

**GREAT LAKES UNITED**

July 20, 1992

Mr. Frank Kelley  
State of Michigan Attorney-General  
P.O. Box 30212  
Lansing, MI 48909

Dear Mr. Kelley:

Thank you for your interest in investigating the out-of-basin diversion of Lake Michigan water by the City of Kenosha, Wi. This letter thoroughly explains our charge that the Kenosha diversion, and also the Pleasant Prairie diversion, are unauthorized and in violation of existing laws.

Gaining an understanding of the Kenosha diversion -- and the Pleasant Prairie diversion which it is intertwined with -- is not an easy matter. The sequence of events are convoluted, partly because Kenosha and Pleasant Prairie intended it that way to obscure what they were doing, partly because of Wisconsin Department of Natural Resources' (WDNR) improper management and lack of clear oversight of the process, and also because of the confusing and undocumented way the 8 governors carried out the approval process for Pleasant Prairie. Our detailed point-by-point response is intended to document why the Great Lakes environmental community is so upset by what ensued, and to establish a case against WDNR and Kenosha.

A primary reason why we feel it is so important for you to investigate the unauthorized Kenosha diversion is that by violating the federal Water Resources Development Act of 1986, Sec. 1109 (and probably Wisconsin State law), WDNR, Kenosha and Pleasant Prairie made it impossible to carry out the intentions of the law: to control and minimize Great Lakes out-of-basin diversions. Tight control of diversions is essential if we are to avoid the cumulative effects of multiple diversions on the Great Lakes environment and economy (see attached fact sheet A). The kind of laissez-faire diversions of water that Wisconsin allowed to take place must not be allowed to occur again, especially in a state whose four Great Lakes are responsible for so much of Michigan's identity, economy, drinking water, scenery, fish and wildlife, recreation and ecological richness.

Another reason is that because Kenosha constructed its diversion without obtaining proper authorization, they denied Michigan's governor and the other Great Lakes governors their federally mandated authority to review and vote on it, and also denied the public their right to comment on it.

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A third reason is that, for the Pleasant Prairie diversion, the State of Michigan based its 1989 abstention on three conditions, which Wisconsin violated immediately. Kenosha's diversion then further violated these conditions. Michigan made it clear that violation of its conditions should lead to review and reconsideration of the diversion. **The conclusion is that Wisconsin made a gubernatorial pledge to Michigan and then broke it.** This cannot be allowed to go unaddressed.

A fourth reason is that by allowing an unauthorized diversion to take place, and by ignoring the law, the message is being given that other localities throughout the Great Lakes can attempt the same. We already have indications that many other communities may be interested in diverting Great Lakes water.

Lastly, the Kenosha and Pleasant Prairie diversions raise serious questions about Wisconsin's ineffectiveness, and even knowing avoidance of, enforcing the laws entrusted in them. As we describe ahead, it also raises questions about WDNR's sloppiness and confusion throughout this entire issue.

The WDNR and Kenosha are trying to dismiss the significance of this case by claiming we are "making a mountain out of a mole hill." First they claim that Kenosha's diversion is authorized because it is "part of the Pleasant Prairie diversion," which they claim is authorized. Second, they claim that Pleasant Prairie's diversion (and therefore Kenosha's) is "only temporary." Third, they claim Kenosha's diversion is "too small" in quantity to be a concern. Lastly, they claim that the whole issue is based on a "little matter about confusion" over changing jurisdictional boundaries.

We will demonstrate that all of the above claims are erroneous and are only an attempt to avoid investigation, criticism and embarrassment.

For purposes of brevity, we will refer to the area north of Highway 50, east of I-94, south of Highway K (60th St.) and west of Highway H (88th) (the area served by the Kenosha diversion) as the "area of concern".

#### Kenosha's Diversion is Distinct From Pleasant Prairie's Diversion

Kenosha's diversion is independent from Pleasant Prairie's diversion and therefore, not covered by Pleasant Prairie's "authorization" (which we refute later). In summary:

- \* Kenosha's diversion is not for a public emergency, as Pleasant Prairie's is.
- \* Kenosha's is only for urban expansion which Michigan clearly stated it was opposed to for Pleasant Prairie's diversion.

- \* The compliance agreement for Pleasant Prairie's diversion was signed only by Pleasant Prairie and WDNR, and the diversion was intended only for use by Pleasant Prairie's residents. Kenosha was not a signer of the agreement and none of its provisions apply to Kenosha.
- \* The area of concern was annexed to Kenosha well before the Pleasant Prairie diversion was given the go-ahead. Further, the area of concern was never previously served by Pleasant Prairie's contaminated wells. The area had been served by safe, private wells and septic systems.

The details of why Kenosha's diversion is a distinct project from Pleasant Prairie's is in Attachment B.

#### Pleasant Prairie's Diversion Also Lacks Authorization

Even if, for argument's sake, one was to consider Kenosha to be encompassed by Pleasant prairie's diversion, this raises larger questions about the legality of the Pleasant Prairie diversion (and therefore also Kenosha's diversion). Either way, the Kenosha diversion's legality is in serious doubt and WDNR's explanation is in trouble no matter how you look at it.

A summary of why Pleasant Prairie's diversion lacks legal authorization is as follows:

- \* Federal law requires "consent by each of the governors of the Great Lakes states." There are serious doubts for nearly all of the 8 Great Lakes states as to whether they consented properly, or at all. There is no written approval whatsoever from New York and Pennsylvania. Michigan formally abstained (the law says consent is required). Minnesota consented but specified it only applied to Pleasant Prairie, not other users (e.g. Kenosha). Ohio, Illinois and Indiana stated that they had "no objection" (which can be argued as not constituting "consent"). And even for Wisconsin, we have never seen documentation that clearly states the governor's formal approval.

Remember that only one non-consenting state is required to prevent approval of a diversion.

- \* However one interprets Michigan's abstention, their letter was signed by their DNR director, not the governor. Since federal law requires each governor's consent, we believe Michigan's letter is invalid. Therefore, Michigan's governor did not vote on the Pleasant Prairie diversion as the law requires.

- \* Michigan DNR's letter based its abstention on the understanding that the diversion 1) not be used for urban expansion (Kenosha diversion is solely for this purpose), and 2) not be used for any community that already has a safe supply of water (the area of concern has always had a safe supply of water) and 3) is unique and that there were no additional diversions anticipated. Therefore Michigan's conditions are clearly being violated and we believe its abstention is voided.

A detailed explanation of why Pleasant Prairie's diversion lacks legal authorization is provided in Attachment C.

### The Truth About Pleasant Prairie's "Temporary" Diversion

When Governor Thompson gave the go-ahead to the Pleasant Prairie diversion in his December 19, 1989 letter, the environmental community, officials of other states, and the media were told that the diversion was required to be temporary. Copies of the unsigned version of the WDNR/Pleasant Prairie compliance agreement were sent out to those who requested it. The version contained a compliance provision stipulating the temporary nature of the diversion. Even a January 8, 1990 letter (prior to the signing of the agreement) from WDNR to Pleasant Prairie repeated the stipulation. Environmental groups, the public -- even the Council of Great Lakes Governors -- accepted the word of the DNR.

It turned out to be completely untrue. There is no document we have seen which legally obligates Pleasant Prairie to return the water. The temporary diversion provision was secretly deleted from the copy of the compliance agreement that was signed by the WDNR SE district and Pleasant Prairie in February 1990.

Great Lakes United repeatedly requested a copy of the signed agreement during our year-long investigation. We requested it because it was a major document that we lacked; we had no idea it has been changed. We were amazed when DNR's Madison office claimed they did not have a copy! It was not until we called their SE District office before we finally were sent a copy in February 1992. Even then, the WDNR was still claiming the Pleasant Prairie diversion was temporary (repeated in their April 9, 1992 letter to Wi. Senator Brian Burke, whose committee is investigating the diversion).

It is even more disturbing that the State of Michigan conditioned its abstention on the promise that the Pleasant Prairie diversion was to be temporary (this was last confirmed in WDNR's March 23, 1990 letter to Village of Pleasant Prairie, signed by Charles Ledin).

The temporary diversion requirement was responsible for defusing the opposition to Pleasant Prairie's diversion by Michigan, New York and Pennsylvania (as WDNR says in their April 9, 1992 letter to Sen. Burke) and the environmental community. The fact that all parties were intentionally misled is highly disturbing. If the WDNR had not deceived everybody, it is possible the Pleasant Prairie diversion would not have been approved. Therefore, this deception is of great significance.

We request that you investigate this deception. Who authorized the deletion of the temporary diversion provision in the signed agreement? Why did Wisconsin continue to inform everybody that the diversion was temporary? Why did WDNR's central office not have a copy of the altered, signed agreement? Why did WDNR allow the Pleasant Prairie diversion to go ahead when it violated Michigan's written conditions upon which they based their abstention?

Pleasant Prairie claims they still plan to return the diverted water back to Lake Michigan. This may indeed be their intention, though we have seen nothing which documents this other than verbal statements in newspaper articles.

But this misses the point. Whether or not they claim they plan to return the water, they are not legally obligated to. This obligation was the basis for Michigan's abstention and the environmental community's acquiescence. While we still insist the diversion must be temporary, the focus needs to be also on WDNR's deception and mismanagement.

Shifting back to the Kenosha diversion, they, too, claim they intend to return the water. While they claim they "planned to all along," the fact is that they said this only after they found out we were investigating them. In short, they came up with their "plan" (to build a lift station at Kilbourne Ditch by November, 1992) as a way of covering themselves once they were caught diverting without authorization.

The fact is that they have been conducting an illegal diversion since 1991. Illegal is illegal.

Besides the above points, we want to bring to your attention a very curious -- and suspicious -- alteration of the Pleasant Prairie/WDNR Compliance Agreement that WDNR sent to Sen. Burke on April 9, 1992. The copy (attachment D) of this Feb. 1990 agreement contains a compliance provision, #2, stating that Pleasant Prairie agrees to return the water on or before year 2010. But this copy is really a splicing together of the first two pages of the unsigned agreement (sent by WDNR to Pleasant Prairie on December 19, 1989), and the last page (the one with the signatures) of the final agreement signed in February, 1990.

This cut-and-pasting of the unsigned and signed agreements resulted in the temporary diversion provision being made to seem that it was part of the final, signed agreement, when it had actually been deleted.

It also resulted in the deletion of three provisions that were in the signed agreement. These are the only enforcement provisions it contained! Interestingly, these refer to enforcement action if "any other violations" are discovered, or renegotiation of the agreement's conditions if "unforeseen events" occur. The Kenosha diversion (in which Pleasant Prairie has complicity) is such an example.

We find this alteration disturbing and suspicious, especially since all the changes are advantageous to WDNR in response to an investigation. Remember that this was preceded by WDNR's deception regarding the temporary conditions for Pleasant Prairie. If it was not intentional, then it is certainly makes one wonder about even more WDNR's sloppiness and mismanagement of this case.

We would like to know what WDNR sent your office regarding the compliance agreement. We have asked Sen. Burke's committee to find out why this alteration of the compliance agreement occurred, who did it, and if any laws were broken. We think Michigan should also receive an explanation.

#### The Significance of the Size of the Diversion

Kenosha and WDNR claim the diversion is "too small to be of any significance." Again, this is an attempt to mislead. The diversion, as of now, is small. But we discovered and exposed it before it was to have reached its maximum capacity. We caught it at the initial stage.

The fact is that it was intended to supply up to 8,000 or more people, plus a school, conference center, church and more businesses. This means it would have served more than the proposed Lowell, Indiana diversion (Lowell's population is 6,400).

The Lowell diversion created international controversy and was vetoed during a widely-watched gubernatorial vote this May. We can assure you that Kenosha's diversion would have created even more controversy than Lowell even if it had gone through a legal and proper procedure.

#### The Facts About Jurisdictional Boundaries

Wisconsin claims this is all a lot of fuss about confusion over changes in jurisdictions due to annexation, changes from town to city and village status, and overlaps of municipal and sewer district boundaries.

Again, this is simply WDNR's attempt to evade responsibility. Just because WDNR was "confused" doesn't relieve them of their responsibility.

WDNR may have been confused, but the facts are very clear:

- \* Kenosha annexed the area of concern a year before the Pleasant Prairie/WDNR compliance agreement was signed.
- \* Kenosha started diverting water one and a half to two years after the Pleasant Prairie diversion was in operation.
- \* The area of concern is within sewer service District D. However, just being within that sewer district, which it shares with Pleasant Prairie, does not in any way constitute an authorization to divert.

We would like Michigan to investigate all the questions and charges we have raised. We urge your office to determine what avenues Michigan can take to get Kenosha to halt its diversion within 1992, and to get Pleasant Prairie to be legally obligated to end its diversion on or before 2010, as originally intended? We request that you identify ways that the Kenosha and Pleasant Prairie situations can be prevented from happening in the future. Lastly, we call on Michigan to formally and publicly protest the Kenosha diversion and call for Wisconsin to penalize those officials who carried it out or let it happen.

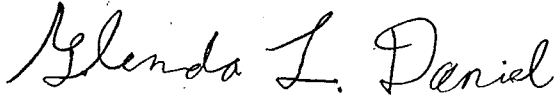
Attached are two other documents. One document (Attachment E) is a correction of the misinformation and errors in WDNR's April 9, 1992 to Sen. Burke. The other document (Attachment F) is a point-by-point response to WDNR's "Pleasant Prairie Diversion Fact Sheet", which they previously sent to the Michigan governor's office. While there is some overlap between the letter you are reading and these two other responses, we felt that separate responses were necessary to ensure that this complicated case is made as clear as possible. We appreciate your patience in reading them all. Also attached for reference purposes are chronologies of the two diversions.

Lake Michigan Federation and Great Lakes United appreciate your interest in pursuing this matter. After preliminary information is gathered, we urge you to hold a public investigative hearing on this case. We intend to pursue whatever avenue is needed to force Kenosha to promptly end its diversion, and to make Pleasant Prairie legally obligated to return the water by or before 2010.

Please contact Lake Michigan Federation at 312-939-0838 or 414-271-5059 or Great Lakes United at 716-886-0142 to discuss the matter further.

We look forward to hearing from you soon.

Sincerely,



Glenda Daniel  
Lake Michigan Federation



Bruce Kershner  
Great Lakes United

cc: Hon. Barbara McDougall, Canadian Secretary of State for  
External Affairs  
Hon. Herbert Kohl, U.S. Senator  
Hon. Carl Levin, U.S. Senator  
Hon. Henry Nowak, U.S. Representative  
Mr. John McDonald, Director, International Joint Commission  
Windsor Office  
Mr. Valdas Adamkus, Co-Chair, IJC Water Quality Board  
Mr. David Egar, Co-Chair, IJC Water Quality Board  
Mr. Tony Wagner, Co-Chair, IJC Water Levels Board  
Mr. John D'Aniello, Co-Chair, IJC Water Levels Board  
Mr. Harvey Shear, Director, Environment Canada Great Lakes  
Environment Office  
Mr. Chris Grundler, U.S. EPA Great Lakes National Program  
Office  
Hon. John Engler, Michigan Governor  
Council of Great Lakes Governors  
Hon. C. J. Wildman, Ont. Minister of Natural Resources  
Hon. Ruth Grier, Ontario Minister of Environment  
Hon. John Sheffer, New York Senator  
Hon. Thomas Seery, Wisconsin State Legislator  
Hon. Shirley Krug, Wisconsin State Legislator  
Hon. Spencer Black, Wisconsin State Legislator  
Mr. Frank J. Kelley, Michigan Attorney General  
Mr. James Doyle, Wisconsin Attorney-General  
Ms. Kathy Falk, Wisconsin Public Intervenor  
Sierra Club Midwest Office  
Wisconsin Wildlife Federation  
National Wildlife Federation - Great Lakes Natural Resource  
Center  
Michigan Environmental Council  
Michigan United Conservation Clubs  
National Audubon Society - Great Lakes Region  
National Audubon Society - Northeast Region  
Canadian Environmental Law Association

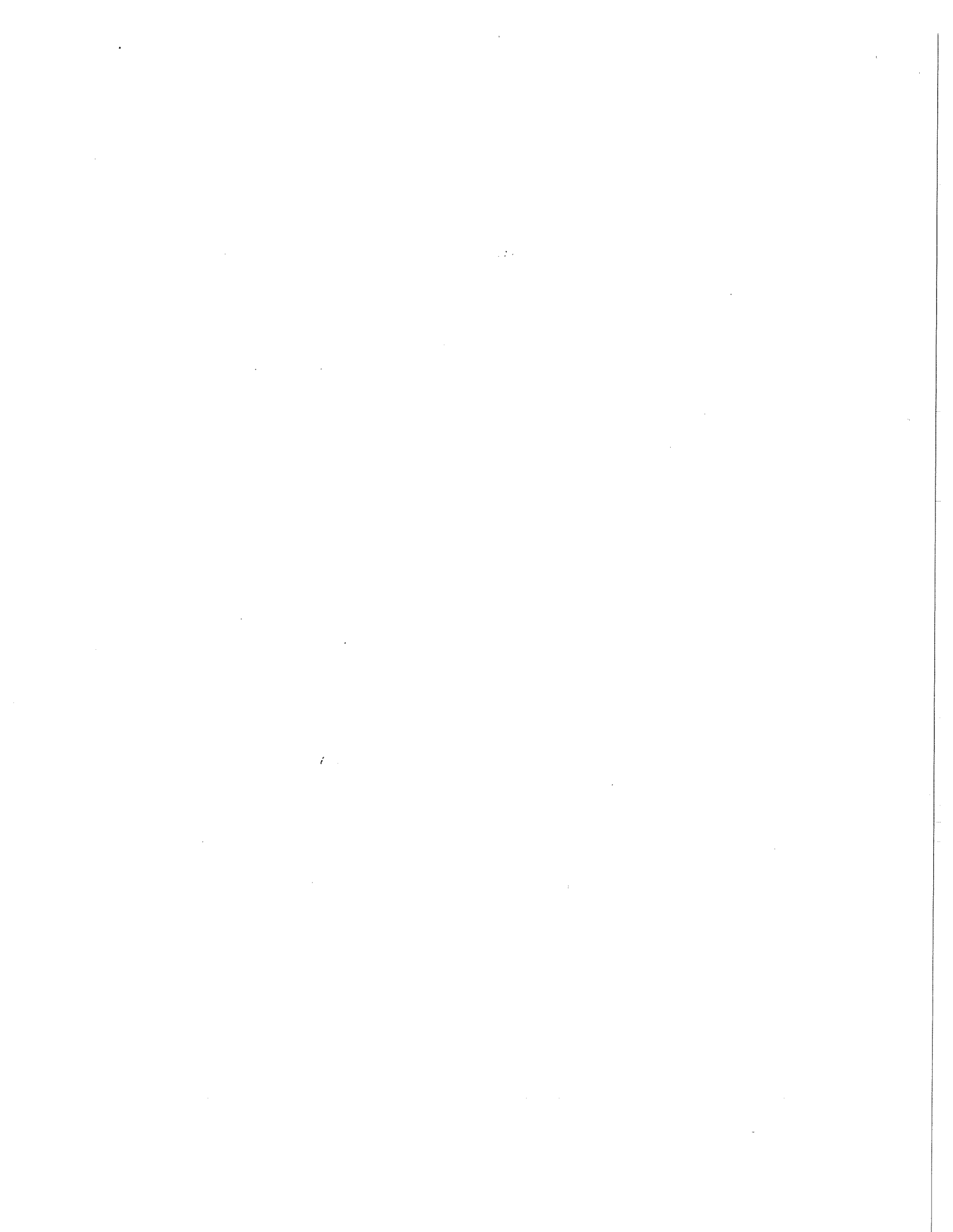


## THE EFFECTS OF DIVERSION OF GREAT LAKES WATERS ON THE ECONOMY AND ENVIRONMENT

In the past, proposals have surfaced to divert large quantities of Great Lakes water to the arid west, New York City, or to the Mississippi or Ohio Rivers. Recently, diversions to provide a drinking water supply for municipalities near, but outside of the Great Lakes watershed have been approved or are pending a decision. Government officials acknowledge that dozens more municipalities (outside the Great Lakes watershed) would find diversions of Great Lakes water a desirable alternative to their current low quality well water supplies.

Here is a summary of the detrimental effects of multiple diversions on the Great Lakes' economy and environment.

1. Great Lakes water levels would be permanently lowered. While diversion by one small municipality may not be measurable, diversions by dozens of municipalities will be. The cumulative long-term effect of lowered water levels would lead to these additional impacts.
2. Receded beaches, shorelines, docks and shipping/boat accesses, reduced waterfront property values and tax receipts.
3. Possible reduced hydropower output.
4. Shallower navigational channels, requiring more dredging, and an additional burden for taxpayers.
5. Increased exposure or disturbance of contaminated sediments, leading to reduced water quality, more fish contamination and threats to human health.
6. Loss of productive fish spawning areas and therefore reduced fishing opportunities and fishing industry revenues.
7. Loss of productive coastal wetlands, with reduced waterfowl production, hunting opportunities and reduced recreation industry revenues.
8. Greater demand to construct costly water control structures downstream to prevent water level reductions, another burden for taxpayers.
9. International relations between the U.S. and Canada, will be affected, since Canada would have to bear the negative effects and costs of U.S. actions. (NOTE: The Canadian federal government in a February 26, 1990 letter declared its opposition to the Lowell, Indiana diversion).
10. Reduced Great Lakes outflow could lead to saltwater encroachment up the St. Lawrence River which could contaminate the drinking water of Montreal and Quebec.



**KENOSHA'S DIVERSION VS. THE PLEASANT PRAIRIE DIVERSION**

**FACT SHEET # 1**

While the Kenosha diversion and the 1990 Pleasant Prairie diversion both withdraw from the same Lake Michigan source and discharge into the same Mississippi tributary, they are otherwise distinct. The Wisconsin DNR claims the Kenosha diversion is part of the Pleasant Prairie diversion and therefore didn't need separate approvals. It is not part of the Pleasant Prairie diversion for the following reasons:

1. The Pleasant Prairie diversion involved an attempt (albeit a failed one) to adhere to Federal law P.L. 99-662 and the Great Lakes Charter by requesting approvals of the eight (8) Great Lakes governors; the Kenosha diversion involved no such attempt.
2. The Pleasant Prairie diversion used as its justification the public health emergency caused by its radium-contaminated public well supply. The Kenosha diversion is strictly for urban expansion.
3. The Pleasant Prairie diversion was done out of health necessity; the Kenosha diversion was done out of financial expedience (i.e., it was the cheapest way to supply water to the new developments).
4. The Pleasant Prairie diversion involved a legally binding Compliance Agreement signed by the State and Pleasant Prairie. Kenosha was not a signer of that agreement, nor do any of its provisions apply to Kenosha.
5. The Compliance Agreement was prepared to resolve Pleasant Prairie's health emergency, and was clearly meant to provide water for Pleasant Prairie's residents. The agreement has no provisions to supply Kenosha residents.
6. The system now supplying that part of Kenosha with diverted water is independent from the Pleasant Prairie system. Its only connection to Pleasant Prairie is the pipe which crosses into Pleasant Prairie for the purpose of diverting the used water into the Des Plaines River.
7. The Pleasant Prairie diversion was given the go-ahead by the State in December, 1989. The Kenosha diversion was constructed in late 1991, well after (not before) the state had approved Pleasant Prairie's.
8. When the Pleasant Prairie diversion was approved by the State, the land that is now supplied by Kenosha's unauthorized diversion was part of Kenosha. Kenosha annexed it from Pleasant Prairie in February, 1989, well

before the Pleasant Prairie diversion was approved, and 15 months before the Pleasant Prairie diversion was formally opened.

9. The area of concern was, prior to 1990, never served by either Pleasant Prairie's contaminated wells, or by Kenosha's Lake Michigan public water supply system. Water users in this area used their own private wells and septic systems. Therefore, there never was a need to find a safe water supply for existing residents, the justification for Pleasant Prairie.

ATTACHMENT C

THE PLEASANT PRAIRIE DIVERSION'S LACK OF LEGAL AUTHORIZATION

FACT SHEET #2

The Wisconsin DNR claims the Kenosha diversion is authorized because it is part of the Pleasant Prairie diversion, which the DNR says adhered to federal law because "it was approved by the eight (8) Great Lakes governors."

We emphatically maintain that the Kenosha diversion is not covered by the authority for the Pleasant Prairie diversion.

But if, for arguments sake, Kenosha were covered by the Pleasant Prairie diversion, the evidence we have clearly shows that the Pleasant Prairie diversion also violated P.L. 99-662, § 1109. That federal law states:

"It is therefore declared to be the purposes and policy of the Congress in this section (2) to prohibit any diversion of Great Lakes water by any state, federal agency, or private entity for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes states."

•The Pleasant Prairie diversion did not receive the approval by all the Governors of the eight (8) Great Lakes states:

- Neither the governor of New York or the governor of Pennsylvania ever gave their written approval to the Pleasant Prairie diversion.

- Minnesota's governor (May 30, 1989 letter) consented to the diversion, but only "limited to this specific proposal" for Pleasant Prairie.

The "specific proposal" referred to was provided in the March 29, 1989 letter from Wisconsin Governor Thompson, which excludes diversion of water by and for Kenosha's own use (non-emergency). The Pleasant Prairie proposal specifically states that it is for a diversion "through a connection with [Kenosha's] existing pipes."

The new Kenosha diversion is through newly-built pipes (1990 & 1991). Therefore, the Kenosha diversion is not covered by Minnesota's approval for Pleasant Prairie.

- The governors of Indiana (July 27, 1989), Ohio and Illinois (both June 26, 1989) stated they "do not object" to the Pleasant Prairie diversion. It is arguable that "no objection" does not constitute the "approval" that P.L. 99-662

requires.

- The state of Michigan in a December 12, 1989 letter to Wisconsin's governor avoided taking any position but chose to take "no formal role in your decision" because it is not covered by the Great Lakes Charter [evidently unaware of his approval required by P.L. 99-662]. Thus, Michigan abstained rather than give approval.

- Michigan's letter is also questionable as constituting Michigan's "approval" because it was signed by Michigan DNR director, not the governor, as required by law.

• The State of Michigan (in their Dec. 12, 1989 letter) based its abstention for Pleasant Prairie on several conditions, each of which has been violated by Kenosha's diversion (which WDNR claims to be part of Pleasant Prairie's diversion). WDNR, in its Dec. 19, 1989 letter, gave its go-ahead based on Michigan's Dec. 12, 1989 conditions for abstention. Since these conditions are now being violated because of Kenosha's action, then clearly Kenosha has voided that abstention, and Pleasant Prairie's "authorization" is removed. Furthermore, Michigan also states that they want "periodic review of the diversion and its necessity by the Council of Great Lakes Governors to assure appropriate implementation of [the] proposal." This is underscored by the wording of the original WDNR/Pleasant Prairie Compliance Agreement provisions 6, 7, and 8, which state that a) as long as Pleasant Prairie remains in compliance, WDNR will withhold further enforcement action, and b) due to occurrence of unforeseen events, the conditions or schedule [such as return of water by 2010]...may be subjected to renegotiation."

These are Michigan's conditions for abstention that have been violated:

a) The State of Michigan based their abstention on the understanding that Pleasant Prairie's diversion would not be used for urban expansion ("The State of Michigan, however, remains opposed to any diversion of Great Lakes water for purposes of supporting growth and expansion...")

b) MDNR's letter also states "It is my understanding based on communication between the staffs of WDNR and MDNR that this proposed diversion is temporary." As we have documented, WDNR never put into writing any provision that obligates Pleasant Prairie to make their diversion temporary (nor is Kenosha so obligated).

c) Michigan conditioned their abstention (as opposed to a veto) on "our understanding, based on communication between WDNR and MDNR staffs, that this [Pleasant Prairie] diversion request is unique and that there are no known similar problems...with the potential for future diversion requests." The intention to allow a Kenosha diversion was apparently

known to WDNR, Kenosha, and Pleasant Prairie at or around that time.

Since the Kenosha diversion constitutes such a "known similar problem", this further puts in question the status of Michigan's abstention.

Despite the lack of unanimous approval by the eight governors, Governor Thompson sent a letter to Pleasant Prairie's Administrator on December 19, 1989 referring to the December 12, 1989 letter from Michigan "which represents Michigan's consent" (!)

The Wisconsin Governor's December 19, 1989 letter was then referred to in the February, 1990 Compliance Agreement between Wisconsin and Pleasant Prairie as follows:

"On December 19, 1989, the governor of the state of Wisconsin authorized the requested diversion from Lake Michigan."

We fail to see how Michigan's letter -- the last of the letters to be received from the five states who responded -- could finalize the "unanimous" approval required under P.L. 99-662.

