



April 21, 2017

Sent by email to [deq-eh@michigan.gov](mailto:deq-eh@michigan.gov)

MDEQ, Drinking Water and Municipal Assistance Division  
Environmental Health Section  
PO Box 30241  
Lansing, MI 48909-7741

Re: Supplemental comments on the application by Nestlé Waters North America, Inc. for a permit pursuant to Section 17 of the Michigan Safe Drinking Water Act to withdraw large amounts of water

To Whom It May Concern:

## 1. Introduction

To further its bottled water operations, Nestlé Waters of North America, Inc. ("NW") has applied ("Application") for a permit under Section 17 of Michigan's Safe Drinking Water Act ("SDWA"), MCL 325.1017, to increase the large quantity water withdrawal to 400 gpm at its PW-101 well at the White Pine Springs Site in Ewart, Osceola County. After the public expressed surprise and concern at the lack of public notice, DEQ extended the comment period to March 3, and then again to April 21.

Freshwater Future and the Great Lakes Environmental Law Center, on behalf of all the organizations listed below, commented in March on the Application before NW provided significant amounts of brand new information to DEQ in response to DEQ's February 14, 2017 request. Following a review of the new information, we submit the following supplemental comments on the Application.

Attached to these supplemental comments is a supplemental report by Mr. Christopher Grobbel of Grobbel Environmental & Planning Associates in Lake Leelanau, Michigan. Our supplemental comments incorporate by reference the entirety of Mr. Grobbel's supplemental report, and will cite to it as Grobbel Supplemental Report.

## 2. Legal standards that apply to NW's application

SDWA § 17 states in relevant part:

(3) A person who proposes to engage in producing bottled drinking water from a new or increased large quantity withdrawal of more than 200,000 gallons of water per day from the waters of the state or that will result in an intrabasin transfer of more than 100,000 gallons per day average over any 90-day period shall submit an application to the department in a form required by the department 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 under this section to be made.

(4) The department shall only approve an application under subsection (3) if the department determines both of the following:

(a) The proposed use will meet the applicable standard provided in section 32723 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.32723.

(b) The person will undertake activities, if needed, to address hydrologic impacts commensurate with the nature and extent of the withdrawal. These activities may include those related to the stream flow regime, water quality, and aquifer protection.

MCL 325.1017(3), (4) (emphasis added). SDWA § 17 thus contains its own standards and also incorporates those of Part 327 ("Part 327") of the Natural Resources and Environmental Protection Act ("NPEPA").

//

//

The incorporated Part 327 standards are that:

- (a) All water withdrawn, less any consumptive use, is returned, either naturally or after use, to the source watershed.
- (b) The withdrawal will be implemented so as to ensure that the proposal will result in no individual or cumulative adverse resource impacts. Cumulative adverse resource impacts under this subdivision shall be evaluated by the department based upon available information gathered by the department.
- (c) Subject to section 32726, the withdrawal will be implemented so as to ensure that it is in compliance with all applicable local, state, and federal laws as well as all legally binding regional interstate and international agreements, including the boundary waters treaty of 1909.
- (d) The proposed use is reasonable under common law principles of water law in Michigan.
- (e) For permit applications received on or after January 1, 2009, the applicant has self-certified that he or she is in compliance with environmentally sound and economically feasible water conservation measures developed by the applicable water user's sector under section 32708a or has self-certified that he or she is in compliance with environmentally sound and economically feasible water conservation measures developed for the water use associated with that specific withdrawal.
- (f) The department determines that the proposed withdrawal will not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties.

MCL 324.32723(6). Subsections (6)(b), (c), and (f) are the most relevant for purposes of this comment.

On top of the standards exclusively from the SDWA and those expressly incorporated by it, DEQ must always evaluate requests for permits according to the Michigan Environmental Protection Act (“MEPA”), which is Part 17 of NREPA. See MCL 324.1705(2); see also MCL 325.1017(9), MCL 324.32723(c) & (f), and Schmude Oil, Inc v Dep't of Env'tl Quality, 306 Mich App 35, 49; 856 NW2d 84 (2014).

Finally, the Wetland Protection Act, which is Part 303 of NREPA, is relevant. Part 303 prohibits draining surface water from a wetland unless a permit authorizes it. MCL 324.30304(d). Since water withdrawal is not an exempted activity, any draining of the surface water of a regulated wetland requires a Part 303 permit.<sup>1</sup>

**3. Significant information that was not originally part of NW’s Application reveals that NW’s proposed withdrawal significantly threatens wetlands.**

Section 17 requires NW to evaluate the “environmental, hydrological, and hydrogeological conditions that exist” and the “predicted effects of the intended withdrawal”. MEPA requires DEQ to base its permitting decision on adequate information related to potential “pollution, impairment, or destruction” of natural resources, and on the availability of any “feasible or prudent alternative” to the proposed activity. NW’s application fails to provide the information necessary for DEQ to decide whether to grant or deny the permit. As a result DEQ should deny the permit and require NW to re-apply if it so wishes.

//

---

<sup>1</sup> The court of appeals holding in Mich Citizens for Water Conservation v. Nestle Waters N Am, Inc, 269 Mich App 25, 95; 709 NW2 174 (2005) does nothing to affect the Part 303 permit requirement. First, the holding related only to whether Part 303 created a pollution control standard that a court could consider and apply when deciding a MEPA lawsuit. Id at 49. Second, while the court wrote in dicta that “the statute specifically limits its own application to specific acts, none of which includes the removal of groundwater”, the court never directly interpreted the meaning of the phrase “drain surface water from a wetland”. By Part 303’s plain language, draining surface water from a wetland is wrong when done without a permit, no matter how the draining occurs.

NW's Application significantly mischaracterizes the risk to wetlands. The Application identified various perched wetlands that were so isolated and distant that asserting the withdrawals would not injure them is of little value. Grobbel Supplemental Report at 1-2. In contrast,

NW's Application also claimed that up to 23 wetlands were also perched based on interpretations of generalized soil maps. Making educated guesses about something as sophisticated as the delineation of wetlands is an unacceptable practice that leads to drastic miscommunication of resource risk. Grobbel Supplemental Report at 2.

In fact, and in contrast to NW's Application, the proposed withdrawals significantly threaten the wetlands based on past evidence of harm caused by similar withdrawals. Grobbel Supplemental Report at 3-4. Various of the wetlands that the Application claims are perched and isolated are actually underlain by leaky aquitards or semi-confining layers and as much are hydraulically connected to the spring aquifer. Grobbel Supplemental Report at 3. Average water levels dropped in springs, seeps, and wetlands during the 16 years of pumping at PW-101. Grobbel Supplemental Report at 4.

The Application, including the new information provided, reveals two important truths. First, the Application significantly miscommunicates risk to wetlands because it relies on easy, cheap proxy methods for gathering hydrological information instead of using scientifically sound methods such as detailed field surveys, historic data analysis, and drawdown testing. Second, based on historic evidence and other kinds of data and analysis, harm has already occurred to wetlands in the area of PW-101. NW has not done the kind of analysis required by either Section 17 or MEPA. The withdrawal as proposed would violate MEPA, the common law, Part 303, and other laws. DEQ must simply deny the Application all together.

//

//

**4. The information in the Application is insufficient to allow either NW or DEQ to adequately evaluate whether its proposed withdrawal will cause an adverse resource impact.**

Anyone proposing to withdraw more than 200,000 gpd of water must meet the applicable standards from section 32723 of Part 327. MCL 325.1017. Large water withdrawals such as the one NW is requesting a permit for cannot cause an individual or cumulative “adverse resource impact” (“ARI”). MCL 324.32723(6)(b). Adverse resource impacts are defined in terms of loss of a certain percentage of biomass depending on the kind of stream. MCL 324.32701(1)(a).

Initially, an applicant must determine whether it will cause an adverse resource impact by using the DEQ’s water withdrawal assessment tool. MCL 324.32706b. If the result of the assessment is that the withdrawal will be a “Zone D withdrawal”, which is defined as “a withdrawal that is likely to cause an adverse resource impact”, MCL 324.1701(1)(ww), then before the applicant can proceed with the withdrawal, it must submit a request for site-specific review to the DEQ. MCL 324.32706c(1). Essentially, site-specific review allows DEQ to confirm or reject the assessment tool conclusion based on the premise that site-specific review is more comprehensive and accurate.

Like its wetland impact assessment, NW’s assessment of whether its activity will cause an ARI continues to be based on flawed premises. Grobbel Supplemental Report 4-7. Most strikingly, there is a major contrast between what is known and predicted about stream flow loss, and the precipitation rates in the area. From 2000 to 2016, precipitation rates have been above average, while the past withdrawals still have managed to reduce flow. Grobbel Supplemental Report 5. That means the stream flow loss from historic withdrawals has been especially hydrologically influential because they losses from withdrawal have outpaced the addition of above average precipitation to the hydrologic system. This also means that the Application’s data and predictions exist in the context of a best-case precipitation premise; with the current Application, what is needed is a realistic evaluation based on predicted and worst-case precipitation levels.

At the very least, NW has not provided sufficient information in its Application to allow DEQ to understand resource characteristics of the area and predicted impacts to them, MCL 325.1017(3), or to evaluate whether the proposed withdrawal will cause an ARI. MCL 324.32723(6)(b).

## 5. Conclusion

When NW submitted the Application originally, it was obviously inadequate in terms its risk assessment. While NW's new materials have not resolved the inadequacy of risk assessment, they have also revealed that the true risk of harm to surface waters is high.

DEQ's decision on this Application will be precedent-setting given how rarely DEQ considers Section 17 applications for large withdrawals. It is already regrettable that the Section 17 process allows a private company to take the most precious of natural resources nearly for free. Yet DEQ has a constitutional, common law, and statutory duty to ensure that a full risk assessment is done, and that any approval of water withdrawal will cause no material harm to streams, wetlands, and other surface waters. This Application fails that test for the reasons given in this supplemental comment and our original March 2017 comment.

Submitted by,

---

Cheryl Kallio  
Associate Director  
Freshwater Future  
PO Box 2479  
Petoskey, MI 49770  
231-571-5001

[cheryl@freshwaterfuture.org](mailto:cheryl@freshwaterfuture.org)

---

Oday Salim, Esq.  
Senior Attorney  
Great Lakes Environmental Law Center  
4444 2nd Avenue  
Detroit, MI 48201  
586-255-8857 cell

[oday.salim@glelc.org](mailto:oday.salim@glelc.org)

Michigan DEQ

Supplemental comment on Nestlé request for large water withdrawal

April 21, 2017

Page 8 of 12

Joined by the following Nestlé Comment Letter Signatories:

**Michigan**

Nic Clark  
Clean Water Action

Gene Champaign  
Concerned Citizens of Big Bay

Lynn Knopf  
Duck Creek Watershed Assembly

Carol Drake  
Friends of Jean Klock Park

Matt Meersman  
Friends of the St. Joe River Association

Thomas Goddeeris  
Grandmont Rosedale Development Corporation

Tanya Keefe  
Great Lakes Environmental Alliance

David Peterson  
Great Lakes Council- International Federation of Fly Fishers

John Leon  
Grosse Ile Nature and Land Conservancy

Nancy Hawley  
Henrietta Conservation & Recreation Conservancy

William Collins  
Huron Ecologic, LLC



Michigan DEQ  
Supplemental comment on Nestlé request for large water withdrawal  
April 21, 2017  
Page 9 of 12

Sarah Nash  
IHM Sisters

Ashley Wick  
Kalamazoo Nature Center

Judy Karandjeff  
League of Women Voters of Michigan

Kathy Evans  
Muskegon Lake Watershed Partnership  
Danielle Conroyd  
River Raisin Institute

Danielle Wilson  
Rosedale Park  
Patricia Gillis  
Voices for Earth Justice

Melissa Mays  
Water You Fighting For

Monica Lewis-Patrick  
We the People of Detroit

Gregg Bruff  
Upper Peninsula Environmental Coalition

Alexandra Maxwell  
Yellow Dog Watershed Preserve

**From Around the Great Lakes Region**

Katya Gordon

Michigan DEQ

Supplemental comment on Nestlé request for large water withdrawal

April 21, 2017

Page 10 of 12

Amicus Adventure Sailing and Sea Change Expeditions  
Minnesota

Karen Feridun  
Berks Gas Truth  
Pennsylvania

Joellen Sbrissa  
Congregation of St. Joseph  
Illinois

Kathryn Hanratty  
Enviroscapes Design  
Indiana

Barbara Richards  
Friends of Milwaukee's Downtown Forest  
Wisconsin

June Summers  
Genesee Valley Audubon Society  
New York

Margaret Frericks  
Improving Kids' Environment  
Indiana

John Crampton  
Izaak Walton League of America  
Minnesota Division

Patrick Egan  
Lake Superior Watershed Conservancy  
Ontario, Canada

Michigan DEQ  
Supplemental comment on Nestlé request for large water withdrawal  
April 21, 2017  
Page 11 of 12

John Finazzo  
Lipari Renewables, Inc.  
Minnesota

Cheryl Nenn  
Milwaukee Riverkeeper  
Wisconsin

Kristy Meyer  
Ohio Environmental Council  
Ohio

Jim Sweeney  
Porter County Chapter of the Izaak Walton League  
Indiana

LeRoger Lind  
Save Lake Superior Association  
Minnesota

Karen Donahue  
Sisters of Mercy West Midwest Justice Team  
Regional

Laura Fuderer  
South Bend-Elkhart Audobon Society  
Indiana

Ted Glasoe  
Ted Glasoe Photographic Art  
Illinois

Walter E. Auch  
The FracTracker Alliance

Michigan DEQ  
Supplemental comment on Nestlé request for large water withdrawal  
April 21, 2017  
Page 12 of 12

Ohio

Lori Andersen  
Save Our Sky Blue Waters  
Minnesota

Lee Wilbanks  
Save The River / Upper St. Lawrence Riverkeeper  
New York

Matt Trokan  
Sierra Club Ohio Chapter  
Ohio

Enclosures

Copies have been provided to the following by email:

Carolyn Looney  
Michigan DEQ  
[looneyc@michigan.gov](mailto:looneyc@michigan.gov)

Michael Shore  
Michigan DEQ  
[shorem2@michigan.gov](mailto:shorem2@michigan.gov)