



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

November 13, 2017

Director Heidi Grether
Michigan Department of Environmental Quality (“DEQ”)
P.O. Box 30241
Lansing, MI 48909-7741
deq-eh@michigan.gov

Mr. James Gamble
Office of Drinking Water and Municipal Assistance
Michigan Department of Environmental Quality
P.O. Box 30241
Lansing, MI 48909-7741
deq-eh@michigan.gov

VIA EMAIL SUBMISSION

RE: NESTLÉ WATERS’ APPLICATION FOR PW 101, OSCEOLA COUNTY, WHITE SPRINGS TO INCREASE PUMPING FROM 150 GALLONS PER MINUTE (“GPM”) TO 400 GPM, PW 101, OSCEOLA TOWNSHIP, OSCEOLA COUNTY MICHIGAN PURSUANT TO SECTION 17, SAFE DRINKING WATER ACT (“SDWA”), MCL 325.1017, SECTION 32723, GREAT LAKES PRESERVATION ACT (“GLPA”), MCL 324.32723, AND OTHER APPLICABLE COMMON LAW AND STATUTORY REQUIREMENTS

Dear Director Grether and Mr. Gamble:

For Love of Water (“FLOW”) submits this Supplemental Letter on the above Nestlé Waters’ Application to expand its water well to 400 gpm, from the initial permit granted in 2001, approved by DEQ under the SDWA in 2007 and 2009. All of our previous reports and appendices addressing hydrological, geological, effects and impacts, and inadequacy of information required for a “reasonable determination” are incorporated by reference.

For purposes of this letter, FLOW emphasizes the fact that all permit applications beyond the original 150 gpm permit all far exceed the 200,000 gallons per day (“gpd”) that trigger the full application of the requirements of Section 17 of the SDWA and Section 32723 of the GLPA (MCL 324.32723). In fact, because the GLPA and amendments to Section 17 of the SDWA regarding water withdrawn for bottled water operations, the 2009 approval of the 150 gpm (216,000 gpd) exceeded the threshold and triggered the full sweep of requirements under Section 17 of the SDWA and Section 32723 of the GLPA.¹

¹ The original permit for 150 gpm or 216,000 gpd has never been permitted as required by law. As described in Section B.1. of this report, Nestlé filed a voluntary application under Section 32724, for a narrow determination of “no adverse resource impact” to “characteristic fish populations” before the water assessment tool was in place. The DEQ approved the voluntary request for no adverse impact in 2007, but explicitly stated this did not satisfy and Nestle would have to obtain any other permits and approvals. Final approval came in 2008, and the permit under Section 17 SDWA was not obtained until 2009. At all relevant times, Section 17 required a permit for bottled water withdrawals exceeding 200,000 gpd. The original 150 gpm totaled 216,000 gpd and required a permit under Section 17(3) and (4). Moreover, a determination was required that it complied with the standards of Section 32723 (not 32724) of the GLPA. As a result, the Nestlé permit for 150 gpm from PW-101 is contrary to and not in compliance with law; Nestlé has pumped from 2009 to the present without a valid permit under Section 17 and Section 32723. The application in the instant matter does not address or evaluate the original 150 gpm, only the increment of 250 gpm, and therefore the current level of pumping by Nestlé is contrary to law for lack of required permits.

Specifically, FLOW emphasizes that Nestlé's is not in compliance with the Osceola Township zoning ordinance: Osceola Township has denied Nestlé's request for a zoning permit and special use permit for its proposed booster pump and related facilities required to transfer water from the well by pipeline for quantities above 150 gpm to the transfer and haul facility in Evert.

Zoning is a state delegation of power from the legislature to local governments, in this case Osceola Township, to establish land use districts, uniform uses allowed by right and special permit if expressly designated within those districts, and the authority to regulate land use activities to protect air, water, and natural resources. MCL 125.3201, 125.3202, 125.3203. In the instance of water withdrawn for bottled water operations, especially those for spring water defined by the FDA, the water is *not* returned but loss to the watershed because it is diverted or transferred off track and out of the watershed for export and sale elsewhere. This creates serious competition for water related to land uses and characteristics, including adequate water in streams, wetlands, lakes, ponds, and other natural uses and resources. It also creates competition from other uses of land or potential uses of land authorized in a land use district, such as agricultural, residential, recreation and related habitat.

As such, independent of questions regarding effects from high-volume water wells on hydrology and environment or yields, regulated by Section 17 of the SDWA and Section 32723 of the GLPA, local governments are vested with authority through state delegated zoning law to determine which uses are allowed by right or designated for special use permits to address local land and related water use and natural resource considerations related to potential, threatened, or actual competing land and related water uses in a given district and local government area.

Section 17(4) of the SDWA authorizes an approval only if “the proposed use will meet *the applicable standard provided in Section 32723*” of the GLPA. Until this information has been submitted, it necessarily follows that Nestlé has not and cannot meet the standards under Section 17 and Section 32723, and the application must be denied. One of the standards under Section 32723 requires a showing that the withdrawal will be implemented or used in compliance with local laws and ordinances. Section 32723(6)(c) mandates that the Nestlé's must demonstrate that withdrawal as implemented, including the booster pump required to transfer the water for bottling, just be “in compliance with all applicable local, state, and federal laws.”

Nestlé has filed a lawsuit against Osceola Township in the Osceola Circuit Court to appeal the township's denial of special use permit and the decision by the township's zoning board of appeals affirming the denial of such permit. Until this lawsuit and appeal are finally decided or otherwise reversed by courts, Nestlé has not and cannot demonstrate that it meets the applicable standards of Section 32723. A permit under Section 17 and Section 32723 can be issued only if all standards and requirements are met. Because Nestlé has not met this standard and requirement, the DEQ cannot, on this basis alone, issue any Section 17 and Section 32723 permit.

Accordingly, in addition to the other bases and requirements (including but not by way of limitation lack of adequate information and proper application of the common law of reasonable use doctrine under Michigan Supreme Court and Court of Appeals decision), the DEQ must deny Nestlé's current permit application.

Thank you for the opportunity to submit this additional essential information into the record of this matter.

Respectfully yours,

A handwritten signature in blue ink, appearing to read "James Olson", with a stylized flourish extending to the right.

James Olson

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

CC:

Governor Rick Snyder
Attorney General William Schuette
Asst. Attorney General Peter Manning
Asst. Attorney General Bob Reichel