



Protecting the Common Waters of the Great Lakes Basin
Through Public Trust Solutions

December 16, 2016

Director Heidi Grether
Michigan Department of Environmental Quality
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deq-eh@michigan.gov

Carrie Monosmith
Office of Drinking Water and Municipal Assistance
Michigan Department of Environmental Quality
P.O. Box 3024
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DEQ-EH@michigan.gov

RE: NESTLÉ APPLICATION FOR PW 101, OSCEOLA COUNTY, WHITE SPRINGS TO 400 GALLONS PER MINUTE (GPM), 576,000 PER DAY PERMIT APPROVALS AND PROCEEDINGS

Dear Director Grether and Ms. Monosmith:

FLOW (For Love of Water) is conducting an independent review of science, legal, and policy matters of the above matter. This purpose of this letter is to address what appears to be a serious legal error with Nestlé's applications.

FLOW appreciates your role and the Michigan Department of Environmental Quality's (DEQ) extensions to date for public comment, submissions, and public hearing(s) on Nestlé's Section 17 Safe Drinking Water Act (SDWA) application. We request your consideration and appropriate action as outlined below.

On January 5, 2016, the Department approved a Site-Specific Review request for the increased 400 gpm under Section 32706c, MCL 324.32706c (2008 Water Withdrawal Law). Without formal public notice, in late October 2016, the Department announced on its webpage Nestlé's application for water source approval under Section 17 of the SDWA, MCL 325.1017. After public outcry, and your own sensitivity to the lack of adequate public notice, hearing, and time period for public comments, the Department committed to a public hearing(s) and extended the public comment period to March 3, 2017 on Nestlé's application for approval under Section 17 of the SWDA.

Based on our review of publicly available documents to date and applicable law, the January 5, 2016 Site-Specific Review approval under Section 32706c of the Water Withdrawal Law should be nullified and set aside as contrary to law. The Nestlé application for water withdrawal for bottled water under Section 17 of the SWDA must be coordinated with an application required by Section 32723 of the Water Withdrawal Law. Public notice and public comments not less than 45 days and the requirements for the application and standards for approval are controlled by Section 32723, not site specific review under Section 32706c. Accordingly, Nestlé must resubmit its application under Section 32723 and Section 17 of SWDA.

Section 17(3) states that a person proposing to produce bottled water “from a new or increased large quantity water withdrawal of more than 200,000 gallons per day... shall submit an application to the department... containing an evaluation of environmental, hydrological, and hydrogeological conditions that exist and the predicted effects” that provide a “reasonable basis to make the determination under this section.”

Then, Section 17(4) states that “The department *shall only* approve an application under subsection (3) if the department determines both of the following: (emphasis added)

- (a) The proposed use will meet the applicable standard provided in section 32723” [of the 2008 Water Withdrawal Law, Part 327, MCL 324.32723];
- (b) “The person will undertake activities ... to address hydrologic impacts commensurate with the extent of the withdrawal,” and “These activities may include those related to stream flow regime...” [Note: imposition of conditions and limitations on withdrawals and pumping that reduce effects on flows and levels throughout the year, such as summer or drought conditions].

Therefore, Nestlé’s application is controlled by the mandatory requirements of Section 32723 (including public notice and public comment and specific standards for the Department’s decision) and not by Section 32706c. DEQ should have required Nestlé to apply for a permit and approval under Section 32723 *in conjunction* with its current Section 17 permit application.

Section 32723 provides that “(4) the department shall provide public notification of its receipt of applications under this section and shall provide a public comment period of not less than 45 days before applications are acted on under subsection (5). In addition, the Department cannot issue a permit unless an application complies with the following under subsection (6): “(b)... ensure that the proposal will result in no individual or cumulative adverse resource impacts... based on available information to the department;” and (c) [it is] “in compliance with all applicable local, state, and federal laws.”

To date, it appears from the record that Nestlé’s current application (400 gpm) does not comply with Section 17(3) and (4) and Section 32723. Similarly, Nestlé’s 2015 increase of 100 gpm up from the originally permitted 150 gpm also exceeded 200,000 gallons per

day when Nestlé registered under the WWAT on April 16, 2015; instead, Nestlé should have applied for a Section 17 permit under the SWDA and approval under Section 32723 as required by Section 17(3) and (4).

Accordingly, you are requested to set aside the Section 32706c site specific review approval, dated January 5, 2016, and any other approvals or permits for PW 101, and instruct Nestlé to submit an application under Section 32723 in conjunction with Section 17 of the SWDA. On submission of that application, it first should be determined to see if it is administratively complete, and once that is done, the matter should be given public notice and public comment period of not less than 45 days before the Department makes any decision. This should not pose a problem, because this can be coordinated with the public notice, hearing(s), and public comment period for Nestlé's current application proceeding under Section 17 of the SWDA. In order to coordinate the timing of both laws and applications, and because of the importance of this matter, the public notice should combine both applications, set hearing(s), and set a new time period for public comment.

Further, you are requested to ensure that all of the requirements of Section 17 of the SWDA, Section 32723 of the Water Withdrawal Law, Part 327, together with all applicable local, state, and federal laws, are addressed and fully complied with; if not, the Department is compelled to deny the requested applications.

It may be that the Department is aware of the above legal error and needs to set aside the January 5, 2016 Site-Specific Review approval. If so, please advise that you have done or will do so, and that the Department will apply Section 32723 to all aspects of the applications. If not, then please set aside the Site-Specific Review and direct Nestlé, the Department, and all interested persons and citizens to follow the provisions of Section 17 of the SWDA and the Water Withdrawal Law, Section 32723, and all other applicable laws and regulations, including the Michigan Environmental Protection Act, MCL 324.1701 et seq., common law of groundwater and riparian law, public trust law applicable to public trust waters, habitat, or wildlife, including fish, and inland lakes and streams laws, wetlands protection laws, and other laws, regulations or treaties of the U.S.

Should you or your staff have any questions, please advise by contacting Executive Director Liz Kirkwood or myself at (231) 944-1568 or liz@flowforwater.org; jim@flowforwater.org.

Thank you for your concern and attention to the above.

Sincerely yours,



James Olson
President and Law and Policy Advisor
FLOW (For Love of Water)