

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



MIKE COX
ATTORNEY GENERAL

P.O. Box 30212
LANSING, MICHIGAN 48909

October 31, 2006

Maureen Connors
Office of the Great Lakes
Wisconsin Department of Natural Resources
Box 7921
Madison, WI 53707

Dear Ms. Connors:

On behalf of the State of Michigan, this responds to the Wisconsin Department of Natural Resources' September 26, 2006 press release inviting comments on the City of New Berlin's "Application for Water Diversion," a proposal to divert water from the Great Lakes. Previously, in June 2006, the application was sent to the Great Lakes Governors by Wisconsin Department of Natural Resources' Secretary Scott Hassett for "any reactions you may wish to provide" and for "staff comments on the completeness of the proposal under the Annex."

In its application, the City of New Berlin proposes to divert an average of 1.83 million gallons of water daily from Lake Michigan to areas of the city outside of the Great Lakes Basin for residential, commercial, and industrial uses. The Water Resources Development Act of 1986 (WRDA) requires approval from all Great Lakes Governors before Great Lakes water may be diverted in this manner:¹

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 Lake[s] States.

By federal law, New Berlin cannot proceed with the diversion without obtaining approvals from each of the Governors. And the Wisconsin Department of Natural Resources cannot authorize the diversion by granting New Berlin's "application."

I am troubled by the statement in your September 26 press release that New Berlin's proposal could be a "non-diversion" because "no water will be lost from the Lake Michigan

¹ 42 USC § 1962d-20(d). The Great Lakes States are Illinois, Indiana, Michigan, Minnesota, Ohio, Pennsylvania, New York, and Wisconsin. 42 USC § 1962d-20(c).

basin." While it appears that some water diverted from Lake Michigan would be returned through the wastewater treatment system, New Berlin acknowledges in its application that approximately 13 percent of the Lake Michigan water will be permanently lost to the Basin through consumptive use. Moreover, New Berlin makes clear throughout its application that it is requesting a diversion. Finally, Secretary Scott Hassett referred to the proposal as a "diversion" in his June 13, 2006 letter transmitting the application to Governor Granholm.

Secretary Hassett's letter also referenced the Annex 2001 Implementing Agreements—the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Compact. The Compact and the Agreement do not apply to New Berlin's proposal by their express terms. When and if they become fully effective, both agreements would provide a limited exception to the prohibition on diversions when a "straddling community" uses water solely for public water supply purposes. But the Compact is not in effect—it has not been ratified by the state legislatures and consented to by the United States Congress.² And the provisions governing the "straddling communities" exception in the Agreement do not enter into force until "60 days after the last Party has notified the others that it has completed the Measures necessary to implement" certain parts of the Agreement.³ No such notification has taken place.

The Governor of Michigan has not received a formal request for approval under WRDA, nor has any other Great Lakes Governor to my knowledge. If New Berlin wishes to proceed with its proposal, a formal request under WRDA should be submitted to all of the Great Lakes Governors that explains why the diversion should be approved. Absent this approval, the proposed diversion cannot proceed.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mike Cox", written in a cursive style.

Mike Cox
Attorney General

c: Ken DeBeaussaert, Director
Office of Great Lakes

² Great Lakes-St. Lawrence River Basin Sustainable Water Resources Compact, Section 9.4.

³ Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, signed December 13, 2005, Article 709.2.b.