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June 16, 2004

Hon. Jennifer M. Granholm
Governor
George W. Romney Building, 2nd Floor
111 South Capitol Avenue
Lansing, MI 48909

Dear Governor Granholm:

This letter is written on behalf of Michigan Citizens for Water Conservation ("Michigan Citizens") to address the relationship between the public trust doctrine, Michigan water rights, and the extent of federal interests that could be asserted in upcoming negotiations over Annex 2001 and the proposed Michigan Water Legacy Act. The letter also bears upon the pending appeal in *Michigan Citizens for Water Conservation v Nestlé Waters North America*.¹ For the following reasons, Michigan Citizens urges you to protect Michigan's title and public trust in the waters of our Great Lakes and their tributary lakes, streams, and groundwater.

You have raised a question over whether or not the public trust should be raised by Michigan in the water diversion and withdrawal debate because of a possible threat that asserting the public trust might risk the counter-assertion of a national interest.² While potential federal interests³ could be involved, these interests are narrow and would not jeopardize the State's interest and rights if the State asserts its sovereign interest and public trust in our waters. As discussed below, the zone of federal interests in the Great Lakes is limited to its reserved interest in navigation and an implied oversight role of states to make sure that states do not violate their respective public trust duties to their citizens, the beneficiaries of the trust in these waters. In this respect, the federal interest would have to be consistent with protection of the state's title and public trust waters of the Great Lakes and their tributary lakes, streams, and groundwater. Beyond these narrow circumstances, the federal interest involves the exercise of regulatory or police power,

¹ Mecosta County Circuit Court Case No. 01-14563-CE; COA No. 254202.

² "Friends & Neighbors - Governor Jennifer Granholm," Interview by Michigan Land Use Institute, Great Lakes Bulletin, p. 11, Issue 18, Spring 2004:

Institute: The two principles that we're anxious to see in this proposal is one, the principles that the state's waters are a public trust, clearly delineated, clearly stated and that its not a private interest"

Governor Granholm: Let me ask you just as an intellectual matter: If in the public trust argument, if there is some sort of national interest in our water, does the public trust argument end up being dangerous? What if the feds decided it was in the public interest to send our water to some other part of the country?

³ The terms "federal interest" and "national interest" are used synonymously for purposes of this letter.

which generally does not preempt or trump the State's exercise of state property power to protect this public trust interest.⁴ Indeed, it is believed that the more dangerous course of action would be the State's failure to vigorously assert the public trust and state title to our waters. If anything, the failure to vigorously defend the public trust in these waters and bottomlands would weaken the State's interest and increase the likelihood of the assertion of rights by private interests or the federal government. For example, the federal government could claim the State has abdicated its public trust interest for failing to protect it and seek to take control.

This is not to say that your focus on withdrawals of water and their impacts is misplaced, only that the safeguarding of the State's title to its waters and the public trust in them from diversion is of primary importance. As will be seen below, the two approaches are not mutually exclusive, but complimentary.

1. The Background of Public Trust Doctrine

The public trust doctrine is based on the state's title and interest in the Great Lakes. It is fundamentally a state common law doctrine rooted deeply in state property law and constitutional power over its sovereign interests. Michigan's public trust interest cannot be subordinated, alienated, allocated or disposed of for primarily private purposes, and cannot be infringed by the Congress or the federal government except in the exercise of federal power in furtherance of its navigational servitude reserved when the federal government conveyed the bottomlands and waters of the Great Lakes as a condition to statehood in 1837.

The nature of Michigan's public trust interest was described by our Supreme Court in *Collins v Gerhardt*:⁵

It will be helpful to recall that Michigan was carved out of the Northwest Territory; that the territory was ceded to the United States by Virginia; that the United States held this territory in trust for future states to be created out of it; that the United States held the waters of navigable rivers and lakes and the soil under them in trust for the people, just as the British Crown had formerly held them in trust for the public uses in navigation and fishery; *but when Michigan entered the Union of States she became vested with the same qualified title that the United States had; that these waters and the soil under them passed to the state in its sovereign capacity*

⁴ Typically, preemption involves conflicts between the exercise of federal and state regulatory police powers, but not the exercise of state property power. A state's power over its property and related sovereign interests, such as natural resources, cannot be taken away by Congress or the federal government absent the exercise of a specific power granted to it under the U.S. Constitution. *California v United States*, 438 US 645, 98 S Ct 2985 (1978). The federal government could exercise regulatory police power under the commerce clause, enter into treaties so long as they do not violate a condition of statehood, or exercise its own property power over property of the United States. The Great Lakes and tributary waters and the rules of property law, including public trust, belong to Michigan as these resources and powers do in other Great Lakes states.

⁵ 237 Mich 38; 211 NW 115 (1926).

impressed with a perpetual trust to secure to the people their rights of navigation, fishing and fowling.⁶

The United States Supreme Court had earlier confirmed that this public trust was impressed on the waters and bottomlands of the Great Lakes in *Illinois Central Railroad v Illinois*,⁷ and noted the nature of the trust:

So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be entirely beyond the control of the state.⁸

The Michigan Supreme Court has consistently reaffirmed the public trust in our Great Lakes waters and bottomlands in *State v Venice of American Land Co.*;⁹ *Obrecht v National Gypsum Co.*;¹⁰ *People v Broedell*.¹¹

The basic standards of the public trust doctrine are:

- a. Public trust waters and bottomlands cannot be alienated, subordinated, or disposed of unless explicitly authorized by statute.¹²
- b. Even if expressly authorized by statute, the disposition must be for a primarily public purpose.¹³
- c. And, even if authorized by statute, the disposition cannot alienate, subordinate, or impair the overriding rights of citizens as beneficiaries of the trust for public trust purposes. Public

⁶ *Id.*

⁷ 146 US 452; 453-454 (1892).

⁸ *Id.*, at 453.

⁹ 160 Mich 680; 87 NW 117 (1901).

¹⁰ 361 Mich 399; 105 NW2d 143 (1960).

¹¹ 365 Mich 201; 112 NW2d 517 (1961).

¹² *Illinois Central Railroad; Obrecht, supra; Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1968). For a discussion of the four standards set forth in the text of this letter, see also Olson, *The Public Trust Doctrine: Procedural and Substantive Limitations on the Governmental Reallocation of Natural Resources*, 1975 Det Col L Rev 161, pp. 183-187, 205-206 (1975). Olson and Noonan, *The Public Trust Doctrine*, Chpt. 13, *Environmental Law Deskbook* (ICLE 1992).

¹³ *Illinois Central; Obrecht, Sax, supra; People ex rel Scott v Chicago Park District*, 66 Ill 2d 65; 360 NE2d 773 (1976); Olson, *Towards A Public Lands Ethic: A Crossroads in Publicly Owned Natural Resources Law*, 56 Univ Det J Urban L 739, Chpt. V, pp. 881-886 (1979).

trust purposes include navigation, boating, fishing, swimming, and other recreational or similar public needs of the state's citizens.¹⁴

d. Finally, even in those instances where it is authorized by statute and the foregoing standards are met, a disposition is improper unless the state on behalf of its citizens receives fair compensation for the disposition or use of waters and bottomlands that is allowed.¹⁵

The State of Michigan is the "sworn guardian" to protect and uphold the public trust in the Great Lakes within its borders.¹⁶ Thus, the State must act affirmatively as the sovereign owner and of the title and trustee of these waters and bottomlands. As occurred in the conflict over federal, private, and state interests in *Obrecht*, the current conflict over the various competing interests for the water resources of the Great Lakes Basin requires that the State's title and public trust interest be vigorously asserted and defended.

In *Obrecht*, a private owner asserted that it could dredge and fill for an industrial dock in Lake Huron without obtaining authority to occupy and construct the dock in the Great Lakes from the State of Michigan. The private owner argued that its permit from the Corps of Engineers granted by the federal government excused it from obtaining the assent of the State and a conveyance or agreement to use the State's bottomlands and waters. The Attorney General of Michigan intervened to uphold the public trust, and our Supreme Court ruled that the permission given by the Corps of Engineers had no effect upon the separate right and duty of the State to require its assent and protect public trust lands and waters.¹⁷ As recognized by the U. S. Supreme Court, "a federal permit does not obviate the necessity of obtaining State assent.... It merely expresses the assent of the federal government so far as concerns the public rights of navigation."¹⁸ In other words, the interest of the federal government is limited to navigational interests, and the assertion of regulatory authority by Congress cannot be read to preempt or obviate the necessity of compliance with the authority and approvals required by a State in its sovereign capacity and as trustee on behalf of its citizens to protect and conserve the public trust.

As noted at the outset, when Michigan was admitted to the United States, under the Constitution and Compact of admission to the Union, Michigan obtained title to the waters and bottomlands of the Great Lakes, including the waters to their tributary lakes and streams, and became the guardian of these waters for the benefit of its citizens under the public trust doctrine. The State's title and public trust in our waters are conditions of Statehood, and these conditions are in perpetuity and inviolate except for the authority reserved by the federal government to protect

¹⁴ *Illinois Central; Obrecht, supra*. See also *People v Broedell*, n. 11, *supra*; *Twp of Grosse Isle Dredging Co*, 15 Mich App 556, 567; 167 NW2d 311 (1969). *People v Babcock*, 38 Mich App 336, 351; 196 NW2d 489 (1972). Even a small diminishment of public trust waters and bottomlands may constitute an unlawful impairment. *Broedell, Babcock, supra*.

¹⁵ *Illinois Central; supra*. This principle has been recognized by Michigan's Legislature in the Great Lakes Submerged Lands Act. MCL 324.32505.

¹⁶ *Obrecht*, p. 412.

¹⁷ *Obrecht*, n4, p. 407.

¹⁸ *Cummings v City of Chicago*, 188 US 410, 23 S Ct 472, 47 L Ed 527.

and improve its navigational servitude.¹⁹ The State's exercise of sovereign power as owner of these lands and waters is under the common law property power, which is plenary so long as citizens are treated equally and the federal navigational interest is not impaired. The exercise of state property power and its definition and scope is within the province of the State so long as it does not discriminate in favor of residents against non-residents regarding interstate commerce.²⁰ The exercise of commerce clause power by the federal government involves the exercise of regulatory police power to protect a federal interest, such as navigation or commerce, but it cannot negate or preempt the State's basic property power, including the public trust doctrine and rights of citizens protected by it. Thus, it is important to distinguish between conflicts between federal power, such as the commerce power, and state police power regulations concerning the environment and natural resources from the State's exercise of *property power* to safeguard or control the public trust in the waters of the Great Lakes Basin.²¹

2. Federal Water Resources Development Act

As you know, the Federal Water Resources Development Act ("WRDA") prohibits diversion and export of water out of the Great Lakes Basin unless consented to all of the Great Lakes' governors.²² That WRDA establishes a bright line against diversion and export, but contemplates further refinement through the development of a mechanism or standard for the governors to invoke the WRDA and seek to obtain such consent. In the absence of consent, a diversion or export of water in any size container, including bottled water like that diverted and exported by Nestlé Waters North America, Inc., would be unlawful. While not included as a standard in WRDA itself, the public trust standard (or standards) are implicit if not express as a result of the application of the state sovereign title and public trust doctrine to all Great Lakes waters and their tributaries.²³ For example, a Great Lakes governor or state could not give consent

¹⁹ In *Illinois Central Railroad*, n 15, *supra*, the Court even ruled that it was beyond the power of a state legislature could convey public trust waters or bottomlands to a private concern for a private purpose. The federal government in establishing the trust as a condition of conveyance and statehood can not do what the states or private interests cannot do.

²⁰ *California v United States*, n 4, *supra*.

²¹ Reports cautioning the Annex 2001 process that standards for diversions and withdrawals may be subject to claims of discrimination under the commerce clause or international investment treaties, like NAFTA or WTO, may have merit when it comes to establishing regulations under the police power. But these same claims are limited when a standard is tied to an exercise of the property power to protect the public trust. For example, a prohibition of a diversion of public trust waters for a primarily private sale and purpose is discriminatory, because it simply prevents a disposition or alienation of Great Lakes waters contrary to public trust law.

²² 43 USC 1962d-20(a)(1).

²³ It was the realization of this risk that likely led Michigan Congressman Bart Stupak to introduce amendments to the WRDA. Amendment to H.R. 5428, Offered by Bart Stupak, Sept. 25, 2002 to WRDA, 42 USC 1962d-20(a)(1):

to a diversion or disposition of public trust water without complying with public trust principles and standards. In short, the WRDA is consistent with the public trust doctrine, and the states have an obligation to apply public trust standards in the WRDA consent process or Annex 2001 mechanism.

3. The Great Lakes Charter of 1985 and its Annex 2001

You and the Michigan's Office of Great Lakes, through its Director Kenneth DeBeaussaert, have been urging the importance of a favorable implementation of Annex 2001 as a standard for the Great Lakes Charter of 1985 and the consent process required by WRDA. Michigan Citizens applauds these efforts with the following qualification. The focus to date has been on standards that look at water withdrawals "significant adverse impacts" and "resource improvement."²⁴ Arguments have been advanced, by some representatives of the environmental community and others by representatives of Nestlé Waters, that Annex 2001 (and your proposed Michigan Water Legacy Act for that matter) standards should be "purpose" or "diversion" blind; that is only withdrawal and impacts should be considered without reference to diversions for private sale of water out of a watershed or the Great Lakes Basin. Unfortunately, such an approach falls short of, if not abdicates, the State's interest as title owner and trustee of these unfathomably great public trust water resources that secure the livelihood of citizens and the businesses. Such an approach impliedly would support the privatization of Great Lakes waters and their tributaries- declared public resources. Under public trust law, the waters cannot be alienated, subordinated, or diverted for private ownership and sale without complying with the standards described above in Section 1 of this letter.

If Michigan and other states, as well as its citizens and businesses, do not insist on the application of standards under public trust law, then the State could be charged with not living up to its public trust responsibilities. And if such a charge would have merit, it would be this type of situation that would give rise to the possibility of the assertion of federal power to promote national or federal interests to the disadvantage of Michigan and other Great Lakes states and the water resources themselves. Accordingly, for Michigan to avoid a federal "takeover" or assertion of private interests beyond those uses allowed under water law as it exists today, it must advocate strongly the State's title and public trust in our Great Lakes water resources.²⁵

Yet Annex 2001 does not contain a standard that addresses the responsibility of the State to assure protection of Michigan's title to Great Lakes water or the public trust in them. There is no standard that requires explicitly that any diversion of water out of the Great Lakes or tributary waters must meet the standards under public trust law. If anything, the focus on "withdrawal" and

²³ (...continued)

"(a) Findings.— ... is amended by inserting 'are impressed with a public trust' after the 'Great Lakes' the first place it appears."

(b) Purposes.— Section 1109(b) ... is amended by ... "inserting 'principles of water conservation, public trust and water and public trust resource improvement';"

²⁴ Directive #3, June 18, 2001 Great Lakes Charter Annex.

²⁵ See n 23, *supra*.

“impacts,” to the exclusion of private diversion for sale of water, has resulted in a failure to assert the State’s title and interest under public trust law. For example, under Directive # 3, Annex 2001, June 18, 2001, a diversion is allowed so long as a withdrawal does not have “significant adverse impacts” to the waters and water-dependent resources of the Great Lakes basin. There is no public purpose requirement consistent with the public trust doctrine. Considerable harm up to the higher threshold of “significant” is sanctioned to the point where it could be too late to back up and correct the harm without running afoul of claims by private interests (it would be argued Annex 2001 made some harm acceptable and therefore a private interest) under the takings clause, commerce clause, or NAFTA or the WTO as to foreign investment interests in water projects within the Great Lakes Basin.

4. The Proposed Michigan Water Legacy Act

You highlighted the importance of the Great Lakes and the State’s water when you advised Governor Engler and the Legislature in August 2001 while you were Michigan’s Attorney General that the Nestlé Waters’ operation was a diversion and export subject to WRDA.²⁶ You have recognized the public trust in our water resources, including tributary groundwater to the lakes and streams that flow to the Great Lakes, in your proposed Michigan Water Legacy Act.²⁷ This proposal also recognizes that Michigan’s present laws, including the Great Lakes Preservation Act,²⁸ declare that our waters are “public resources” and “held in trust.”

But like Annex 2001, as presently proposed, the Water Legacy Act does not contain public trust standards for those withdrawals that are for the purpose of diversion or export of water out of our watersheds or the Great Lakes Basin.²⁹ For example, as in Annex 2001, there is a standard for withdrawals that would allow withdrawal (and presumably diversion within or outside of the Basin) up to the point of “adverse impacts,” and another one that could allow the use of a “resource improvement” which could become a trade-off for allowing a withdrawal to occur. Too, like Annex 2001, it appears to be “purpose” or “diversion” blind in the sense that there is no separate standard to address the private diversion or diversion or alienation of water out of the watershed for sale and private profit. As written, the Water Legacy Act could result in an interpretation that would sanction water withdrawals for diversion and private sale up to the point

²⁶ Letter, Hon. Jennifer M. Granholm (then Attorney General) to former Governor John Engler, Sept. 13, 2001; Letter, Hon. Jennifer M. Granholm (then Attorney General) to Michigan Legislators, Sept. 13, 2001.

²⁷ Senate Bill 1087; House Bill 5634.

²⁸ MCL 324.72701, *et seq.*

²⁹ Circuit Judge Lawrence Root ruled in *Michigan Citizens for Water Conservation v Nestlé Waters North America, Inc.*, Cir. Ct. No. 01-14563-CE, Nov. 25, 2003, reaffirmed by decision denying new trial, Feb. 13, 2004, that a private diversion of water out of a watershed for the purpose of sale elsewhere was prohibited under Michigan common law where it would diminish the flow or level of a lake or stream. This would mean that any standard that was more liberal or relaxed would undermine the property rights of riparians and citizens under the public trust doctrine from the headwaters of streams (such as those pumped and diverted by Nestlé Waters) down to and including the Great Lakes.

of significant injury or adverse impacts.³⁰ As such, the public trust in our Great Lakes waters would be alienated or subordinated.

In order to avoid such a result, a companion law is needed that addresses the state's title and/or public trust waters as a public resource, setting forth any narrow exception where the public water resources could be diverted for private ownership and sale. While there are good arguments that the door for diverting or converting public water resources to private ownership and sale would be unwisely opened, the fact of the matter the door is opened by a "purpose" or "diversion" blind regulatory law that looks only at withdrawals and impacts. Thus, it would be prudent for the State to either prohibit diversions for private ownership and sale of water outright, applying it all within or outside our watersheds or the Basin, or if the State authorized a private sale of water but only if within a narrow exception allowed under public trust law: that is, it would have to be for a primary public purpose and meet the other standards of public trust law described in Section 1 of this letter. In addition, to guard against a sea-shift of water law from public ownership or control to private ownership or control, placing the security of Michigan's waters and its businesses and citizens at great risks, Michigan through your leadership can and should insist that the courts of this state uphold common law principles, like public trust and prohibitions against diversions of water for private sale out of a watershed. This can be done by supporting the decisions by the Circuit Court in *Michigan Citizens v Nestlé Waters*.

In Summary and Our Request

Michigan Citizens for Water Conservation and its 1800 members appreciate the attention you have given to date to safeguard our waters, but now requests on behalf of all citizens and businesses that you give voice and vitality to the stewardship of our sovereign and public trust interest in the State's waters. This can be done by applying the principles set forth by the Circuit Court in the recent *Michigan Citizens v Nestlé Waters* lawsuit, and by demanding that the standards under the public trust doctrine will be applied to our waters and water resources to the full extent in Annex 2001 and newly proposed Michigan water laws.

What better way could there be to assure a true legacy to the people of Michigan and the sustainability of the Great Lakes and tributary waters and our economic stability and quality of life, than to insist on the strict application of the public trust doctrine that prohibits the diversion, disposition, or alienation of these waters for private sale? Anything short of this could result in a flood of claims, by large interests seeking to profit off of the global water crisis by selling our water as a private commodity elsewhere. Why allow such a dismal legal and political climate to occur? This would be a curse, not a legacy, on Michigan, its water, aquatic resources, residents and businesses. Michigan should and must assert its sovereign interest and public control.

³⁰ This is exactly what Nestlé Waters has argued for in the courts. If the common law standards that protect lakes, streams, and tributary groundwater are relaxed and a diversion for private sale can occur up to a point of unreasonable or serious injury, then the flow and level of our lakes and streams, including the Great Lakes, would be subject to private use and sale of the groundwater that feeds them. Such a sea-shift in water law would subject Michigan's public water resources to property claims of international companies who seek to divert and sell it elsewhere. Under the common law, diversion of water in a lake or stream outside of a watershed for sale elsewhere is prohibited. *Dumont v Kellogg*, 29 Mich 420; 420-421 (1874); *Kennedy v Niles Water Supply Co*, 173 Mich 474 (1912).

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To date, you have carefully chartered a course for Michigan and other states toward a standard consistent with the intentions of the 1985 Great Lakes Charter. Michigan Citizens for Water Conservation urges you to continue this course, but in addition urges you to safeguard the public trust in our waters as the cornerstone and framework by which other standards, such as those proposed for Annex 2001 and in the Michigan Water Legacy Act, are implemented and decisions affecting our Great Lakes and tributary waters are made.

Michigan Citizens for Water Conservation respectfully requests a meeting with you to discuss these public trust and common law principles and seek your assurance that these principles will be adhered to and implemented as part of the upcoming round of discussions on Annex 2001, the proposed Michigan Water Legacy Act, and in the pending appeal by Nestlé Waters of the Mecosta Circuit Court's decisions. While you supported Nestlé Waters request for a temporary stay of the Circuit Court's injunction prohibiting Nestlé Waters diversion and sale of our waters in violation of the common law, Michigan Citizens believes that you strongly support the principles set forth in this letter and that you will support the Circuit Court decisions and your previously stated commitment opposing the private exploitation and sale of Michigan's water resources.

Thank you for considering the content of this letter and responding to this request. If you have any questions regarding any aspect of the matters presented by this letter, please contact me or Terry Swier,³¹ President, Michigan Citizens.

Respectfully,

/s/

James M. Olson

JMO:ral

xc Mr. Steve Chester, Director, MDEQ
Mr. Kenneth DeBeaussaert, Office of the Great Lakes
Sen. Patricia Birkholz, Chairperson, Senate Committee on Environment and Natural Resources
Rep. Ruth Johnson, Chair, House Committee on Land Use and Environment
US Sen. Carl Levin
US Sen. Debbie Stabenow
US Cong. Bart Stupak

³¹ Terry Swier can be reached at (231) 972 8856. I can be reached at the phone number noted on the letterhead. My email address is olson@envlaw.com.