, the United States Geologic Survey has found that ceasing all pumping from the deep aquifer would allow its water level to recover by 300 feet within seven years.¹⁴ In addition to substantially benefiting the aquifer, this recovery would dramatically reduce the existing negative impacts on surface streams and wetlands.

II. WAUKESHA'S PROPOSED ACTION CONSTITUTES A CONTINUATION OF A PRE-AUTHORIZED DIVERSION AND THEREFORE IS EXEMPT UNDER THE WATER RESOURCE DEVELOPMENT ACT ("WRDA").

WRDA exempts all pre-authorized diversions, including those from the groundwaters of the Great Lakes basin. Since WWUs discharge to the Fox River constitutes a pre-authorized diversion, its proposed use of direct pumping in place of its present groundwater withdrawal

¹¹ Attachment 1.

¹² Annex §4.12.2.

¹³ Annex §4.12.2.a.

¹⁴ Attachment 1.

from the Great Lakes Basin is not a new or increased diversion and therefore is not subject to WRDA.

A. WRDA Exempts Pre-authorized Diversions.

WRDA requires approvals of new or increased diversions from the Great Lakes basin by the Governor of each of the Great Lakes states. See 42 U.S.C. §1962(d)-20(d). However, the law makes clear that it “shall not apply to any diversion of water from any of the Great Lakes which is authorized on November 17, 1986.” See 42 U.S.C. §1962(d)-20(f).

B. Pre-authorized Diversions Include Diversions of Groundwater as well as Surface Water within the Great Lakes Basin.

Although WRDA is a relatively short statute with limited legislative history or case law, it is evident that it relates to the Great Lakes basin as a whole, and that basin includes groundwater as well as surface water. For example, WRDA makes clear that its purpose is to protect against the “withdrawal and use of water from the Great Lakes basin” rather than only withdrawals and uses directly from the surface of the Great Lakes themselves.¹⁵ Likewise, to protect the water resources and related resources of the Great Lakes basin, WRDA requires a comprehensive study of the Great Lakes basin, including its *groundwaters* as well as its surface waters.¹⁶

The inclusion of groundwater as a part of the basin is further supported by the Great Lakes governors’ application of WRDA. Most recently, the governors agreed to the terms of the Annex, which WWU understands the governors plan to apply as their guiding lens for WRDA decisions even prior to the Annex’s formal adoption as an interstate compact. As noted above, the Annex clearly defines “Waters of the Basin” as “the Great Lakes and all streams, rivers, lakes, connecting channels and other bodies of water, including *tributary groundwater*, within the Basin.”¹⁷

Similarly, the State of Michigan has made clear that it considers the Great Lakes basin to include hydrologically connected groundwater. Indeed, both the present and past governor of Michigan have noted in writing that the basin includes its groundwater as well as its surface water. With respect to the proposed Crandon Mine, then Governor Engler stated that tributary groundwater is a part of the Great Lakes basin under WRDA¹⁸. In this letter, Governor Engler noted that “the Great Lakes Compact, Great Lakes Charter, and Congress’ ratification of the Great Lakes Commission...are indicative of the understanding that Great Lakes waters include tributary groundwater.”

¹⁵ 42 U.S.C. §1962d-20(b)(2).

¹⁶ 42 U.S.C. §1962d-21(b)(1)(B) (stating that relevant information for the study includes “information on *ground* and surface water hydrology.”) (Emphasis added.)

¹⁷ Annex §1.2. (Emphasis added.)

¹⁸ Attachment 2 (correspondence from then Governor Engler).

Then Attorney General and now Governor Granholm likewise made clear that groundwater that is hydrologically connected to the Great Lakes and their tributaries is covered by WRDA¹⁹. Thus, Michigan has made clear its position that groundwater is within the scope of the Great Lakes basin and within the purview of WRDA.

C. WWU's Existing Use of Groundwater from the Great Lakes Basin Qualifies as a Pre-authorized Use.

WWU has been authorized to withdraw water up to the capacity of its wells from the Great Lakes basin and to discharge treated wastewater from the withdrawal outside the basin since prior to November 17, 1986. Since substantially prior to that date, WWU has been authorized to and has received 100% of its water supply from groundwater that is tributary to Lake Michigan.²⁰ This water has been used west of the surface water divide, and WWU has been authorized to discharge all of its treated wastewater to the Fox River, a surface water that is part of the upper Mississippi River basin. Since prior to 1986, the capacity of WWU's water system has been 24 MGD. Accordingly, as of November 17, 1986, WWU was authorized to use and divert at least 24 MGD from the Great Lakes basin.

D. WWU's Proposed Action Constitutes a Continuation of its Pre-Authorized Diversion and Therefore is Excepted from WRDA.

WWU's Proposed Action will not exceed its authorized diversion capacity because it will reduce the use of its water from the deep aquifer as it increases the use of water from the surface of Lake Michigan. Accordingly, WWU's proposed replacement of its withdrawal of water from the deep aquifer that is part of the Great Lakes basin with surface water from that same basin constitutes a continuation of its pre-authorized diversion and therefore is exempt from WRDA regulation.

III. THE ONLY REGULATORY APPROVAL REQUIRED FOR WWU'S PROPOSED ACTION IS A PLAN APPROVAL UNDER WIS. STAT. §281.41.

Section 281.41 governs the approval of the plans for proposed water systems such as the piping system that WWU proposes. The section calls for the submission of a certified copy of complete plans for the proposed system and, if applicable, information specified under §281.35(5). In WWU's case, the requirements for water loss approval under §281.35(5)(d) are not applicable since WWU's proposed action does not constitute a "water loss" that requires an approval. A water loss approval is only required for a *new withdrawal* that will result in a water loss of more than 2 million GPD or for the *increase in the amount of an existing withdrawal* that will result in a water loss of more than 2 million GPD *above the authorized base level of water loss*.²¹ As discussed above, WWU is not proposing a new withdrawal or seeking to increase the

¹⁹ Attachment 3 (correspondence from then Attorney General Granholm).

²⁰ Attachment 1.

²¹ Wis. Stat. §281.35(4)(a) and (b).

amount of its currently authorized base level of water loss by more than 2 million GPD. Rather, it simply wishes to replace its present withdrawal of water from the deep aquifer with water from the surface of Lake Michigan. Accordingly, the Proposed Action simply requires approval of the plans for WWU's proposed piping system under Wis. Stat. §281.41, and does not require a water loss approval under Wis. Stat. §281.35(5).

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ATTACHMENT 1

**THE REGIONAL GROUND WATER FLOW
SYSTEM IN SOUTHEASTERN WISCONSIN**

**BASED ON THE FINDINGS OF
THE UNITED STATES GEOLOGICAL SURVEY:
GROUND WATER IN THE GREAT LAKES BASIN:
THE CASE OF SOUTHEASTERN WISCONSIN**

Prepared by:

**Jeffrey Edstrom
William Ward**

March 23, 2006



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**PRIVILEGED AND CONFIDENTIAL COMMUNICATION PREPARED AT THE
DIRECTION OF LEGAL COUNSEL FOR WAUKESHA WATER UTILITY:
SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK
PRODUCT DOCTRINE.**

**PRIVILEGED AND CONFIDENTIAL COMMUNICATION PREPARED AT THE
DIRECTION OF LEGAL COUNSEL FOR WAUKESHA WATER UTILITY:
SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE AND ATTORNEY WORK
PRODUCT DOCTRINE.**

**THE REGIONAL GROUND WATER FLOW
SYSTEM IN SOUTHEASTERN WISCONSIN**

Summary: Waukesha's Existing Source of Water is Groundwater within the Great Lakes Basin and Ceasing Use of that Source would have Significant Environmental Benefits.

This document summarizes the findings of the United States Geological Survey (USGS) regarding the regional groundwater system in southeastern Wisconsin and, in particular, Waukesha's use of water from that system in its web-based report, "Groundwater in the Great Lakes Basin: The Case of Southeastern Wisconsin."¹ The USGS is within the U.S. Department of the Interior and is "the primary source of data on the Nation's surface-water and ground-water resources."²

The USGS has determined that Waukesha draws its water supply from the portion of the St. Peter sandstone aquifer that flows toward Lake Michigan (See Figure 1). An analysis performed by the USGS based on a MODFLOW groundwater model shows that:

- 100 percent of Waukesha's current, as well as its historic, water supply comes from groundwater that is tributary to Lake Michigan (i.e., the water in the St. Peter aquifer below Waukesha is flowing to the east toward Lake Michigan).
- The surface water divide for the Lake Michigan watershed is not the same as the watershed's groundwater divide.
- While the City of Waukesha is located outside of the surface water divide, which defines the locations of streams flowing to Lake Michigan and the Mississippi River, Waukesha has always been located over a portion of the St. Peter sandstone aquifer that flows toward Lake Michigan. Thus, Waukesha is within the Lake Michigan groundwater watershed and uses tributary groundwater.

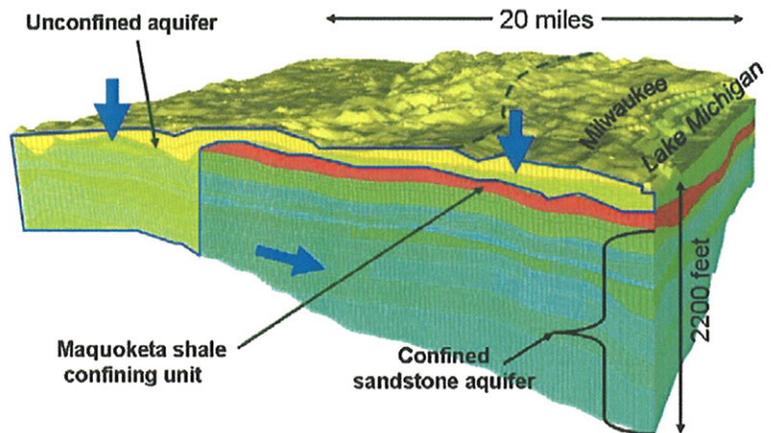


Figure 1. Hydrogeology of Southeastern Wisconsin. The confined aquifer in the graphic is the St. Peter Aquifer. The blue arrows indicate direction of flow. The Maquoketa shale confines ground water below it and is a barrier to the flow of water to and from the surface. The dotted line is the surface water divide.

Source: USGS, adapted by Southeastern Wisconsin Regional Planning Commission*

¹ United States Geological Survey, "Groundwater in the Great Lakes Basin: The Case of Southeastern Wisconsin," <http://wi.water.usgs.gov/glpf/index.htm>, (Page viewed March 10, 2006).

² United States Geological Survey, Mission Statement, Wisconsin Water Science Center, <http://wi.water.usgs.gov/overview/mission1.html> (Page viewed March 15, 2006).

* Larger versions of all of the figures in this report are attached.

- Pumping over the last 100 years by municipalities in southeastern Wisconsin has drawn down the water level in the St. Peter aquifer by more than 600 feet and has resulted in the movement of the divide that defines the flow of ground water toward Lake Michigan or the Mississippi River further to the west.
- Ceasing all pumping from the St. Peter aquifer will allow the water level to recover by 50% within 7 years and by 90% in 70 years.³ Ceasing ground water pumping would allow the ground water divide to move back to its historic location and dramatically reduce the negative impacts of the drawdown on surface streams and wetlands.

Waukesha’s Water Supply Source is Groundwater that is Part of the Great Lakes Basin.

Waukesha’s existing deep wells have a pumping capacity of 24 million gallons per day.⁴ Wells 1 through 10 pump water from depths of between 1650 and 2266 feet. These wells are located in the east central portion of Waukesha County within Waukesha City limits.

These wells draw water from the St. Peter sandstone aquifer. The aquifer is located beneath southeastern Wisconsin and serves as a water source for many local communities. It once served the City of Milwaukee before the city switched to a Lake Michigan surface water supply.

The groundwater divide is partly defined by a layer of Maquoketa shale under the surface of southeastern Wisconsin that runs from Lake Michigan in the east to approximately the Waukesha County-Jefferson County line (See Figure 2). This shale significantly reduces the ability of water to infiltrate from surface to the St. Peter sandstone aquifer. As a result, the deep aquifer is “confined” below the Maquoketa shale but is “unconfined” further to the west. Just to the west of the shale, water flows to the aquifer in two different directions (east and west) based on topography, soil type, and other hydrogeologic factors (See Figure 3).

Because of the confinement layer in much of southeastern Wisconsin, the primary infiltration/recharge area for the St. Peter sandstone aquifer is in the western portion of Waukesha County where the Maquoketa shale ends. This is in the Kettle Moraine area in western Waukesha County where the type of soil deposits allows the highest infiltration rate in all of southeastern

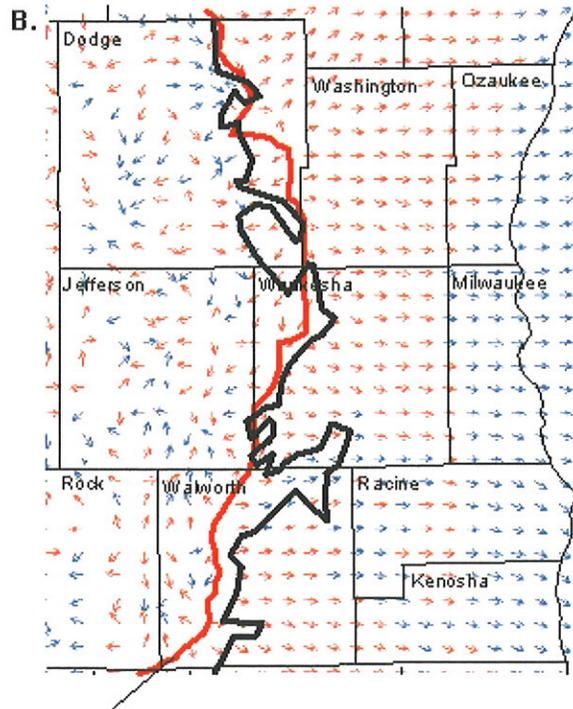


Figure 2. The St, Peter Aquifer groundwater divide (red line) under prepumping conditions relative to the western extent of the Maquoketa shale (black line) and flow of water in the aquifer (red – upward flow and blue – downward flow – arrows). Source: United States Geological Survey

³ United States Geological Survey, “Groundwater in the Great Lakes Basin: The Case of Southeastern Wisconsin,” http://wi.water.usgs.gov/glpf/es_pmp_src.htm, (Page viewed March 10, 2006).

⁴ Waukesha Water Utility.

Wisconsin. It is located to the west of both the surface water divide that defines the surface watersheds of the Lake Michigan and Mississippi River basins and the groundwater divide for the basins. Because the shale largely acts as a barrier to water entering the aquifer within the Lake Michigan basin, water flows from the west into the ground and follows a natural path down and to the east to the deep aquifer and then toward Lake Michigan (See Figures 3 and 4).

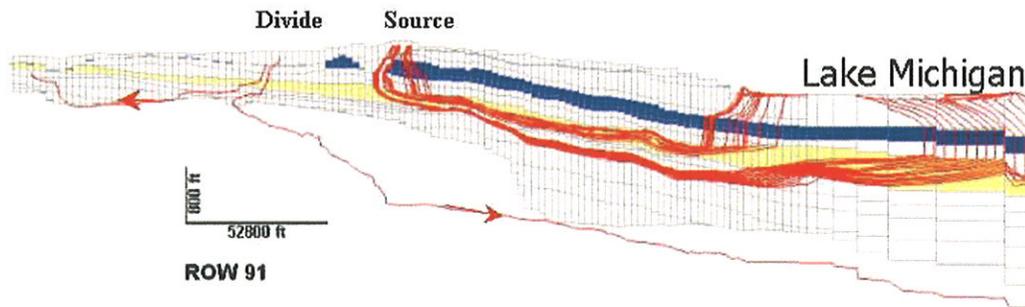


Figure 3. “USGS Model output: West-to-east sections showing locations and regional ground-water flow lines to Lake. Blue formation is Maquoketa shale. Yellow formation is St. Peter sandstone. East of divide all flow lines go from water table toward Lake Michigan.”

Source: D.T. Feinstein, U.S. Geological Survey, http://wi.water.usgs.gov/glpf/cs_nt_lk.htm

This flow from the Mississippi River basin through the deep aquifer system to the Lake Michigan basin is neither accidental nor man-made. It is a natural flow of surface water into an aquifer that is tributary to Lake Michigan and has occurred since the glaciers that formed the Great Lakes retreated.

Currently, the USGS model indicates that approximately “71% of the water that replenishes discharge from deep wells in southeastern Wisconsin is ground water that flows from surface water streams (captured base flow) within the Mississippi River (surface water) Basin”⁵ where the shale layer ends. As this surface water infiltrates, some of it remains in shallow aquifers located in the Mississippi River basin, but the remainder percolates further through the soil to the St. Peter sandstone aquifer. Once settling in the deep aquifer, the direction of flow of this water is easterly toward Lake Michigan, meaning that it becomes Lake Michigan tributary groundwater.

Other sources of ground water recharge to the deep aquifer system are from the Lake Michigan basin including captured flow from streams in the Lake Michigan surface water Basin (6%), inland storage release (3%), storage release below Lake Michigan (8%), water that once flowed toward rocks under Lake Michigan (8%), and water flowing out of Lake Michigan itself (4%).⁶

A Reduction of Pumping from the St. Peter Sandstone Aquifer will Result in a Dramatic Recovery from Groundwater Drawdown Effects.

Waukesha has always been within the Lake Michigan groundwater basin. Under pre-pumping conditions, the ground water flow beneath Waukesha was uninterrupted to Lake Michigan (See Figure 4). The effect of pumping over the last 100 years has been dramatic. It has created a large cone of depression that has lowered the aquifer level by approximately 600 feet. This has created a sharper incline of the aquifer level that has increased the rate of flow from the west and moved the boundary of the groundwater divide further westward (See Figures 5 and 6). It also draws water

⁵ <http://wi.water.usgs.gov/glpf/im.html>, (Page viewed March 8, 2006).

⁶ <http://wi.water.usgs.gov/glpf/im.html>, (Page viewed March 8, 2006).

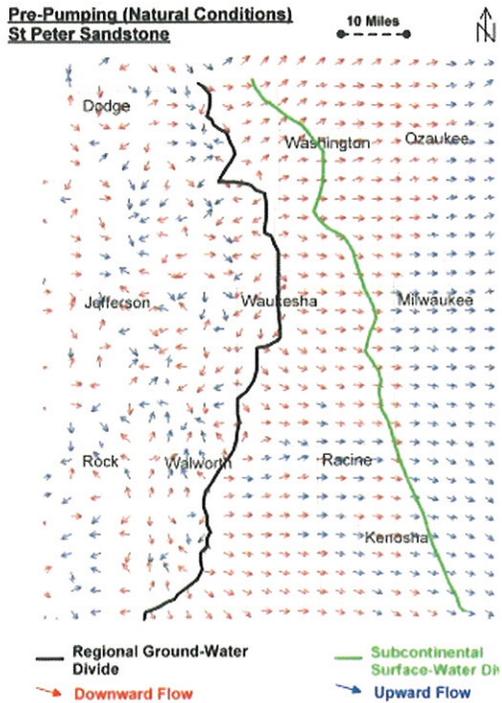


Figure 4. Flow of groundwater, Pre-pumping (Natural Conditions), St. Peter Sandstone aquifer
Source: United State Geological Survey,
http://wi.water.usgs.gov/glpf/cs_nt_divides.htm

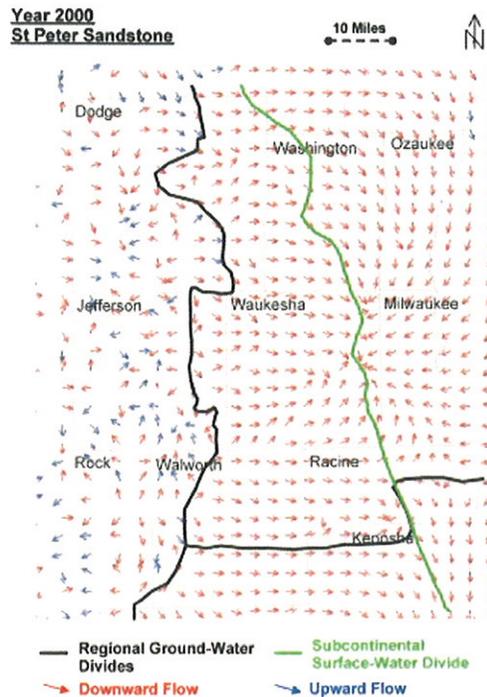


Figure 5. Flow of groundwater, Year 2000 St. Peter Sandstone aquifer
Source: United State Geological Survey,
http://wi.water.usgs.gov/glpf/cs_nt_divides.htm

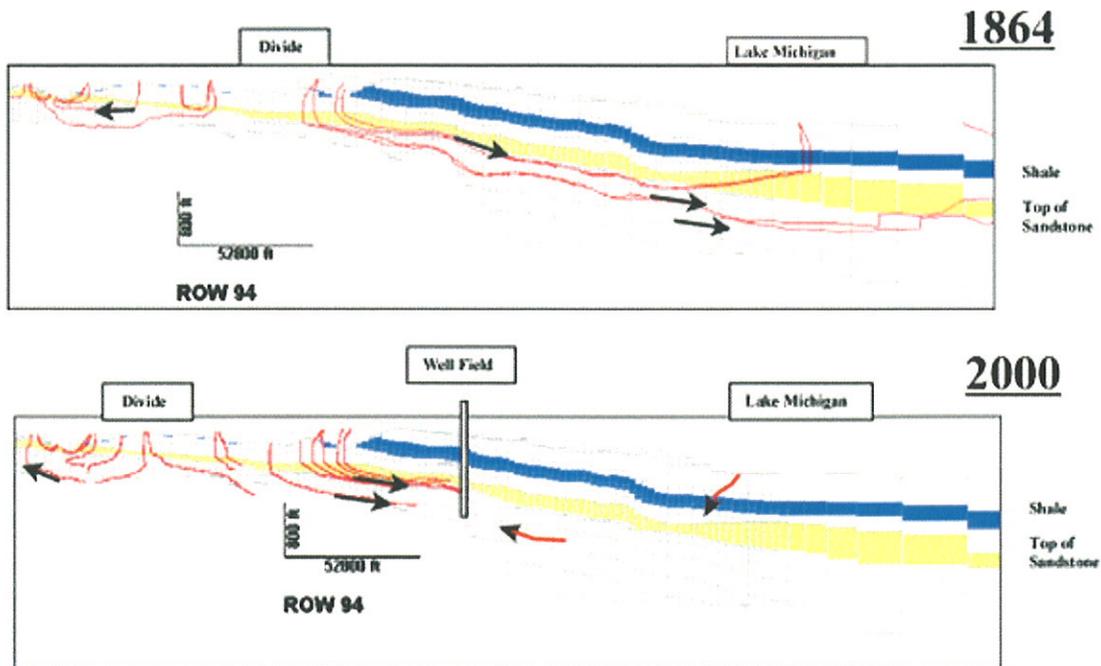


Figure 6. The effect of pumping on groundwater flow in the St. Peter Sandstone Aquifer.
Source: United States Geological Survey,
http://wi.water.usgs.gov/glpf/cs_pmp_divides.htm

away from surface streams, reducing baseflow and leading to negative impacts on the local environment.

Ceasing water pumping from the St. Peter aquifer in southeastern Wisconsin would allow the water level to recover by 50% within 7 years and by 90% in 70 years⁷ and allow the ground water divide to move back to its historic location. This will also reduce the negative impacts on surface streams and wetlands.

Conclusion.

The source of water for the Waukesha Water Utility is, and has always been, drawn from a portion of the St. Peter sandstone aquifer that the USGS has identified as tributary to Lake Michigan, not the Mississippi River basin. The flow of water from the aquifer under both pre--pumping and pumping conditions has always been eastward toward Lake Michigan. Like the surface waters of Lake Superior, it may take hundreds of years for the groundwater in the aquifer to move to southern Lake Michigan, but its ultimate destination is Lake Michigan.

Defining the deep groundwater divide as being the same as the surface water divide is contrary to scientific evidence. The surface water divide is defined by the surface topography of the area. In contrast, the groundwater divide in southeastern Wisconsin has historically been defined by the western extent of the layer of Maquoketa shale, although it has been affected by pumping from the aquifer over the last 100 years.

The effect of 100 years of water withdrawal from the deep aquifer system in southeastern Wisconsin has moved the deep ground water divide between the Lake Michigan and the Mississippi River basins further to the west and has drawn down base flow from local streams. Ceasing pumping from this aquifer will allow it to recover over time and allow the groundwater divide to move back to its historic location and reduce the impacts on surface streams and wetlands.

⁷ United States Geological Survey, "Groundwater in the Great Lakes Basin: The Case of Southeastern Wisconsin," http://wi.water.usgs.gov/glpf/cs_pmp_src.htm, (Page viewed March 10, 2006)

ATTACHMENT 2



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN ENGLER
GOVERNOR

January 28, 1998

The Honorable Tommy G. Thompson
Governor of Wisconsin
PO Box 7863
Madison, Wisconsin 53707

Dear Governor Thompson:

Subject: The Proposed Crandon Mining Company Diversion of
Great Lakes Basin Waters

We are writing to express our concerns relating to the diversion of waters from the Great Lakes Basin that may occur in conjunction with the Crandon Mining Company's (CMC) proposal to build a zinc, lead and copper mine near Crandon, Wisconsin. Based upon information assembled by our staff which includes documents from the Wisconsin Department of Natural Resources and reports produced by CMC's consultant, the groundwater that is intended to be extracted is hydraulically connected and thus "tributary" to the surface water of the Great Lakes. It is, therefore, undisputed that waters that are hydraulically connected to the Great Lakes Basin will be diverted to the Upper Mississippi River Basin.

The proposed diversion is unquestionably precedential and presents important legal and public policy issues, not only in Michigan, but to all the Great Lakes States. Our staff has reviewed the Water Resources Development Act of 1986, 42 USC § 1982d-20(d), which prohibits a diversion of any portion of the Great Lakes within the United States or from any tributary within the United States, unless such diversion has the unanimous gubernatorial consent by all Great Lakes State Governors. We are aware that the United States Army Corps of Engineers has opined that the Water Resources Development Act of 1986 pertains only to surface water diversions, and not to groundwater extraction. Nevertheless, our research indicates that a clear preponderance of the case law has held that "waters of the United States" include tributary groundwater. Moreover, the United States Army Corp of Engineers' interpretation is also undermined by the terms and the demonstrable intent of the Great Lakes Compact, the Great Lakes Charter and Congress' ratification of the Great Lakes Commission, which are indicative of the understanding that Great Lakes waters include tributary groundwater.

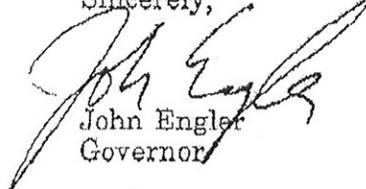
Governor Tommy G. Thompson

Page 2

January 28, 1998

As one who appreciates and has actively worked to advance the collective natural resource protection, management and development goals and objectives of the Great Lakes States, we trust that you will give this matter your earliest attention and most thoughtful consideration.

Sincerely,


John Engler
Governor


Frank S. Kelley
Attorney General

JE/dkl/pw

cc: The Honorable Jim Edgar
The Honorable Frank O'Bannon
The Honorable Arne H. Carlson
The Honorable George E. Pataki
The Honorable George V. Voinovich
The Honorable Thomas J. Ridge
The Honorable James E. Doyle
The Honorable Jim Ryan
The Honorable Jeff Modisett
The Honorable Hubert H. Humphrey, III
The Honorable Dennis C. Vacco
The Honorable Betty D. Montgomery
The Honorable Michael Fisher . .

ATTACHMENT 3



**Attorney General
Jennifer M. Granholm**

For further information contact:
Chris De Witt 517-373-8060

FOR IMMEDIATE RELEASE

September 17, 2001

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

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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ATTACHMENT 3



**Attorney General
Jennifer M. Granholm**

For further information contact:
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