

*Delivered via electronic mail*

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RE: Village of Somers' Diversion Application

Ms. Pfeiffer:

The undersigned organizations submit these public comments on the Village of Somers' application to divert 1.2 million gallons per day from Lake Michigan to a portion of the Village outside the Great Lakes Basin. Please let us know if you have any questions or concerns.

Sincerely,

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## COMMENTS ON THE VILLAGE OF SOMERS APPLICATION TO DIVERT LAKE MICHIGAN WATER

The Great Lakes-St. Lawrence River Basin Water Resources Compact (hereafter, “The Great Lakes Compact”) and Wisconsin’s implementing statute prohibit diversions of water from the Great Lakes to areas outside of the basin with limited exceptions. Applicants for diversions of Great Lakes water have the burden of meeting applicable regulatory requirements with adequate evidentiary support to qualify for those exceptions. Those exceptions are in place primarily to ensure that communities near the Great Lakes but outside the basin have access to potable water when alternatives are otherwise unavailable, not to support urban and suburban sprawl. That is especially the case when such sprawl is motivated by predominately non-residential purposes, and corresponding diversion applications should be subject to the utmost scrutiny. With that in mind, Midwest Environmental Advocates, Clean Wisconsin, the Alliance for the Great Lakes, and Milwaukee Riverkeeper submit these comments on the Village of Somers’ Application to divert an average of 1.2 million gallons of water per day from Lake Michigan to a portion of the Village that is outside the Great Lakes Basin.

Although explained in greater detail below, we provide the following overview of our comments:

- (1) The Wisconsin Department of Natural Resources (“DNR”) needs to promulgate a rule better establishing the procedural and informational requirements for water supply service area plans.
- (2) The Village of Somers needs to perform an adequate cost-effective analysis of alternative water supplies.
- (3) The DNR should condition any approval of the proposed diversion on the Village of Somers demonstrating, on an ongoing basis, that it has adequately implemented and completed necessary water conservation and efficiency measures.
- (4) The DNR should not approve the proposed diversion until the Village of Somers obtains all other applicable regulatory approvals.
- (5) The DNR should condition any approval of the proposed diversion with a continuing obligation that the Village of Somers meets the public water supply purposes requirement.

### I. Straddling Community & Exception Standard Requirements

Since the Village of Somers is requesting a diversion “that would average 100,000 gallons or more per day in any 90-day period”, it must meet the straddling community and exception standard requirements contained in the Great Lakes Compact and state implementing statutes.<sup>1</sup> Those requirements place the burden on applicants to demonstrate, among other things, that:

- (1) The proposal is consistent with an approved water supply service area plan;
- (2) The need for the diversion cannot be reasonably avoided through conservation and efficient use of existing water supplies;

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<sup>1</sup> Wis. Stat. § 281.346(4)(c).

- (3) The diversion is limited to reasonable quantities for the proposed purpose;
- (4) The diversion is in compliance with all applicable local, state, and federal laws; and
- (5) The proposal is for public water supply purposes.<sup>2</sup>

### **A. Water Supply Service Area Planning**

We have significant concerns that the DNR continues to process diversion applications and corresponding water supply service area plans without fulfilling its statutory mandate to “establish, by rule, and administer a continuing water supply planning process for the preparation of water supply plans.”<sup>3</sup> Although the DNR attempted to promulgate such a rule, it was ultimately withdrawn in 2014, and to our knowledge has not been reintroduced. Section 281.348 of the Wisconsin Statutes provides minimum procedural and informational requirements, but lacks important detail on exactly how those requirements are to be fulfilled, depriving both applicants and the public of much needed clarity.

The lack of an administrative rule further establishing water supply service area planning procedural and information requirements also calls into question whether any diversion application can comply with the statutory mandate that the proposed diversion “is consistent with an approved water supply service area plan under s. 281.348.”<sup>4</sup> If such plans must be developed in accordance with an administrative rule that Section 281.348 requires, and that rule does not exist, the plan cannot be approved and the proposed diversion cannot be consistent therewith. We encourage the DNR to reintroduce and promulgate a water supply service area planning rule to provide clarity to both applicants and the public as to the procedural and informational requirements involved, and to ensure the DNR is on solid legal footing when considering diversion applications.

#### **i. Water Supply Alternatives.**

The water supply service area planning statute requires water supply service area plans to identify “the options for supplying water in the area for the period covered by the plan that are approval under other applicable statutes and rules and that are cost-effective based upon a cost-effective analysis of regional and individual water supply and water conservation alternatives.”<sup>5</sup> “Cost-effective analysis” is defined as “a systematic comparison of alternative means of providing a water supply in order to identify alternatives that will minimize total resources costs and maximize environmental benefits over a planning period.”<sup>6</sup> “Total resources costs”, in turn, is defined as including “monetary costs and direct and indirect environmental as well as other nonmonetary costs.”<sup>7</sup> The Village of Somers has not engaged in a systematic, comparative review of identified alternatives and the proposed diversion, including economic and environmental

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<sup>2</sup> Wis. Stat. § 281.346(4)(c), (f).

<sup>3</sup> Wis. Stat. § 281.348(3)(a).

<sup>4</sup> Wis. Stat. § 281.346(4)(c)2m, (e)1.em.

<sup>5</sup> Wis. Stat. § 281.348(3)(c)4.

<sup>6</sup> Wis. Stat. § 281.348(1)(b).

<sup>7</sup> Wis. Stat. § 281.348(1)(e).

impacts. The DNR should require the Village to provide more information that is necessary to determine whether this requirement has been met.

The Village identifies the installation of groundwater wells as the only alternative to its proposal to divert water from Lake Michigan via purchases from the Kenosha Water Utility. Rather than engaging in a systematic comparison of these alternatives, Somers provides a cursory review of estimated costs associated with the installation of groundwater wells based on costs from a “similar project” in Elkhorn, Wisconsin, and then determines that such costs would be prohibitive. These estimated costs are not itemized in terms of construction, operation, maintenance, etc., nor are the similarities and differences between the Village’s proposal and the Elkhorn project discussed. These estimated costs are also not compared to the costs of implementing the proposed diversion.

The Village’s comparative review of the environmental impacts associated with the proposed diversion and groundwater alternative is cursory as well. The water supply service area plan mentions that the Village has used shallow and deep aquifers in the past, but that they were deemed unreliable in the long-term due to declining water levels and significant treatment costs. To be sure, historical groundwater pumping in southeast Wisconsin has led to declining aquifer levels and water quality issues, but the use of groundwater throughout the region has changed in recent years and will continue to change in coming years. Somers needs to conduct an updated analysis of using groundwater based on these changes. That analysis should be performed in the context of meeting the projected needs of the proposed diversion area, not the entire Village.

Finally, the Village seems to imply that its existing intergovernmental agreement with the City of Kenosha to be the exclusive water supplier for the Village should have bearing on its ability to obtain a diversion. Such agreements should not be a basis of need for a diversion or a basis for determining that alternatives are infeasible, and municipalities should refrain from simply expecting diversion approvals when entering into those agreements.

#### **B. Reasonably Avoiding the Need for the Diversion Through Conservation and Efficient Use of Existing Water Supplies.**

Diversion applicants must demonstrate that “[t]he need for the proposed interbasin transfer cannot reasonably be avoided through the efficient use and conservation of existing water supplies.”<sup>8</sup> This demonstration must be in accordance with Wis. Admin. Code ch. NR 852,<sup>9</sup> which requires the submission of a water conservation plan.<sup>10</sup> Applicants are also required to submit written documentation showing the implementation or completion of conservation and efficiency measures (“CEMs”).<sup>11</sup> Adequately implementing these CEMs is important because they reduce the overall need for water and therefore the need to divert water outside the Great Lakes

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<sup>8</sup> Wis. Stat. § 281.346(4)(f)1.

<sup>9</sup> Wis. Stat. § 281.346(4)(g).

<sup>10</sup> Wis. Admin. Code NR § 852.04(1).

<sup>11</sup> Wis. Admin. Code NR § 852.05(1).

Basin. While the Village has submitted a water conservation and efficiency plan, it is clear that more information is needed to assess whether they have adequately implemented the CEMs.

For example, among those CEMs is a requirement that public water systems develop a written program to control water losses.<sup>12</sup> Public water systems regulated by the Wisconsin Public Service Commission (“PSC”) must comply with the procedures established in Chapter PSC 185 of the Wisconsin Administrative Code. Under those procedures, a public water system like the Village’s must submit an annual water audit.<sup>13</sup> When a water audit shows more than 15 percent water loss for that year, public water systems must submit a water loss control plan, explaining the water loss, describing the measures the public water system will take to reduce the water loss to acceptable levels within a reasonable time period, and analyzing the costs associated with the water loss control program.<sup>14</sup>

In the Village’s water conservation and efficiency plan, it states that historical water losses are approximately 12 percent while recognizing that water loss was 16 percent in 2018. The Village attributes this to water main breaks in the Sheridan Road area and indicates its intention to replace the water mains in that area in 2020. As an initial matter, the Village needs to update its plan to indicate whether the Sheridan Road water main project was completed or explain why not and describe the plan for completion. The Village must also explain water losses of 15.7 percent in 2017 and 18 percent in 2019, indicated in the table on page 23 of the water conservation and efficiency plan, because it is clearly trending in the wrong direction.

We encourage the DNR to analyze whether the Village is adequately implementing and completing all the applicable CEMs, and to condition any approval of the proposed diversion on the Village demonstrating such on an ongoing basis. That condition should include measurable target dates and an accountability mechanism if the condition goes unmet. It may not obviate the need for the proposed diversion, but it certainly will reduce the amount of water the Village needs to divert, which it must do for its application to be approved.

### **C. The Diversion Must Be in Compliance with Applicable Local, State, and Federal Law.**

We are extremely concerned that the Village began constructing part of the infrastructure necessary to implement its proposed diversion prior to receiving authorization from the PSC. As the DNR is aware, the PSC issued Somers and its consultant a formal reprimand for failing to obtain a Certificate of Authority from the PSC before completing approximately 75 percent of a water main project at a cost of over \$2.5 million. In response to the reprimand, Somers developed a compliance plan that involves consulting with legal and technical experts, as well as the DNR and the PSC—something the Village had already done prior to violating state statutes and PSC regulations. Indeed, the Village seems to be taking its ability to obtain diversion approval for granted, which is contrary to the concept that diversions are prohibited with limited exceptions.

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<sup>12</sup> Wis. Admin. Code NR § 852.04(2), tbl. 1.

<sup>13</sup> Wis. Admin. Code PSC § 185.85(3).

<sup>14</sup> Wis. Admin. Code PSC § 185.85(4).

The DNR should not grant Somers approval for its proposed diversion until after it obtains all other applicable regulatory approvals and thereby demonstrates its commitment to complying with local, state, and federal laws, which is required for diversion approval.<sup>15</sup>

#### **D. Public Water Supply Purposes Requirement**

We understand the DNR's interpretation of the public water supply purposes requirement in Wis. Stat. § 281.346(4)(c) to be whether the relevant utility operates a public water system that serves, as a whole, a group of largely residential customers, not whether the water being diverted serves a group of largely residential customers. While there may be some disagreement as to the correct interpretation, the Village's projected water uses at full build out in 2050 indicate a disproportionate increase in the amount of water being used for industrial and commercial purposes as opposed to residential purposes.

The Village's 2018 water use summary indicates approximately 42 percent being used for residential purposes and approximately 15 percent being used for commercial and industrial purposes. Accounting for a conservative 10 percent water loss, the Village projects to use approximately 7.89 million gallons of Lake Michigan water per day in 2050, with 43.7 percent being used for residential purposes and 38.9 percent being used for business, commercial, and industrial purposes.

We encourage the DNR to subject the Village's water use projections to further scrutiny and analyze whether, even under the DNR's interpretation, the Village will satisfy the public water supply purposes requirement. For example, the DNR should require the Village to determine the margin of error in its population and corresponding water use projections, and include ranges rather than rigid numbers. And even if the Village satisfies the public water supply purposes requirement right now, DNR should consider conditioning approval of the proposed diversion with a continuing obligation to satisfy that requirement. This would ensure that diverting entities do not significantly alter projected water uses in the future, following diversion approval, so that they are no longer serving a group of largely residential customers.

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<sup>15</sup> Wis. Stat. § 281.346(4)(f)7.