

BEFORE THE STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES  
WATER DIVISION

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
AND DECISION

The Wisconsin Department of Natural Resources (DNR) has the authority under §281.346(4)(c), Wis. Stats., to approve a proposal to begin a diversion of Great Lakes water to an area within a straddling community but outside the Great Lakes basin if certain conditions are met. DNR has reviewed an application for a proposed diversion from the City of New Berlin and issues the following Findings of Fact, Conclusions of Law and Decision regarding the proposed diversion.

Findings of Fact

The Department of Natural Resources (DNR) finds that:

- 1) The City of New Berlin applied to DNR for a diversion of Great Lakes water under §281.346(4)(b), Wis. Stats.
- 2) The City of New Berlin's application for a diversion included the following materials, consistent with §281.346(4)(b), Wis. Stats.: Amended Sample Application for Straddling Community Water Diversion Volume 1; Amended Sample Application for Straddling Community Water Diversion Volume 2; a 2003 Agreement between the Cities of Milwaukee and New Berlin; a 2008 Agreement between the Cities of Milwaukee and New Berlin; and a Water Supply Service Area Plan. The City of New Berlin also submitted supplemental information in letters dated March 9, 2009 and April 20, 2009 from its consultant (Ruekert-Mielke) to the DNR.
- 3) The area of the City of New Berlin to which the City has proposed to extend Lake Michigan water is currently served by groundwater containing high levels of radium, a known carcinogen posing a public health threat. The City of New Berlin has investigated other water supply options and has determined that obtaining water from Lake Michigan is the most cost-effective alternative for meeting its long-term needs, based on an analysis of regional and individual water supply and water conservation alternatives.
- 4) The City of New Berlin has implemented ongoing water conservation measures and has committed by City Resolution to increase its water conservation over the next twenty years.
- 5) The portion of the City of New Berlin lying east of the subcontinental divide is currently served by Lake Michigan water, through an agreement with the City of Milwaukee. The "subcontinental divide" refers to the single major surface-water divide that separates areas that slope down toward the Great Lakes from areas that slope in other directions.
- 6) The City of New Berlin's diversion application proposes to expand the area of the city served by Lake Michigan water to include an area representing approximately the middle third of the city lying immediately west of the subcontinental divide.
- 7) The area immediately west of the subcontinental divide to which the City of New Berlin proposes to extend the supply of Lake Michigan water is currently served by the Milwaukee

Metropolitan Sewerage District (MMSD) for its wastewater needs, and the wastewater from the area is currently discharged to Lake Michigan.

- 8) The DNR received a copy of a letter dated 20 March 2009 from MMSD, a copy of which is attached, indicating MMSD's willingness to accept the return flow of the diverted water from the current sewer service area in New Berlin in accordance with MMSD's approved 2020 Facilities Plan.
- 9) The City of New Berlin's diversion application indicates that the amount of water returned to the source watershed (Lake Michigan) by the City of New Berlin will exceed the amount of water diverted from the Lake Michigan watershed. A portion of the water supply service area to which the City of New Berlin proposes to divert Lake Michigan water consists of residences that currently receive their water supply from private wells, but that discharge wastewater to MMSD.
- 10) The City of New Berlin implements an ongoing program to reduce the amount of rainfall-induced infiltration and inflow entering the sanitary sewer system.
- 11) The DNR held a public hearing on 12 March 2009 at the City of New Berlin City Hall to give interested persons an opportunity to comment on the City of New Berlin's diversion application. Prior to the public comment portion of the hearing, the Department held an hour-long open house to allow interested persons an opportunity to ask questions of DNR personnel, a representative of the South East Wisconsin Regional Planning Commission, and representatives of the City of New Berlin, including New Berlin Mayor Jack Chiovatero, and a consultant for the City.
- 12) The DNR issued a response to comments dated 21 May 2009.

#### Conclusions of Law

DNR concludes that:

- 1) The City of New Berlin's diversion application complies with the requirements of §281.346(4)(b), Wis. Stats.
- 2) The City of New Berlin is a "straddling community" as defined in §281.346(1)(t), Stats., since its boundary existing as of 8 December 2008 is partly within the Lake Michigan basin and is wholly within the county of Waukesha that lies partly within the Lake Michigan basin. Consequently, the diversion proposal is reviewed by DNR under §281.346(4)(c), Wis. Stats.
- 3) Subject to the following conditions being met, the proposal to begin a diversion to the City of New Berlin, may be approved:
  - a. The water that the City of New Berlin proposes to divert from Lake Michigan will be used solely for public water supply purposes, as required by §281.346(4)(c)(intro.), Wis. Stats., and as the phrase "public water supply" is defined in §§281.346(1)(pm) and 281.348(1)(d), Wis. Stats.
  - b. The amount of water returned to the source watershed (Lake Michigan) by the City of New Berlin will at least equal the amount of water diverted from the Lake

Michigan watershed less an allowance for consumptive use, as required by §281.346(4)(c)1., Wis. Stats.

- c. Any surface water or groundwater from outside the Lake Michigan watershed that is returned to the Lake Michigan watershed will be from a wastewater treatment system that combines water from inside and outside the Lake Michigan basin, and all returned water will be treated to meet applicable wastewater discharge permit requirements under §283.31, Wis. Stats., and to prevent the introduction of invasive species into the Lake Michigan basin, as required by §281.346(4)(c)2.a. and b., Wis. Stats.
  - d. The City of New Berlin will maximize the amount of water withdrawn from the Lake Michigan basin that will be returned to the source watershed, and will minimize the amount of water from outside the Great Lakes basin that will be returned to the Lake Michigan watershed, such as through infiltration and inflow reduction efforts, as required by §281.346(4)(c)2.c., Wis. Stats.
- 4) The City of New Berlin's proposed diversion is consistent with the water supply service area plan that is approved by the DNR, as required by §281.346(4)(c)2m., Wis. Stats., as described in the attached water supply service area plan and diversion approval.
  - 5) Because the City of New Berlin's proposed diversion of Great Lakes water will be received from the City of Milwaukee Water Works pursuant to the 2008 Intergovernmental Cooperation Agreement between the cities, and because the amount of water diverted to the area lying immediately west of the subcontinental divide is within the City of Milwaukee's initial withdrawal amount (baseline) as calculated pursuant to §281.344 (5m) and (4e), Wis. Stats., the proposed diversion to the City of New Berlin will not result from a "new withdrawal or an increase in a withdrawal" as that phrase is used in §281.346(4)(c)3., Wis. Stats.
  - 6) There is nothing in the diversion application to suggest that the proposal would result in a new water loss from consumptive use that would average 5,000,000 gallons or more per day in any 90-day period. Consequently, the proposal is not subject to regional review by the regional body, under § 281.346(4)(c)4., Wis. Stats.
  - 7) The conditions required for DNR approval of a water supply service area plan in §281.348(3)(d) have been met.
  - 8) DNR complied with the public notice and comment procedures set forth in §281.346(9)(b), Stats.

Decision

The DNR approves the City of New Berlin's proposal to begin a diversion of Lake Michigan water, as outlined in the City's application, subject to the conditions in the Conclusions of Law, and pursuant to the terms of the Water Supply Service Area Plan and Diversion Approval dated 21 May 2009, which is attached hereto and incorporated herein by reference.



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Todd L. Ambs, Administrator  
Division of Water

May 21, 2009  
Date



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Eric K. Ebersberger, Chief  
Water Use Section  
Bureau of Drinking Water & Groundwater

May 21, 2009  
Date