

# Midwest Environmental ADVOCATES

*pro bono publico*

## SENT VIA EMAIL AND U.S. MAIL

March 27, 2009

Secretary Matt Frank  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
Madison, Wisconsin 53707-7921

Todd Ambs  
Wisconsin Department of Natural Resources  
101 S. Webster Street  
Madison, Wisconsin 53707-7921

**Re: Comments on New Berlin's Amended Sample Application for Straddling  
Community Water Diversion**

Dear Secretary Frank and Mr. Ambs:

Thank you for the opportunity to submit public comments on New Berlin's amended sample diversion application to use Great Lakes water in the Mississippi River Basin.

We have reviewed the application and accompanying materials mindful of the important regional and state precedent that will be set by this application under the Great Lakes Compact and Wisconsin Act 227. While we believe that New Berlin may be an appropriate candidate for a straddling community diversion under Act 227, we nonetheless must assert, as a preliminary matter, our genuine concern over the manner in which the application has been submitted to the state.

Rather than following the sequential format of Act 227's statutory provisions relating to the Exception Standard for diversions, the amended sample application has been submitted instead as a confusing patchwork of old and new correspondence, reports and maps. This has resulted in an application that is nearly impenetrable in terms of public accessibility, one which is neither convenient nor understandable to the general public or decision makers. For this reason and others set forth below, the amended sample application raises a serious question as to its "completeness" for state review.

Moreover, it is unclear whether the instant application, put together by a consultant and released to the public for comment, has even been approved by the City of New Berlin in any official manner. It is unfortunate that the presentation of the application documents in this manner unnecessarily places the citizens of New Berlin, and the state overall, in a disadvantaged position in terms of the present application process.

Having stated the foregoing concerns, we would direct your attention next to the following questions and deficiencies still unresolved by New Berlin's amended sample application for a Great Lakes water diversion:

**I. The Sample Application's Water Supply Service Area Delineation Is Unclear and Confusing**

A necessary point of clarification that remains regards the sample application's water supply service area delineation. Notwithstanding efforts to clarify the service area in the application's materials, it remains unclear which portions of New Berlin (i.e. west of the sub-continental divide) would ultimately be served by the proposed diversion of Lake Michigan water. This confusion is largely the result of continuing discrepancies between several of the figures and maps and also the exclusion of what we understand is a key proposed service area map recently endorsed by New Berlin's Common Council.

For example, Figure 2-1 indicates that the area cross-hatched at the southern end of the service area map is included in the SEWRPC Water Supply Service Area but will not be served by diverted water. This appears consistent with the City of New Berlin Utility Planned Water Supply Service Area's delineation included in the Appendix's Map 1. However, the City of Milwaukee's agreement with New Berlin includes a map that shows a different area to be served by the requested diversion. Meanwhile, New Berlin's Mayor has explained to us that New Berlin's Common Council was in the process of adopting a map of the City showing a service area for the diversion that roughly parallels Calhoun road. Yet, this map, arguably the most important and dispositive document concerning the service area boundary issue, is missing from the amended sample application submission. Clarification is needed here to allow the public and government decision makers to understand the actual area that will be served by the proposed diversion.

**II. The Sample Application's Reliance on SEWRPC's Regional Water Supply Plan is Premature**

As part of the amended sample application, New Berlin's consultant has placed great reliance on preliminary regional planning agency information in a way that may be premature at the present juncture. For example, in the Plan's introduction, the following statement is made:

The plan satisfies the requirements of S. 283.83 where the rules are written and clear, and substantially addresses areas of the statutes where time has not allowed implementing agencies to establish clear delineation and explanation of the implementing rules. Furthermore, regional planning agency information referenced herein may be adopted by technical advisory committees and not yet by the approving commission as of the writing of this plan.

There is no question that New Berlin's Water Supply Service Area plan relies heavily on the SEWRPC Water Supply Plan. Yet, as noted above, the plan was only recently available for public comment and has not yet been approved by the Commission. What

can the public expect to happen if SEWRPC's water supply plan changes and/or if SEWRPC alters New Berlin's service area boundary? For example, there is current discussion that SEWRPC's water supply plan needs to include a socio-economic analysis before moving forward with other proposed changes to the plan.

If SEWRPC, in fact, does make changes to its water supply plan, those changes may very well require certain amendments to New Berlin's water service area boundary or developments within it. How will the public be notified or be able to comment with respect to any changes in SEWRPC's water supply plan that will impact the terms of New Berlin's diversion? What would such changes to SEWRPC's water supply plan mean in terms of DNR approval of New Berlin's application for diversion (given that it was based in part on a redacted plan)? Would another full-blown review be required as a result?

Thus, given the preliminary and changeable nature of SEWRPC's Water Supply Plan at the present time, the reliance of New Berlin's application on the plan appears premature.

### **III. The Sample Application Demonstrates a Continuing Lack of Coordination with MMSD and Long Term Treatment Capacity Issues**

As stated in earlier comments, in order to effect necessary extensions to the wastewater treatment infrastructure as proposed in the amended sample application, New Berlin will need to coordinate plans and capacity issues with the Milwaukee Metropolitan Sewage District (MMSD). Still, the application fails to reference any document in the record wherein MMSD confirms the "approved sanitary sewer service area" and/or its capability to serve the additional service area and waste stream.

In addition, a previously raised concern that the amended sample application fails to resolve relates to New Berlin's current and projected delivery of wastewater into the MMSD system. As again conceded in the application, New Berlin continues to deliver to MMSD a surplus of wastewater originating from west of the divide. Currently, there is an identified net increase of out-of-basin water entering the Basin to the tune of roughly 1.056 billion gallons per year. Although the application materials assert that the above amount "would be decreased at least to about 412 million gallons per year, or, with continued I/I reform even more," it is not clear from the submitted materials wherein lies the factual support for this estimated reduction.

As such, we would request further evaluation of this issue, including explanation of the I/I reform currently underway and how future increases in development might impact MMSD's already overtaxed wet-weather treatment capacity.

Here as in other respects, action taken on New Berlin's application needs to be considered in the larger context because other communities in the region will likely seek similar treatment.

#### **IV. New Berlin's Water Conservation Program Requires Further Development**

Under the Compact's and Act 227's Exception Standard, a straddling community applicant like New Berlin is required to incorporate water conservation measures that are "environmentally sound and economically feasible" in order to minimize water withdrawals or consumptive use. In order to comply, the applicant needs to demonstrate that the methods, measures, technologies or practices it is employing for efficient water use:

- a. Are environmentally sound
- b. reflect best practices applicable to the water use sector
- c. are technically feasible and available
- d. are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs
- e. considers the particular facilities and processes involved, taking into account the environmental impact, age of equipment and facilities involved, the processes employed, energy impacts and other appropriate factors.

In keeping with these conservation requirements, New Berlin should be required to undergo a thorough analysis of its conservation opportunities and to develop an intelligent, far-reaching water conservation plan for the city. According to New Berlin's consultant's letter to the DNR dated March 9, 2009, New Berlin remains in the process of preparing a Water Conservation Plan, which it expects to finalize "over the next 6-9 months." That plan, still in draft form and admittedly incomplete, is dated July 2008 and attached as Appendix A. Per this water conservation plan, it is evident that New Berlin's efforts regarding water conservation are quite minimal to date, essentially boiling down to a lawn sprinkling schedule, public education materials, discontinuation of water softeners, and a leak detection program.

While the consultant's March 9, 2009 letter further points to the City's "willingness to deal with conservation issues in a more aggressive manner," nowhere in that letter or in the water conservation plan draft was there any commitment to undertake specific measures, such as the imposition of fines for violations of the sprinkler ordinance or the requirement of low flow fixtures in all new development. Instead, New Berlin's consultant rests his assessment of the program's effectiveness largely on a chart illustrating per capita total water use pumpage declines and on SEWRPC predictions concerning water use reductions for the region.

It is in consideration of these shortcomings that the DNR should instruct New Berlin to undertake further water conservation planning and initiatives in order to demonstrate compliance with the requirements of the Compact.

In conclusion, in view of the precedent-setting nature of New Berlin's application, we request that the DNR direct New Berlin to remedy the deficiencies identified above and

to submit a final application, organized and written in such a manner as to clearly demonstrate New Berlin's adherence to the provisions governing straddling communities under Act 227.

As a final point, while we recognize that New Berlin's application is distinguishable given the timing of its initial submission prior to Compact enactment, we request, once again, that the DNR comply with the Wisconsin Stat. § 281.346 requirement that the DNR promulgate rules and standards to effectively implement the Compact *before* considering any other applications for diversions of Great Lakes water. We fear that without rules in place, diversions proposed by straddling communities will be approved in Wisconsin on an ad hoc basis, a course at complete odds with the driving principles of the Compact and wise policy development in the state.

Thank you for your consideration.

Very truly yours,

Jodi Habush Sinykin  
Of Counsel, Midwest Environmental Advocates

and

Peter McAvoy  
Vice President, Department of Environmental Health  
Sixteenth Street Community Health Center

**On behalf of the following organizations:**

Clean Water Action  
Clean Wisconsin  
Freshwater Future  
Milwaukee Riverkeeper  
River Alliance of Wisconsin  
Sierra Club John Muir Chapter  
Town and Country Resource Conservation & Development  
Waukesha County Environmental Action League  
Wisconsin Great Lakes Coalition  
Wisconsin Wildlife Federation

Cc: Mayor Jack Chiovaturo, City of New Berlin  
Deb Lyons-Roehl, WI Department of Natural Resources,  
Bureau of Drinking Water and Groundwater