

November 22, 2006



RECEIVED

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

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OFFICE OF THE  
SECRETARY

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

**Re: Public Comments on New Berlin's Application for Great Lakes Water**

Dear Secretary Hassett and Mr. Ambs:

Thank you for the opportunity to submit public comments on New Berlin's diversion application to use Great Lakes water in the Mississippi River Basin. This is a critical time for the Great Lakes and any decisions about diversions need to be made with the future of the Great Lakes – St. Lawrence River Basin Water Resources Compact (hereinafter "Compact") and the region's 40 million water users in mind.

The following points are a summary of our comments:

- Diversion applications should only be considered after the Compact is ratified and implemented by the Wisconsin legislature; considering or approving diversion applications prior to the ratification and implementation of the Compact will lead to confusion and undermine passage of the Compact. Once in place, the Compact will offer a far better process and clearer standards for protecting the Great Lakes and our future prosperity and quality of life that are inextricably tied to how we manage and use these world class resources.
- Until all the Great Lakes states and Congress pass the Compact, the existing federal Water Resource Development Act (WRDA), that covers Great Lakes diversions, is in full force. WRDA requires that any proposed Great Lakes diversion must be approved by all eight Great Lakes states.
- It is absolutely imperative that the process for considering a diversion application be open and transparent and that the public be involved throughout the entire process.
- It is clear with our initial review that the New Berlin diversion application fails to meet the minimum requirements of several of the draft Compacts standards. We fully expect our legislature to add greater clarity to the Compact.
- While we do not believe the State of Wisconsin should act on this application, we do think that New Berlin could move forward on a number of important fronts to address its water supply problems including the adoption and implementation of a comprehensive set of conservation practices.



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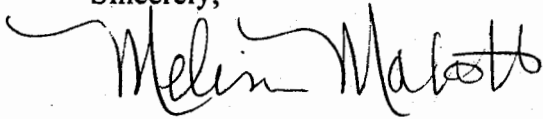


The New Berlin application provides an excellent example of why it is premature and potentially harmful to review this or any other application for diversion without clear standards or legislative authority in place. Accordingly, the attached comments, submitted to complement and expand on public comments submitted by Clean Wisconsin and other groups, highlight many problems and issues that go beyond deficiencies in that community's documents. Hopefully, our comments will help inform the Wisconsin legislative process as it moves forward on the Compact.

Finally, we would note that New York, Illinois and the Province of Ontario have also raised serious concerns and substantive issues with the New Berlin Application. The State of Michigan has already indicated that it will invoke its veto authority under the federal legislation, WRDA. The better course for our State to follow at this time is to not move on any applications for diversion until the requisite standards of the Compact are in place.

Thank you for considering Clean Wisconsin's comments.

Sincerely,

A handwritten signature in cursive script that reads "Melissa Malott". The signature is written in black ink and is positioned to the right of the word "Sincerely,".

Melissa Malott  
Water Program Director

## COMMENTS ON THE LAKE MICHIGAN WATER DIVERSION APPLICATION BY THE CITY OF NEW BERLIN, WISCONSIN

The Wisconsin Department of Natural Resources (“DNR”) should not consider applications for Great Lakes water diversions until Wisconsin has passed state legislation that includes standards for implementing the Great Lakes – St. Lawrence River Basin Water Resources Compact (“Compact”). Until the Compact has been successfully ratified by the Great Lakes states and US Congress, any diversions of water outside the Great Lakes Basin remain subject to approval under the Federal Water Resources Development Act (WRDA). The following comments support this position and suggest the type of actions or further information needed for a diversion application, using the draft Compact’s general criteria as a guide to the appropriate decision-making standard under WRDA. The purpose of our comments is to inform the process for future applications for diversion.

### **I. DIVERSION APPLICATIONS SHOULD ONLY BE CONSIDERED AFTER THE COMPACT IS ADOPTED AND IMPLEMENTED BY THE STATE OF WISCONSIN.**

Considering diversion applications before the Compact is adopted and implemented by the State of Wisconsin will violate WRDA, diminish the momentum for adopting the Compact and state implementing legislation, and cause uncertainty and confusion.

#### **A. Approving Diversion Applications Without the Unanimous Approval of all the Great Lakes Governors Violates WRDA.**

The DNR may only take actions that are authorized by statutes or regulations. Until the Compact is passed into state law, the DNR cannot apply its standards and processes. In the interim period before the Compact is incorporated into state law, the Water Resources Development Act (“WRDA”) is controlling. Under WRDA, a disapproval by any Great Lakes governor quashes a diversion application, and Wisconsin has already tentatively received two such vetoes:

1. **Michigan.** Governor Granholm’s refusal to even consider New Berlin’s application and Ontario’s identification of the incompleteness of New Berlin’s application are indications that there will not be unanimous approval during this interim period. Recently, Michigan Attorney General also indicated that they would invoke the federal WRDA authority to stop such diversion.
2. **Illinois.** In a response letter to New Berlin’s application, Illinois makes several suggestions and recommendations on how New Berlin’s application could better meet the standards of the Compact. While Illinois does not refer to any of these suggestions or recommendations as “deal breakers,” Illinois does infer that the application is incomplete.
3. **New York and Ontario.** Both New York State and the Province of Ontario have also commented on the New Berlin application, pointing out numerous deficiencies in the application.

If the DNR uses the Compact in the interim, in a way that conflicts with WRDA, it will be violating federal law. With Wisconsin's leadership role in the Great Lakes, this will set a very bad example for the other states, and create confusion and uncertainty about the future of the Compact and regional cooperation. WRDA is in effect at this time, and must be respected. Accordingly, no diversion applications under the Compact should be allowed at this point until clear standards are set and the Compact is ratified.

**B. Considering Diversion Applications at This Time Violates the Spirit of the Compact.**

State Parties pledged to support implementation of all provisions of the Compact. Article 7 of the Compact pertains to "Good Faith Implementation" of the Compact, wherein the parties promise that no officers or agencies will "hinder, impair, or prevent any other party carrying out any provision of this Compact." Given the negative precedent that would be set by processing diversion applications without any implementing legislation in place, and the delicate nature of the years of Compact negotiations, proceeding to process applications before the Compact is passed by the State of Wisconsin is contrary to the Good Faith Implementation clause in the Compact.

The best way to carry out Article 7 is by passing the state implementing legislation in order to achieve the added certainty the Compact will afford to decisions made pursuant to it. Straddling Communities, such as New Berlin, stand to gain a lot of freedom and certainty in planning and development under the Compact. Refusing to act under the Compact until it is passed by the State will build momentum for passing it; whereas acting under it in the meantime makes the Compact unnecessary, and will hinder the Compact from being implemented, thus violating Article 7. Additionally, any action taken by the State of Wisconsin or any other states on a diversion application must meet the requirements of WRDA.

**C. Considering Diversion Applications Now Will Cause Confusion and Uncertainty.**

The New Berlin application is a case study in what happens when a state or province accepts a diversion application prior to implementing the Compact in their respective jurisdiction. The DNR has attempted to act in compliance with the Compact, but without legislative authority to do so and given the lack of clear process; this has led to confusion and frustration for everyone involved.

With a Legislative Council Committee made up of diverse members negotiating language for the implementing legislation under the watch of seven other states and two Canadian provinces, this is an important time for the Compact. On one hand, controversial actions by the DNR have the ability to negatively impact or break down the drafting process. On the other hand, the DNR can use planning, consistency, and its experience to positively affect the Compact adoption and implementation process that is going on throughout the region.

Furthermore, until the Compact is passed, there are no decision-making standards by which the DNR can consider water diversion applications; WRDA does not contain

decision-making standards, and until we have state legislation with clear standards, the process for considering such applications is completely in question. One example of a debilitating lack of guidance or standards at this time is the lack of legislatively-approved community boundaries for in-Basin communities, straddling communities, communities in straddling counties, and out-Basin communities. If the DNR proceeds, we strongly recommend the DNR adopt community boundaries as they existed on December 13, 2005, the date that the Compact was endorsed by all eight Great Lakes governors. We will recommend that our State Legislature do the same in adopting the Compact. This will prevent straddling communities from stretching their boundaries further beyond the continental divide with the goal of supplying Great Lakes water to additional lands and users outside the Great Lakes Basin.

Moreover, it now appears that Wisconsin's Legislature would benefit from the current legislation study committee it recently established to consider what elements of the Compact need additional clarification. The responsible position is to respect the on-going legislative process, and not entertain applications for diversions until this Committee completes its deliberations and the Legislature passes implementing legislation with clear standards and public accountability.

#### **D. Public Involvement Must Be Incorporated Into Consideration of Water Diversion Applications.**

In Article 6 of the Compact, public involvement is incorporated into all aspects of the decision-making process. Along with the requirements of the Compact, public participation must be incorporated into all aspects of the State process to respect the public nature of waters and make decisions in the public interest. The water diversion application process should be open to the public in four basic ways:

- ✓ **Provide public notification of receipt of all applications for in-Basin and out-of-Basin water diversion and any notice of intent to file such applications.** Applications for withdrawals and diversions are complex, expensive processes in which applicants hire expert technical firms, expensive public relations firms, and hold lawyers on retainer. In order to balance the process, the DNR should make the public aware of upcoming applications in order to be educated on the science and policy surrounding the proposal.
- ✓ **Allow the public reasonable opportunity to submit comments before applications are acted upon by the State and the State should supply responses to the comments as part of the public record.** To have a balanced process, the public must be allowed to meaningfully participate through public comment periods early in the application process. The DNR should be required to respond to comments received during the public comment period and the department's response should be a part of the official record.
- ✓ **Assure public accessibility to all documents relevant to an application, including public comment received.** Access to all documents is necessary for meaningful, well-informed participation in any process.

- ✓ **Open the decision-making process up to the public.** All aspects of the DNR's decision-making process that affect the public should invite the public to participate and have access to the process, including public notice, open records, and holding public hearings.

When processing the New Berlin application, the DNR failed to provide public notice that it had received an application and circulated the application to the other states and provinces prior to giving the residents and citizens of Wisconsin a chance to comment on the proposal. This approach has damaged public confidence in the DNR. Fortunately, the DNR is now rightly incorporating the public into the evaluation of the New Berlin application. The DNR can further incorporate the public into this process by holding a public meeting where citizens of Wisconsin can voice their comments and hear the comments of others.

## **II. UNDER THE DRAFT COMMENT LANGUAGE, THE NEW BERLIN DIVERSION APPLICATION IS DEFICIENT IN A NUMBER OF CRITICAL RESPECTS.**

On April 28, 2006, New Berlin submitted an application for a diversion of Lake Michigan water to Lee Boushon at the Wisconsin DNR, hereinafter referred to as the "New Berlin Application." The application was "based upon guidelines" of the Compact.<sup>1</sup> New Berlin states:

The City of New Berlin recognizes that these agreement are not binding upon the State or Provinces but rather guides for developing future agreements... It is the intent of this application to promote review by the Parties to the Agreement in a spirit of comity and cooperation that the agreement were based on, as they are reviewed under current law.<sup>2</sup>

New Berlin's insight into the delicate status of the Compact and the respectful nature of their application letter is considerate and appropriate, especially given the fact that their application is precedent-setting, both legally and practically. This application will set a standard of practice for the state and the region. Therefore, New Berlin's application should be carefully scrutinized and the DNR should not make a final determination as to whether or not New Berlin's application meets the standards of the Compact until Wisconsin adopts the Compact and state implementing legislation with appropriate standards and procedures.

### **A. Compact Standards Applicable to a Straddling Community**

As a straddling community with a proposed diversion of between 100,000 and 5 million gallons per day, New Berlin's application must, at a minimum, adequately address the general straddling community standards criteria, and the criteria under the Exception Standard as follows:<sup>3</sup>

1. The diverted water would be used solely for Public Water Supply Purposes

<sup>1</sup> New Berlin Application, page 1.

<sup>2</sup> New Berlin Application, page 1.

<sup>3</sup> Compact Section 4.9 (1), and Section 4.9 (4)

2. All water withdrawn shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use; this criteria cannot be satisfied with surface or groundwater from outside the Basin, unless:
  - a. it is part of a water supply or wastewater treatment system that combines water from inside and outside the Basin
  - b. it is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin
  - c. it maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin
3. The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies
4. The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed.
5. The exception will result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal;
6. Exception will incorporate Environmentally Sound and Economically Feasible Water Conservation Measures to minimize water withdrawals or consumptive use. These are methods, measures, technologies, or practices for efficient water use that
  - 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. 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
7. The exception will be implemented so as to ensure that it is in compliance with all applicable municipal, state and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909.

**B. Comments on How New Berlin's Application Needs to be Improved to Meet Compact Standards**

The Compact addresses the most important factors to protecting our Great Lakes while allowing some communities to access this valuable, vulnerable resource. The drafters of the Compact saw that mandating return flow and conservation requirements are essential to responsible stewardship of water resources. The New Berlin application is seriously deficient in some of these important areas. Allowing these deficiencies to remain unaddressed establishes a potentially harmful legal and practical precedent.

***1. Water Used for Public Water Supply Purposes***

Under the Compact, a proposed diversion must be solely for Public Water Supply Purposes.<sup>4</sup> New Berlin's application claims that the proposed water diversion will be used solely for Public Water Supply Purposes. Public Water Supply Purposes is defined as:

Water distributed to the public through a physically connected system of treatment, storage, and distribution facilities serving a group of largely residential customers that may also serve industrial, commercial, and other institutional operators. Water withdrawn directly from the Basin and not through such a system shall not be considered to be used for Public Water Supply Purposes.<sup>5</sup>

There are two key components to this definition of Public Water Supply Purposes. First, diverted water must be "distributed to the public through a physically connected **system of treatment, storage, and distribution facilities.**" Second, the diverted water must serve a "group of largely residential customers that may also serve industrial, commercial, and other institutional operators."

New Berlin's application asserts that it will be used solely for Public Water Supply Purposes, but does not describe the presence nor extent of its "physically connected system of treatment, storage, and distribution facilities."<sup>6</sup> New Berlin indicates that it has a "sanitary sewage collection system and a potable water supply system," and that the sanitary sewer system is "entirely tributary to the Milwaukee Metropolitan Sewerage District and subsequently to Lake Michigan after treatment at one of two wastewater treatment facilities."<sup>7</sup> This indicates that, after use, New Berlin's waste water will be treated by Milwaukee Metropolitan Sewerage District, hereinafter "MMSD," before returning to Lake Michigan.<sup>8</sup> However, the proposed application fails to indicate whether there is an incoming treatment facility, and whether there are storage and distribution facilities. Withdrawn water must be distributed to the public through a "physically connected system of treatment, storage, and distribution facilities," to be considered "used for Public Supply Purposes." New Berlin's failure to describe appropriate facilities raises questions as to whether its proposed diversion will qualify as water "solely for Public Water Supply Purposes."

Next, New Berlin asserts that the water will be used for a "group of largely residential customers that may also serve industrial, commercial, and other institutional operators." The Compact does not further define what "largely" means, but New Berlin's application indicates that 60% of the diverted water will be used for residential use, 20% for commercial use, and the remaining 20% for industrial, public, or other use.<sup>9</sup> These general categories however are not particularly useful in determining how and for what specific purposes New Berlin intends to use Lake Michigan water. For example, will any of the intended uses include watering of golf courses or public median strips. If so, perhaps they should not be included as part of the application thus reducing the overall

<sup>4</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact, Section 4.9(1).

<sup>5</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact, Article 1.2, Definition: Public Water Supply Purposes.

<sup>6</sup> New Berlin Application Discussion Document (attached to New Berlin Application Letter), page 1.

<sup>7</sup> New Berlin Application Letter, dated April 28, 2006, pages 1-2.

<sup>8</sup> And, see comments below with respect to MMSD and service of New Berlin's waste water.

<sup>9</sup> New Berlin Application Discussion Document, page 1.



water volume request, since the City may meet water demands of such uses through other means. The lack of specificity in intended uses and volumes however does not allow for such analysis to occur.

**Comment:** New Berlin needs to show how and for what purposes its water will be “distributed to the public through a physically connected system of treatment, storage, and distribution facilities” in order to show that the proposed diversion of water will be used solely for Public Water Supply Purposes.

## ***2. All Water Returned to Watershed***

State and federal policy has long recognized the importance of returning non-consumed water to the original watershed. Indeed, the Compact requires that New Berlin return all water diverted, less an allowance for consumptive use, to Lake Michigan's watershed and that non-Basin water may be part of this return flow only if stringent criteria are met:

All water withdrawn shall be returned, either naturally or after use, to the source watershed less an allowance for consumptive use; this criteria cannot be satisfied with surface or groundwater from outside the Basin, unless:

- i. it is part of a water supply or wastewater treatment system that combines water from inside and outside the Basin
- ii. it is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin
- iii. it maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin<sup>10</sup>

This criterion will be addressed as essentially four components, as follows.

1. All non-consumed, withdrawn water shall be returned to the source watershed naturally or after-use, and
2. Out-Basin water cannot be used to satisfy this criteria unless:
  - a. it is part of a water supply or wastewater treatment system that combines water from inside and outside the Basin, and
  - b. it is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin, and
  - c. it maximizes the portion of water returned to the Source Watershed as Basin Water and minimizes the surface water or groundwater from outside the Basin.

Regarding the first component of this criterion, New Berlin states that they are returning the withdrawn water through the Milwaukee Metropolitan Sewerage District sanitary

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<sup>10</sup> Compact Section 4.9 (1)(a)

sewer system. New Berlin specifies that "all water not consumed returns to the Basin via the sewer system and is treated by MMSD,"<sup>11</sup> thereby satisfying the first component.

At this point, New Berlin further proposes to add out-Basin water to the return flow. New Berlin states that the reason for this is, "so there will be zero loss of water (to Lake Michigan resulting from the withdrawal)."<sup>12</sup> We wonder if it is more convenient, logistically, or if there are other reasons for New Berlin to return out-Basin water along with the withdrawn water.

Additionally, there are potential logistical problems with New Berlin's proposal. New Berlin does not indicate what portions of New Berlin (West of the sub-continental divide) will be served with Lake Michigan water and what geographical areas for purposes of waste water treatment will be served by MMSD. New Berlin acknowledges that "there is no specific accounting of the impact of storm water management projects." This is a major ongoing issue for MMSD and the entire region with infiltration and inflow and lack of capacity to store water during major storm events. Under Wisconsin's current water quality programs and permits MMSD only serves a portion of New Berlin, including a small area west of the sub-continental divide, but not the entire City of New Berlin. MMSD does not have the authority to provide such service beyond its "planned" service area which does not include all of New Berlin.

Unfortunately, MMSD has not been consulted on this project. MMSD must be allowed to consider potential precedents the New Berlin application might hold, including what implication the return of additional water from New Berlin might have for its current infrastructure and current and future goals under its 2020 Water Quality Initiative and, given some of its recent problems during major storm events, what might the acceptance of additional waste water have on its treatment capacity and the Great Lakes ecosystem during such events. Accepting additional waste water from other "straddling communities" in the region may affect MMSD's current customers and its efforts to meet future water quality goals and ecosystem restoration of the Milwaukee watershed and near shore areas of the Great Lakes. Accordingly, MMSD should evaluate what volume of additional waste water it would have to accept under the New Berlin proposal and the ensuing implications for its system.

The requirements set in the Compact Section 4.9(1)(a) are clearly created to protect water systems, and should be used to evaluate New Berlin's proposed incorporation of out-Basin water into the return flow of its non-consumed, withdrawn water. We take these as the reasons that New Berlin analyzed its proposal to add out-Basin water to the return flow.

The second component in Section 4.9(1)(a) that non-Basin water cannot be used to satisfy the water return flow requirement unless New Berlin shows that it is using a water system that combines in and out of Basin waters, the water will meet water quality standards and prevent invasive species, and it is minimizing the amount of water it is using from the

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<sup>11</sup> New Berlin Application Discussion Document, page 2.

<sup>12</sup> New Berlin Application Letter, page 2.

Mississippi River Basin.<sup>13</sup> New Berlin addresses the water quality and invasive species issue by indicating that all of its wastewater is treated by MMSD, which is required by the Wisconsin Administrative code to meet all applicable water quality discharge standards, and that "invasive species are not known nor expected to enter the Basin via the sanitary sewer system." However, given MMSD's failures (which we acknowledge are improving), we would not want New Berlin to snowball any current problems. It would be valuable to this process if New Berlin would share any analysis that it or MMSD has conducted to ensure that New Berlin's addition of water to the return flow will not pose a problem.

Next, New Berlin addresses the requirement that it maximize the return of Basin water and minimize the use of non-Basin water. New Berlin suggests it will maximize the return of Basin water through water conservation efforts.<sup>14</sup> The adequacy of New Berlin's conservation efforts are addressed below. To the extent that this has a bearing on meeting the return flow requirement, the comments below are incorporated by reference.

New Berlin claims that it is minimizing the amount of out-of-Basin water it is using in its return flow.<sup>15</sup> New Berlin supports this claim by explaining it has four wells, two shallow, and two deep, outside of the Basin that currently mixes with its water system. New Berlin has a three-fold plan to minimize water returned from outside the Basin. First, it will turn off the two shallow wells. Second, New Berlin claims it will work to reduce infiltration and inflow (I/I) into its sewer system, by preventing surface water drainage from entering the sanitary sewer system through proper storm water management. New Berlin should further illustrate this, including the current I/I process, goals, and expectations, along with how it will be monitored. Finally, New Berlin proposes to simply not count the water coming into the system via the deep wells.<sup>16</sup> New Berlin states that there is a hydro-geologic connection in the deep sandstone aquifer, and that the water is tributary to the Basin.<sup>17</sup> New Berlin does not explain the relevancy of this fact, and supplies no supporting facts to this claim. To properly evaluate this claim, New Berlin must provide supporting documentation and analysis.

Furthermore, as this issue has come up during the proceedings of the current Legislative Study Committee with Waukesha making similar claims about hydro-geological connections with Lake Michigan for different reasons, and a Waukesha memo indicated that New Berlin would be the guinea pig on this idea, we ask the DNR to take this statement seriously. New Berlin should provide supporting scientific data for its claims about connections to the Lake Michigan Basin. Given that the science and data that is available in the region apparently does not support this characterization and the DNR needs to address this issue.

**Comment:** To adequately address the return flow requirement of the Compact, New Berlin should provide the following:

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<sup>13</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact, Section 4.9(1)(a)

<sup>14</sup> New Berlin Application Discussion Document, page 4.

<sup>15</sup> New Berlin Application Discussion Document, page 4.

<sup>16</sup> New Berlin Application Discussion Document, page 4.

<sup>17</sup> New Berlin Application Discussion Document, page 4-5.

- Reasons for wanting to add out-Basin water to the return flow of non-consumed water withdrawn from Lake Michigan;
- Indication of what portions of New Berlin west of the subcontinental divide will be served by Lake Michigan water;
- Indication of what portion of New Berlin west of the subcontinental divide will be served by MMSD for wastewater treatment;
- Results of a consultation with MMSD about New Berlin's proposal to add out-Basin water to its return flow, and ask for an evaluation of how this will affect the MMSD system, or what amount of water MMSD could accept from New Berlin without disrupting the MMSD system, and provide the DNR, public, and environmental advocacy groups with information obtained;
- Illustration of the plan to reduce infiltration/inflow process, goals, expectations, and monitoring plans; and
- Any study evaluating or concluding that "a hydrogeologic connection exists in the deep sandstone aquifer."<sup>18</sup>

### ***3. Unavoidable Need***

The Compact requires that applicants show that the "need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies." This criterion speaks to the fact that diversions should be rare, unique circumstances, employed only after communities have attempted to preserve their water supplies through diligent efficiency and conservation techniques, but are simply unable to reasonably avoid a shortage of water. In short, requests for diversions should only be raised as a last resort.

A fundamental part of addressing a water shortage is to adequately conserve existing supplies. New Berlin states that it is "dedicated" to water conservation, and then describes its four-part conservation practices, which consist of:

1. a year-round sprinkling restriction
2. public notice of said sprinkling restriction
3. leaflets
4. leak detection program, in which customers can ask for a free leak test of their toilets or water softeners tested for leaks if they feel their water consumption has increased since their last billing. The customer must then repair the leak and pay for any water used.<sup>19</sup>

We support the steps that New Berlin has taken towards conserving its water supply, but believe that these conservation practices still fall woefully short of the conservation practices that should be explored and utilized in order to demonstrate a need exists for a diversion of water from the Great Lakes. Beyond stating that its program has resulted in a 9.7% decrease in peak summer usage, and has "all of the needed elements of a successful conservation program," New Berlin omits any analysis of how additional

<sup>18</sup> New Berlin Application Discussion Document, page 4.

<sup>19</sup> New Berlin Application Discussion Document, page 7, and Appendix C.

water conservation measures or supplementing its supply with some water from the shallow aquifer would reduce the amount of Lake Michigan water needed to meet its water supply needs.<sup>20</sup> New Berlin claims that conservation efforts can only postpone the eventual need for Lake Michigan water, indicating that it could do more in the way of conservation, but completely fails to analyze its water conservation program, the amount of water that could be conserved, and whether or not conservation could remedy its current water shortage. Water conservation is discussed in more detail below, and those comments are incorporated here by reference.

To comply with the Unavoidable Need requirement, New Berlin should seriously discuss other options for obtaining water. New Berlin's Application briefly mentions some alternatives explored in this section of its application. They should do a more thorough job of exploring other options and also providing a price comparison for the different options to the extent possible. New Berlin's analysis of their unavoidable need for Great Lakes water does not explain what the existing water supplies are. Instead, New Berlin indicates that it has done several studies of water solutions since 1999, and in 2001 came to the weakly supported conclusion that it needed Lake Michigan water. New Berlin states that because its current water supplies are running out, have increased salinity, and have a problem with high levels of radium, it needs Lake Michigan water.<sup>21</sup> However, New Berlin's Application notes that as part of their 2004 Radium Remediation Study, it was suggested that New Berlin look for other water sources west of the continental divide but within MMSD service area, and secondly, treat the radium contaminated water.<sup>22</sup> By all indications, New Berlin has done neither of these. Indeed, the Compact requires much more than a showing that tapping into Lake Michigan is the easiest option. It would be helpful to know what other suggestions for water resources were included in the studies.

Also, New Berlin barely analyzes its current water supply, and states that there is not sufficient, shallow, radium compliant water available, but does not evaluate whether it had other options available, including, for example, an aggressive recycling program that could be combined with measurable conservation practices. New Berlin claims that radium in its deep aquifer can be removed, but not in adequate quantities for long term supply.<sup>23</sup> It provides no documentation of what water is contaminated, and how long treatment will allow New Berlin to continue using its current water sources. New Berlin claims that Lake Michigan is its only viable source for the long term needs of its community, despite the fact that its 2004 Radium Remediation study recommended Mississippi River Basin water supplies.

Since New Berlin submitted its application for a diversion of Lake Michigan water it has apparently initiated certain steps to ensure that the community will be in compliance with the radium drinking water standards in the short term. If this information is correct, it would be helpful to understand what measures it has employed to reach compliance and determine whether those measures and perhaps others would allow the community to

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<sup>20</sup> New Berlin Application Discussion Document, page 7.

<sup>21</sup> New Berlin Application Discussion Document, pages 5-6.

<sup>22</sup> New Berlin Application Discussion Document, page 6.

<sup>23</sup> New Berlin Application Discussion Document, page 7.

continue to meet the radium standards for the foreseeable future and whether or to what extent any diversion of Lake Michigan water would be necessary.

In sum, New Berlin has concluded that it needs Lake Michigan water without supporting that conclusion. New Berlin clearly has options in the Mississippi River Basin that need to be analyzed. Further, it must provide details about its current water sources, treatment of current water sources, and conservation of current water sources.

**Comment:** New Berlin does not support the standard of unavoidable need of Lake Michigan water; a circumstance that, if not refuted, would establish a harmful legal precedent for the region. To comply with the Unavoidable Need requirement, New Berlin should provide the following:

- A comprehensive report on what existing water supplies are, and what the potential capacity of those existing water supplies are;
- A comprehensive report on what efficiency and conservation practices are in place, including an analysis of how additional water conservation measures or supplementing its supply with some water from the shallow aquifer would reduce the amount of Lake Michigan water needed to meet its water supply needs;
- Copies of all the studies referred to on pages 5 and 6 of New Berlin's Application Discussion Document;
- A thorough explanation of all water resource options outside of Lake Michigan, including a price comparison for the different options to the extent possible;
- A detailed explanation of New Berlin's plan to use existing water supplies within applicable radium standards.

#### ***4. Limited, Reasonable Quantities***

The Compact requires that diverted water for applicants "will be limited to quantities that are considered reasonable for the purposes for which it is proposed." New Berlin states that it is within the industry standard for per capita, industry, outside, and unaccounted for water use.<sup>24</sup> They supply supporting information.

#### ***5. No Adverse Impacts***

The Compact requires that the proposal will:

result in no significant individual or cumulative adverse impacts to the quantity or quality of the waters and water dependent natural resources of the Basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal.<sup>25</sup>

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<sup>24</sup> New Berlin Application Discussion Document, page 8.

<sup>25</sup> Great Lakes – St. Lawrence River Basin Water Resources Compact, Section 4.9 (4)(d).

It should be clear to applicants and the public how the DNR will evaluate whether a proposed diversion will have a significant individual or cumulative adverse resource impact. It is important that the DNR have a measurable way to determine whether or not a significant adverse resource impact is likely to occur due to a withdrawal or diversion of water. This will be important in helping to determine the additional information that New Berlin will need to provide to the DNR.

To evaluate this criterion, New Berlin should research and evaluate the following factors:

1. any potential adverse impacts to the waters in the Basin, including any reduction in water levels in lakes or changes in flow in rivers and streams,
2. any potential adverse impacts to the natural resources of the Basin that depend on water including wetlands, fish, and other wildlife that depend on these resources

In evaluating these two factors, New Berlin should evaluate and consider any precedent-setting consequences of their proposal, and whether or not any of those consequences, when considered in light of other past, present and reasonably foreseeable future water withdrawals will have cumulative impacts on the above factors, including the potential cumulative impacts of other communities that will make similar arguments.

New Berlin does no such analysis, and concludes, in only four sentences, that the proposal "will not have significant impacts, nor set precedent for cumulative impacts."<sup>26</sup> This statement in itself indicates a failure to comprehend the legal requirement. At a basic level, New Berlin does not even recognize the standard's language; the standard for evaluation is "significant individual or cumulative adverse resource impacts," not merely "significant impacts." In a larger sense, however, this failure to understand the question explains New Berlin's failure to properly evaluate the impacts of its proposal

The fact that New Berlin is a straddling community that has an area served by a sewerage system that returns water to the Basin is unique for the area. There are only a few other communities that do not currently serve areas west of the divide and yet return flow to the Basin and those communities do not have the level of contamination in their water supplies that New Berlin has.

This statement does not seem relevant to whether not New Berlin's proposed diversion will have any adverse impacts to the waters or water-dependent natural resources in the Basin. It instead speaks to the potential precedent set by the decision.

1. The return flow will minimize outside water from entering the Basin and replace contaminated sources of supply (deep wells) that are currently in the Basin.

New Berlin has not provided sufficient information indicating how the return flow will minimize outside water from entering the Basin, nor how return flow will replace contaminated sources currently in the Basin.

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<sup>26</sup> New Berlin Application Discussion Document, page 9.

2. The proposal would discontinue the return of high radionuclide water and higher TDS water to the Basin.

This does not address the potential adverse effects that the proposed diversion will have on the water and water-dependent natural resources in the Basin.

3. The proposal would reduce the need for water softeners because Lake Michigan water is already soft and would thereby reduce the amount of chlorides sent to the Basin.

While this statement indicates that the amount of chlorides sent to the Basin will be reduced, it does not evaluate or in any way address potential adverse effects that the proposed diversion will have on the water or water-dependent natural resources in the Basin.

**Comment:** The application is deficient because it fails to identify and address potential significant adverse impacts on the waters and water-dependent resources in the Lake Michigan Basin. In order to help the DNR determine whether or not there is likely to be a significant adverse resource impact New Berlin's application should include, at a minimum:

- Source and location of the diversion and return flow;
- A description of baseline conditions regarding hydrologic flow, water quality and habitat;
- A projected diversion schedule including peak 30-day demand over the 90-day averaging period;
- Anticipated changes in water quality and water dependent natural resources;
- A description of all mitigation measures that will be implemented to prevent or eliminate significant impacts; and,
- A statement of how the diversion would relate to other existing withdrawals, diversions and consumptive uses in order to assist the DNR in its evaluation of the potential cumulative impacts from this application, including what impact will the granting of this and similar diversions and return flows have on capacity of MMSD to meet its current and new water quality goals.

Any application for a diversion must seriously consider and demonstrate what significant adverse impacts may result from the diversion. To do otherwise would set a potentially harmful legal precedent for the region.

***6. Environmentally Sound and Economically Feasible Water Conservation Measures to Minimize Water Withdrawals or Consumptive Use***

The Compact requires an applicant to incorporate water conservation measures that are "Environmentally Sound and Economically Feasible" in order to



minimize water withdrawals or consumptive use.<sup>27</sup> Indeed, the requirements of this section are detailed; the amount of time spent on this section is a result of the detail required, not an indication that it is a higher priority than other requirements. 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. 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.<sup>28</sup>

The Compact is clearly calling for a thoughtful, thorough conservation analysis and plan. In a 2005 publication called "Protecting Wisconsin's Water; A Conservation Report and Toolkit," ("MEA Toolkit") Midwest Environmental Advocates acknowledges that "choosing the best management practices to form the backbone of a successful conservation plan is a task that may seem daunting for policy-makers." Indeed, developing "environmentally sound and economically feasible water conservation measures" would be a complex task that would involve evaluating:

1. current water use and conservation measures, taking into account the methods, measures, technologies or practices for efficient water use that it is using,
2. environmentally sound, best practices applicable to the water use sector
3. conservation methods, measures, technologies, or practices for efficient water use are technically feasible and available
4. conservation methods, measures, technologies, or practices for efficient water use are economically feasible and cost effective based on an analysis that considers direct and avoided economic and environmental costs, and
5. conservation methods, measures, technologies, or practices for efficient water use are available, considering 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.

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<sup>27</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact, Section 4.9 (4)(e).

<sup>28</sup> Great Lakes-St. Lawrence River Basin Water Resources Compact, Article 1.2, Definition Environmentally Sound and Economically Feasible Water Conservation Measures.

In keeping with the Compact's conservation requirement, New Berlin should be required to undergo a comparable evaluation to analyze and to develop an intelligent, far-reaching water conservation plan for the city. It is clear under the Compact that a high standard, not a low standard, should be applied here. And, yet, outside of evaluating its water use and listing its four current conservation measures, New Berlin has failed to properly evaluate what water conservation best practice options are available to the water sector, what would be economically and technically feasible for New Berlin, and what particular facilities and practices are involved. Given their failure to address these critical components, New Berlin has failed from the outset to meet the appropriate level of inquiry.

New Berlin states that it will review a SEWRPC report on the regional area, and will invoke the report's recommended "procedures that can be of value and are allowable under current regulations." New Berlin's plans to adopt conservation measures for other communities does not suffice. The applicable criteria here require New Berlin to have a tailored evaluation and conservation plan in place before applying for a diversion. New Berlin has not completed this step, and therefore has failed to meet this requirement.

In the MEA Toolkit, MEA creates a three-step method for addressing each of these factors, which in turn will lead to identifying the "Environmentally Sound and Economically Feasible Water Conservation Measures to minimize water withdrawals or consumptive use," from which point a community can implement those measures. This three-step method is an appropriate measure for evaluating a conservation plan for a proposed diversion application. Suggestions for what a complete analysis would look like for New Berlin are analyzed through the three step process outlined in the MEA Toolkit. Step one is "Developing a Water-Use Profile," wherein a community details its current water supply and future needs, and "where, when, and how water is being used." The purpose of this step, outside of the value in gathering this vital information, is to allow the community to "develop water budgets," "set realistic conservation goals," and "select conservation measures and incentives that will prove most effective."

New Berlin has collected the information necessary to complete this step of a water conservation plan. The MEA Toolkit suggests breaking down water use into categories, such as residential, industrial, commercial, agricultural, public use, and loss. New Berlin has already done this, and found that 60% of their water is used residentially, 20% commercially, 15% industrially, and 5% through public use or other. However, we suggest these categories be broken into greater specificity. New Berlin also explains that there are significant residential use increases in the summer.

The next step in the MEA Toolkit is "Identifying, Evaluating, and Assessing Conservation Measures and Incentives." In this step, a community identifies, evaluates, and assesses "the existing myriad of conservation measures and incentives," which "come in many different forms and vary considerably in cost and ease of implementation." While the MEA Toolkit discusses different water conservation measures and incentives, and gives examples of best-management practices implemented around the U.S., it acknowledges that this is not a comprehensive list of best management practices or conservation programs, but is a "starting point" for decision-makers.

Therefore, New Berlin will have to do its own research of best management practices and water conservation program options.

Nevertheless, much of MEA's Toolkit is applicable to New Berlin. MEA's Toolkit suggests first looking at "Traditional Best Management Practices for Water Conservation," including ways to reduce residential and industrial water use, and water reuse and reclamation through educational, financial, and regulatory measures and incentives. Examples of educational measures and incentives include: school curriculum, bill inserts, TV and Radio Ads, demonstrations, training programs, and conservation checklists. Examples of financial measures and incentives include: rebates, conservation rate structures, incentive/surcharge fees, bill credits, and metering. Examples of regulatory measures and incentives include: water-efficiency ordinances, laws and plumbing codes for efficient water fixtures and appliances, landscape standards, irrigation scheduling, and penalties for outdoor water waste.

New Berlin's meager water conservation measures do not stack up against the MEA Toolkit list of examples. New Berlin should thoroughly investigate what measures and incentives are available to it, and then evaluate and analyze the effectiveness and technological and financial feasibility of each of the options.

Step three of MEA's Toolkit is "Selecting Conservation Measures and Incentives," where a community will choose appropriate conservation measures and incentives based off of the individual community's needs, supplies, and financial and technological capabilities. In this section of MEA's Toolkit, they outline twelve best management practices based off of a general analysis of Wisconsin's water usage, needs, and capabilities. MEA's analysis found that industrial and residential uses were the two highest uses in Wisconsin, so much of this list will address residential conservation measures and incentives, which are directly applicable to New Berlin's situation.

1. School and Public Information Programs
2. Residential Low-Flow Toilet and Appliance Replacement and Retrofitting programs and Incentives
3. Landscape Conservation Programs and Incentives for Residential and ICI Customers
4. ICI Customer On-Site Audit Programs and Informational Programs and Incentives
5. Implementation of Conservation Rate Structures
6. Promotion of Efficient Irrigation Practices and Technologies Among Residential, ICI and Agricultural Customers
7. Water Facility Leak Detection and Repair to Achieve Reductions in Unaccounted-for-flows
8. Land Use Planning Protective of Groundwater Resources
9. Developing Groundwater Recharge/Infiltration Systems
10. Increased Use of Reclaimed Water in Lieu of Other Water Sources –Especially for Irrigation
11. Leading by Example: Water Efficient Technologies in Public Parks and Buildings
12. Reduction of Thermoelectric Water Use Through the Promotion of Water Efficient Technologies, Renewable Energy Systems and Energy Conservation

Finally, we encourage communities to pursue other measures including recycling, reuse and recharge of groundwater.

**Comment:** New Berlin's application is deficient in addressing the important and complex criteria of "Environmentally Sound and Economically Feasible Water Conservation Measures to Minimize Water Withdrawals or Consumptive Use" because it failed to address the five components of the criteria and failed to consider the feasibility of all the water conservation options available. New Berlin should be required to address this criteria through an appropriate analysis, such as the three-step approach demonstrated within the MEA Toolkit.

Overall, New Berlin's conservation plan lacks the necessary analysis and scheduled implementation of conservation and efficiency measures, including recycling and reuse of the water that it does use, that the State of Wisconsin should require to meet this requirement of the Compact. If deemed sufficient by the DNR, New Berlin's conservation plan and practices would set a harmful low-bar precedent for Wisconsin and the Great Lakes Region at large.

### ***7. Compliance with All Applicable Laws***

The New Berlin application fails to identify the applicable laws and to explain how it will satisfy their requirements. The Compact standard would require this. At the very least, New Berlin needs to address Wisconsin's laws, the Public Trust Doctrine and WEPA. New Berlin should explain how it will comply with federal and state water quality requirements, including the area-wide "20\*" plans that impact MMSD's waste water treatment program. Further, unlike the Compact, DNR has authority to apply this law and, in fact, must do so prior to taking any action on New Berlin's diversion proposal.

The applicable water withdrawal requirements in Wisconsin law are Wisconsin Statute §281.35 and §281.41, governing water loss approvals and water system approvals. Wisconsin Statute §281.41 requires New Berlin to submit information about, and obtain approval for, the material changes to its water withdrawal and delivery system that would occur if it obtains approval to divert water from Lake Michigan.

Wisconsin Statute §281.35 requires New Berlin to submit substantial detailed information about its proposed water loss (via interbasin diversion) that will exceed 2 million gallons per day, including much of the information requested in this letter and information on the anticipated effects of the proposal on existing water and land uses.

Wisconsin Statute §281.35 also imposes a tough standard for New Berlin to meet that contains some criteria similar to those found in the Compact (e.g., no significant adverse impact, conservation measures) and several criteria that go beyond the Compact's requirements. In particular, New Berlin will need to demonstrate (1) no adverse effects on public water rights in navigable waters, (2) no conflict with state plans for future water use, and (3) further development of its water resources is impracticable or would have a substantial adverse economic, social or environmental impact.

New Berlin must include all this information in its diversion application in order for the DNR and the public to have a thorough understanding of its proposal and to meet this criteria of the Exception Standard.

### **III. CONCLUSION**

In sum, New Berlin's application fails to meet the criteria under the Exception Standard in a meaningful way that will both protect the water and water dependent natural resources of the Great Lakes Basin and that will set an appropriately high standard for the rest of the Basin to meet when evaluating diversion applications. Given the precedent-setting nature of New Berlin's application, it should be a shining example of a diversion application, setting the bar high for diversion applications in the future. The DNR thus should scrutinize the application mindful of this imperative and either reject the application or require New Berlin to correct the identified deficiencies prior to a final determination.

The DNR should keep in mind that it does not have unilateral authority at this time to approve a diversion application submitted by New Berlin. WRDA is the existing federal law governing Great Lakes Basin diversion requests. While the Compact standards reflect the states' consensus on how future diversion proposals ought to be managed, at best these standards can be used to inform the WRDA process, but they are not controlling on the process until the Compact is ratified. In order for New Berlin to gain access to Great Lakes water, the application would be subject to approval under WRDA.

In closing, we would note that these comments are not meant to be exhaustive, nor could they, given the standards for Wisconsin will not be clear until the legislature acts on the Compact. Thank you for allowing the opportunity to participate in this process. An appropriate next step is for the DNR to hold a public hearing to accept comments on New Berlin's diversion application. Clean Wisconsin looks forward to working with you to protect the Great Lakes for current and future generations.