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

Enc.