

March 27, 2008

VIA E-MAIL, FAX AND POSTAL MAIL

Deb Lyons-Roehl
DG-5
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921
Madison, WI 53707-7921
(608) 267-7650
dnrnewberlindiversion@wi.gov

Re: Application for a Diversion by a Straddling Community – New Berlin

Dear Ms. Lyons-Roehl:

The Alliance for the Great Lakes (Alliance) and National Wildlife Federation (NWF) thank the Wisconsin Department of Natural Resources (WDNR) for this opportunity to comment on the first proposed Great Lakes water diversion by the City of New Berlin (City). We urge the WDNR to ensure that the City's application for a diversion as a straddling community is complete and is reviewed utilizing a thorough and publicly accessible process. In addition, any subsequent approval must fully support the sound implementation of the Compact and Wisconsin's legislation.

Background: The Compact – A Forward-Looking Policy

On October 3, 2008, the President signed a joint resolution of Congress consenting to the Compact. This followed nearly five years of negotiations between the States and three years of review and approval by the eight Great Lakes state legislatures. Our groups were actively engaged in Compact negotiations and worked with state and federal officials for Compact approval. The Compact is intended to provide a comprehensive management and legal framework for achieving sustainable water use and resource protection in the Great Lakes basin.

The Compact framework requires each state to create a management program for water withdrawals and consumptive uses within the Great Lakes basin, a program that Wisconsin created through Act 227. While the Compact prohibits new or increased diversions of water outside of the basin, it includes exceptions for public water supply purposes to communities that

straddle the Great Lakes basin divide and to communities located wholly within counties that straddle the basin divide.

The standards for approval of a diversion by a community located wholly within a county that straddles the basin divide, like Waukesha, are more stringent than those for a community that straddles the divide, like New Berlin. The most notable difference is that applications by communities that straddle the divide are approved at the state level, and do not require regional review. However, there are very substantial similarities. It is vital to the sound implementation of the Compact that, in those aspects where the requirements are equivalent, the review, process and conditions of any subsequent approval of the City's application set a high standard.

Absence of Rules & Regulations: A Hindrance to Determining Application's Completeness

We commend the WDNR for initiating the March 12, 2009, public hearing on New Berlin's application. However, we are concerned that the WDNR has initiated a review process after stating in the public notice that it has "...determined that the application materials submitted by the City of New Berlin constitute a complete application under Wis. Stat. § 281.346(9)(b)1."

Whether the intent of the Compact is fulfilled depends in part on the states and provinces requiring complete applications. The City's application is *the* first test of the Compact and, unfortunately, the application is incomplete, as detailed below. Because the application is incomplete, it appears that the City's project would not fulfill the terms of the Compact.

It could be inferred from the language in the public notice that Wis. Stat. § 281.346(9)(b)1. governs the completeness of an application. That section of the statute is, however, limited to issues regarding public notice.

Requirements for a diversion application are found in Wis. Stat. § 281.346(4)(b). These requirements include the following: "A person who applies under subd. 1. shall provide information about the potential impacts of the diversion on the waters of the Great Lakes basin and water dependent natural resources *and any other information required by the department by rule (emphasis added).*" Because the City's diversion proposal would increase the withdrawal of water from Lake Michigan by a maximum 30-day average over one million gallons per day, that increased withdrawal requires approval not only under the "straddling community" exception, but also approval of an individual permit under Wis. Stat. § 281.346(5). The withdrawal must meet the standards set forth in the state decision-making standard in Wis. Stat. § 281.346(5m), including use of conservation practices and an assessment of "other potential water sources for cost-effectiveness and environmental effects." No diversion can proceed unless this individual permit is issued. Pursuant to Wis. Stat. § 281.346(5)(n), an applicant for this permit is required to submit "information *required by the department by rule*" (*emphasis added*). But it is unclear how the WDNR can determine whether an applicant has submitted the correct information if there is no rule in place.

An additional application requirement is found in Wis. Stat. § 281.346(4)(g). Under this paragraph, the WDNR is directed to "promulgate rules specifying the requirements for an

applicant for a new or increased diversion subject to par. (f) to demonstrate the efficient use and conservation of existing water supplies for the purposes of pars. (d) 2. b. and 3. b., (e) 1. d., and (f) 1., including requiring the applicant to document the water conservation planning and analysis used to identify the water conservation and efficiency measures that the applicant determined were feasible." In turn, under Wis. Stat. § 281.346(f)(1), the WDNR must decide if "[t]he need for the proposed diversion cannot reasonably be avoided through the efficient use and conservation of existing water supplies *as determined under par. (g)*" (*emphasis added*).

In the short time since the approval of the Compact, the WDNR has not developed approved rules as called for above. It is unclear whether New Berlin's application is complete because there are no rules specifying the documentation New Berlin is supposed to provide to WDNR, specifically on conservation and efficient use of supplies. It is also unclear how the WDNR will decide whether New Berlin meets paragraph (f)(1) "as determined under par. (g)" when the rules called for under paragraph (g) have not been issued. The Alliance and NWF are concerned that WDNR is proceeding in the absence of these rules which makes it difficult to judge whether the City's application is complete. Our concern is heightened by the absence of state drinking water conservation standards and in the absence of a meaningful water conservation program in the City's application.

Application Fails To Meet Compact's Water Conservation Requirements

While the City's application has no State conservation rules or standards to comply with, it fails to fulfill the Compact's intent for water conservation. Under Section 4.9 1 b. of the Compact, this applicant must meet the Exception Standard requirements found at Section 4.9 4 of the Compact. Paragraph e. of that Standard states: "The Exception will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures to minimize Water Withdrawals or Consumptive Use." The Compact defines these measures in Section 1.2 to include "those measures, methods, technologies or practices for efficient water use and for reduction of water loss and waste or for reducing a Withdrawal, Consumptive Use or Diversion that i) are environmentally sound, ii) reflect best practices applicable to the water use sector, iii) are technically feasible and available, iv) are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs and v) consider 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."

Under Wis. Stat. § 281.346(f)(6), "[t]he applicant [must] commit[] to implementing the applicable water conservation measures under sub. (8)(d) that are environmentally sound and economically feasible for the applicant." There are additional conservation requirements required under Wis. Stat. § 281.346(5m). Wis. Stat. § 281.346(8)(d) directs the WDNR to issue rules "specifying water conservation and efficiency measures for the purposes of implementing [the statewide program]." Once again, it is unclear how WDNR can decide whether New Berlin has committed to implementing such measures when the agency has not issued rules.

The City's application does not incorporate reasonable environmentally sound and economically feasible water conservation measures to minimize water withdrawal. Water conservation is hardly mentioned in the application materials. While addressing most significant issues, an application document titled The Water Supply Service Area Plan contains neither existing nor proposed water conservation practices.

No Demonstration That A Portion Of Diversion Can Be Avoided

Because the City's water conservation plans have not been fully developed – and in fact are still in the planning stages – it is probable that part of the demand for Lake Michigan water might be reasonably avoided. Compact provision 4.9(4)(a) states that an exception (allowing a diversion) can be granted to a straddling community “only when...the need for all *or part* of the proposed Exception cannot be reasonably avoided (*emphasis added*).” It is probable that some portion of the Lake Michigan diversion request might reasonably be avoided because the City has implemented few basic water conservation best practices.

Switch To Lake Water in 2005 Does Not Constitute Water Conservation

A 3/9/09 letter from Steven Schultz of Ruekert/Mielke addresses questions raised by Eric Ebersberger of the WDNR. Question #2 raises the water conservation issue. The reply includes a graph of per capita water use from 2000 through 2007, citing a decline of about 10 percent. This decline is attributed to several factors, including some outdoor limitations on watering and a water conservation education program. Also listed, and more pertinent, is the reduction in water softener use in the eastern portion of the City since the 2005 switch to Lake Michigan water. The chart reveals that most improvement in per capita use occurred since 2005, and the reply admits it is probably largely due to the reduction in the use of water softeners. A declining use in water softener backwashing will lead to significant water savings and a decline in per capita use. But it is a one-time savings that is not a water conservation program practice.

Reliance On Unspecified SEWRPC Water Conservation Assumptions

The City cites the Southeast Wisconsin Regional Planning Commission (SEWRPC) regional water supply plan and its alternatives analysis, which assumes increasing levels of water conservation that could reduce consumption by up to 10 percent. The City indicates that it will consider implementation of water conservation practices in keeping with the SEWRPC plan. But the SEWRPC plan recently presented for public comment does not include information on best management practices that might achieve that level of reduction.

Stormwater Management Practices Are Not Exception Standard Conservation Practices

Attached to the 3/9/09 letter is a copy of a draft water conservation plan prepared by City staff. It includes a recitation of many water conservation practices undertaken in the City. While these programs are commendable, and improve the water quality and hydrologic health of water in the environment, they are primarily storm water management practices that do not impact potable water consumption and water withdrawal.

Water Conservation Plan Must Precede Diversion

The 3/9/09 letter also cites the on-going efforts of the City to develop a water conservation plan, starting with their staff's draft. Mr. Schultz's reply includes minutes of a New Berlin Utility Committee meeting from September, 2008 and notes that this: "...shows the Committee's willingness to deal with conservation issues in a more aggressive manner *following completion of the Lake Michigan water project (emphasis added)*." The City has the sequence backwards and must define a meaningful water conservation program as a part of its application and must commit to its implementation as a condition of approval to satisfy the requirement of Compact section 4.9(4)(a).

The only meaningful conservation measures in the application are existing limitations on outdoor water use and an education program. The application commits to the implementation of no additional specific practices. While the staff's draft water conservation program suggests many demand-side practices, the only mention of supply-side practices is a brief suggestion for a leak detection program. Supply-side conservation practices can have a significant impact on reducing water use, as well as enhancing City revenues.

It is important for the City to proceed with and complete the current public process for developing a water conservation program that includes demand-side management practices. A participative process will lead to better implementation. However, the City can define and commit to numerous supply-side water conservation best management practices immediately. These can be unilaterally implemented by the City's water utility without the active participation of the public, and include but are not limited to: conducting annual water audits to determine the amount of unbilled water; an on-going water meter testing and replacement program that specifies the replacement interval for water meters; a leak detection program that is on-going and specifies the time interval for incrementally testing the entire distribution system; and a water main replacement program tied to the leak detection program as well as to a commitment to replace the distribution system over a specified time period.

It is a serious deficiency in the City's application that the water conservation program is not in place so it can be reviewed for its adequacy as a part of the City's diversion application.

Ecological Improvement (Restoration) Measures Are Insufficient

In approving the Compact, the states agreed to protect, conserve, *restore, improve* and effectively manage Great Lakes resources (*emphasis added*). In considering this first application for a diversion, and to meet that obligation, it is critical to establish that approvals for diversions be accompanied by a restorative action that is in addition to those that are unavoidable consequences of receiving and returning Great Lakes water. All environmental benefits cited by the City are such unavoidable consequences. The City should be required to make an affirmative restorative commitment to a resource in the basin.

Conclusion

The City of New Berlin's application is gravely deficient in meeting the water efficiency and conservation requirements of the Exception Standard. And it provides no restorative effect other than unavoidable consequences. All of those who worked to draft and approve the Compact, all of those who worked to pass implementing legislation in Wisconsin, and all of those anticipating the benefits of Compact implementation deserve better.

We request that the WDNR, before further consideration of the application, 1) require the submission of a meaningful water conservation program and a commitment for program implementation, 2) ensure that the applicant meets the requirements under Wis. Stat. § 281.346(5) for an individual permit, and 3) require a commitment to an affirmative restorative action to a resource in the basin. We also think it is a mistake to proceed with the review and approval of diversion applications without developing related rules and regulations called for in Wisconsin's implementing legislation.

Thank you for the opportunity to submit these comments. Should you have any questions about our comments, please contact Ed Glatfelter at 312-939-0838 x235 or eglatfelter@greatlakes.org.

Sincerely,

F. Edward Glatfelter
Water Conservation Program Director
Alliance for the Great Lakes

Marc Smith
Great Lakes State Policy Manager
National Wildlife Federation

And on behalf of the following:

James Clift
Policy Director
Michigan Environmental Council

Gary Botzek
Executive Director
Minnesota Conservation Federation

Kristy Meyer
Agriculture and Water Director
Ohio Environmental Council