



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

February 22, 2016

Director Heidi Grether
Michigan Department of Environmental Quality
P.O. Box 30473
Lansing, MI 48909-7741

Carrie Monosmith
Office of Drinking Water and Municipal Assistance
Michigan Department of Environmental Quality
P.O. Box 3024
Lansing, MI 48909-7741

Via Email: deq-eh@michigan.gov; GretherH@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:

For Love of Water (FLOW) submitted comments on the legal framework for the above referenced applications and/or approvals on December 16, 2016. In your response letter dated January 17, 2017, Director Grether clarified and edified all involved on the legal framework, statutes, and standards that will apply to processing and evaluating the combined or cumulative requests.¹ This clarification is most appreciated.

The purpose of the instant letter is to address the procedural and substantive application requirements needed for Nestlé's combined and/or cumulative approval requests to extract high volumes of water from PW 101 and transport the water to the Stanwood Plant.

¹ Please note that while the laws you identified, Section 17 of the Safe Drinking Water Act (SDWA), MCL 325.1017, and Section 32723 of the Water Withdrawal Law, MCL 324.32723, fully apply, other laws apply to the review and determinations requested by Nestlé, including, not by way of limitation, the Inland Lakes and Streams Act (ILSA), MCL 324.30101 et seq., Wetlands Protection, MCL 324.30301 et seq., and Michigan Environmental Protection Act (MEPA), MCL 324.1701 et. Seq. (e.g. Section 1705(2) and duties imposed by the common law of the environment under the MEPA).

1. Public Comment Period Can Be 45 Days Or More.

Section 17(6) of the Safe Drinking Water Act (SDWA) requires an “opportunity for public comment of not less than 45 days.” Section 32723 of the Water Withdrawal Act (WWA) requires “a public comment period of not less than 45 days” before an application is acted upon. Under both the SDWA and WWA, applicable to the instant Nestlé request for approvals and determinations, the Department of Environmental Quality (DEQ or the Department) can schedule a public comment period for more than 45 days. In short, there is no maximum limitation of the number of days; implicitly, the time-period is governed by the complexity and nature of circumstances surrounding the request or applications.

For the reasons described below, FLOW has concluded and recommends that the DEQ extend the period and opportunity for public comment at least 60 days, or May 3, 2017.

2. The Public Comment Period Should Be Extended Where There is Insufficient Information To Make A Determination.

Section 17(3) requires Nestlé to “submit an application... containing an evaluation of *environmental, hydrological, and hydrogeological conditions that exist* and the predicted effects of the intended withdrawal that *provides a reasonable basis for the determination...*” (emphasis added).

Section 17(4), as recognized by the Department in its January 17, 2017 letter, authorizes an approval only if the proposed use meets the applicable standard in Section 32723 of the WWA and adequate conditions or restrictions are imposed for stream flow, water quality, and aquifer protection.

Section 32723(2) requires an “evaluation of existing hydrological and hydrogeological conditions” and “detailed description of the preventative measure” and how they will be implemented to protect flow regimes, aquifers, creeks, wetlands, and other water courses.

Among other standards, Section 32723(3) provides that where the Department requires additional information, its time requirement for approving or denying the application is tolled until the Department determines it has received the adequate information.

In other words, where the applicant has not submitted adequate information for the Department to make a determination, or the Department advises the applicant that it does not have sufficient information, the time-period for the determination is suspended. As a result, the Department can extend the time-period for public comment once the information is considered sufficient or administratively complete. Therefore, the Department has the authority and should extend the time-period for public comment to May 3, 2017.

3. The Information Submitted By Nestlé Is Incomplete And Otherwise Insufficient To Make A Determination.

To date, the Department has reversed earlier reviews based on a concern for sufficient information and corresponding adequate opportunity for evaluation, public comment, and the Department's determination on Nestlé's requests for approvals.

In the Department's letter to FLOW dated January 17, 2017, Director Grether made it quite clear that previous registrations and certifications by Nestlé, including its site-specific review, January 15, 2016, were not final, but conditional on final evaluations and review under Section 17 of the SWDA and Section 32723 of the WWA and its standards.

On February 14, 2017, the Department sent Nestlé a letter requesting critical information regarding the groundwater model, streamflow data, fish, and related biological data, wetlands, and legal criteria or standards applicable to the request for approvals. The Department expressly states that it has "identified additional information that is needed to continue the review." See **Exhibit 1**, attached hereto.

Based on the above, the critical data is insufficient to consider the application complete or to make a determination as required by the law.

Because the information is insufficient as needed to evaluate and make a determination and/or incomplete, the time period for public comment should be reset from the date the information is sufficient and/or complete, for at least 45 days; because March 3 is fast approaching, public comment should be extended to at least May 3, 2017.

We request an extension on the public comment period for the public and interested persons or organizations to at least May 3 provided that date is at least 45 days after you have received all sufficient information that is needed under the law and to evaluate and make a determination. Without such information, the SWDA and Section 32723 require a denial.

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

Exhibit 1



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
LANSING



C. HEIDI GREYER
DIRECTOR

February 14, 2017

VIA E-MAIL

Ms. Arlene Anderson-Vincent
Natural Resource Manager
Nestlé Waters North America, Inc.
19275 8 Mile Road
Stanwood, Michigan 49346

Dear Ms. Anderson-Vincent:

SUBJECT: Request for Additional Information
Permit Application, Under Section 17 of the Michigan Safe Drinking Water Act,
1976, PA 399, As Amended
White Pine Springs Well PW-101

Michigan Department of Environmental Quality (DEQ) staff have completed an initial review of information submitted in the above-referenced matter and have identified additional information that is needed to continue the review. Although this request comes through the Drinking Water and Municipal Assistance Division (DWMAD), the list is composed of staff contributions from across the Departments of Environmental Quality, Natural Resources, and Attorney General. Therefore, when responding, please reference the section and number so information can be routed to the appropriate technical review staff. Please provide the following:

Groundwater Model:

1. Electronic copies of all input and output data files used in the MODFLOW groundwater model (Groundwater Vistas format);
2. All supporting (electronic) data files, base map files, calibration data files, graphs, maps and tables, etc., used to construct the Groundwater Vistas model or the presentation of groundwater modeling results in S.S. Papadopoulos & Associates, Inc.'s July 2016 "Evaluation of Groundwater and Surface Water Conditions in the Vicinity of Well PW-101, Osceola County, Michigan."

Streamflow Data:

1. Any streamflow measurement data collected in Chippewa Creek and Twin Creek watersheds after October 2015;
2. All electronic Flow Tracker data files available for measurements collected in 2015 and 2016;
3. A site map, which includes all streamflow measurement locations in the Chippewa Creek and Twin Creek watersheds;
4. If Nestlé Waters North America, Inc. (Nestlé), implemented modifications to the streamflow measurement protocol since the last version received by the DEQ, update the March 2, 2015, Streamflow Measurement Protocol for the city of Ewart and White Pine Springs memo.

Fish, Macroinvertebrates, and Aquatic Habitat Data:

1. Individual sampling event data tables for fish, macroinvertebrates, stream dimensions, and water temperature for each sampling event for each creek;
2. Describe the methods used for habitat, fish collection, and macroinvertebrate collection;

3. Provide catch per unit effort for fish collection, including the length of stream, time sampled, fish length and weight;
4. Revise Figure 1-2 in S.S. Papadopoulos & Associates, Inc.'s 2016 report "White Pine Springs Evaluation of Fish, Macroinvertebrates, and Aquatic Habitat Resulting from an Increase in Groundwater Withdrawal" to show the location of Station SF8-1;
5. Table 2 in the same report has several errors regarding Orders and Families: Order Basommatophora, Family Physidae and Order Pulmonata, Family Physidae should be consolidated into one category; Order Ephemeroptera and Family Letohyphidae should be Family Tricorythidae; Order Plecoptera, Family Philopotamidae should be Order Trichoptera;
6. D-framed kick nets were used to survey mussels and the reference provided (Merritt, et al., 1996) is for aquatic insect sampling. Please confirm whether mussels were collected using D-framed kick nets. If not, please provide a reference for the method that was actually used. If D-framed kick nets were actually used, please note that this is not an appropriate method for mussel sampling and refer to the following links for methods that should be used in the future:

<https://wildlife.ohiodnr.gov/portals/wildlife/pdfs/licenses%20&%20permits/OH%20Mussel%20Survey%20Protocol.pdf>

https://www.fws.gov/westvirginiafieldoffice/PDF/West_Virginia_Mussel_Survey_Protocols_March_2014.pdf

7. Provide water temperature details for Stations SF9, SF8, and SG5, and how the proposed withdrawal increase could affect those stream temperatures;
8. Provide detailed information regarding changes in streamflow, depth, and temperature for each station and the impacts to macroinvertebrates;
9. Identify all road/stream crossings for Chippewa and Twin Creeks, provide photographs of these stream crossings, existing dimensions of culverts or bridges, stream widths, and stream depths. Project changes to stream widths and depths due to the proposed withdrawal increase;
10. Provide rating curves and temperature data for Chippewa and Twin Creeks and describe how the rating curves were developed;
11. Describe the inputs to the United States Geological Survey program Stream Segment Temperature Model Version 2.0 used by S.S. Papadopoulos & Associates, Inc., and how they were determined.

Wetlands

1. In the Environmental Consulting & Technology, Inc. (ECT) report, reference is made to water level measurements, soil samples and monitor wells. Please provide this data as well as any additional monitoring observations, plant identification, etc., conducted by ECT. Copies of soil boring logs identifying soil sample descriptions and depths, any sieve analyses, and water levels measured/used in the wetlands evaluations should be submitted. The data should be clearly presented in table or other appropriate format and a map of all data locations provided. The latitude/longitude in decimal degrees and North American Vertical Datum (NAVD) of each sample or measurement location should be provided if known. Were multiple borings taken within each wetland to document consistent soil layers?

2. A copy of the wetland delineations and associated reports, data, and maps for the project area (including the Don Tilton report).
3. Any additional water level measurements available (e.g., prior to and after pumping, current levels, etc.), preferably data close to or in the wetlands.
4. Explanation of why wetlands underlain by silt, etc., should be considered perched.

Reasonable Use and Michigan Water Law

1. Section 5. D. of the application package, at pages 23-27, states that “[t]he proposed use is reasonable under common law principles of water law in Michigan,” as required by MCL 324.32723(6)(d). Please: (a) document, by reference to relevant sources of Michigan law (e.g., Michigan case law and authoritative secondary sources), the specific legal bases for Nestlé’s stated understanding of “common law principles of water law in Michigan,” and (b) explain in detail how the proposed use is “reasonable” under the documented “common law principles.”
2. Section 5. F of the application package, at pages 27-28, states that “the proposed withdrawal will not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties,” as required by MCL 324.3723(6)(f). Please: (a) document, by reference to relevant Michigan sources of law (e.g., Michigan case law and authoritative secondary sources), the specific legal bases for Nestlé’s stated understanding of “public or private rights and limitations imposed by Michigan water law or other Michigan common law duties,” and (b) explain in detail why the proposed withdrawal will not violate the documented “public or private rights or limitations imposed by Michigan water law or other Michigan common law duties.”

Once you and your staff have had time to review the above, please let me know if you would like to schedule a conference call or meeting to discuss the request further. I can be reached at 517-897-1508; gamblej1@michigan.gov; or by mail at DEQ, DWMAD, P.O. Box 30241, Lansing, Michigan 48909-7741.

Sincerely,



James (Matt) Gamble, Supervisor
Source Water Unit
Drinking Water and Municipal Assistance Division

cc: Mr. Robert Reichel, Department of Attorney General
Ms. Tammy Newcomb, Department of Natural Resources
Ms. Maggie Pallone, DEQ
Mr. Bryce Feighner, DEQ
Ms. Diana Klemans, DEQ
Ms. James Goodheart, DEQ