

STATE OF MICHIGAN
BEFORE THE DIRECTOR

MICHIGAN DEPARTMENT OF ENVIRONMENT, GREAT LAKES, & ENERGY

In the matter of:	Docket No.	18-011549 Hon. Daniel Pulter, ALJ
Petitions of Michigan Citizens for Water Conservation, and Grand Traverse Band of Ottawa and Chippewa Indians on the permit Issued to Nestlé Waters North America, Inc. (consolidated cases)	Permit No.:	1701
	Act:	1976 PA 399 Safe Drinking Water Act
	Agency:	Dept. of Environment, Great Lakes & Energy

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PETITIONERS' EXCEPTIONS TO PROPOSAL FOR DECISION

Petitioners, the Michigan Citizens for Water Conservation (MCWC) and the Grand Traverse Band of Ottawa and Chippewa Indians (GTB), through their attorneys at OLSON, BZDOK & HOWARD, PC, file these Exceptions to the findings of fact and conclusions of law in the Proposal for Decision (PFD) issued in this contested case on April 24, 2020.¹ Petitioners respectfully request that the final decision-maker, the Director of the Michigan Department of Environment, Great Lakes, and Energy (EGLE or the Department), reverse the PFD and invalidate or decline to issue the underlying Permit due to its failure to comply with Michigan law.

I. INTRODUCTION

Nestlé Waters North America (Nestlé or Applicant) sought and was ultimately granted a permit for a high-capacity water withdrawal well in Osceola County, obtaining approval to pump up to 400 gallons per minute (gpm) from the well known as “PW-101” in 2018. While the substantive portions of the Applicant’s efforts to gain approval to operate PW-101 occurred *after* the 2006-08 amendments to the Safe Drinking Water Act (SDWA)² pertaining to high-capacity commercial water bottling operations (including the requirements for Applicants to supply data on existing environmental, hydrological, and hydrogeological conditions), neither the Applicant nor the Department followed or even attempted to follow those requirements until after pumping had already been occurring from PW-101.

With impacts to the resource(s) already occurring, the Applicant worked on obtaining the permit at issue in this case (Permit 1701) by hiring a consultant to develop a computer model on which basically all of the witnesses for the Applicant (and those of the Department) have relied for their testimony in this case. While it is possible for a carefully crafted model to be coupled with actual data of the existing

¹ Further support for the Petitioners’ positions as stated herein may be found in the Petitioners’ April 30, 2019 Brief in Opposition to Nestlé Waters North America’s Motion for Summary Disposition Regarding Baseline Capacity; Petitioners’ September 18, 2019 Closing Brief; and Petitioners’ February 7, 2020 Supplemental Brief on the Court of Appeals Opinion in *Nestlé Waters North America v. Township of Osceola*, as well as in Petitioners’ testimony and exhibits, all of which are incorporated by reference as if fully set forth in these exceptions.

² Public Act 399 of 1976; MCL §325.1001 *et seq.*

“environmental, hydrological, and hydrogeological conditions”³ in the vicinity of the proposed well to provide an accurate depiction of the predicted effects of the intended withdrawal on flows and levels of affected wetlands, streams, and other water bodies, that is manifestly not what the Applicant proffered in this case. Instead, the Applicant’s consultant constructed a flawed model that uses limited data sets taken from an already-impacted resource, that does not adequately integrate groundwater and surface-water data, and which limits one’s ability to predict/determine what the actual impacts of pumping at high volumes during dry conditions are likely to be, which is precisely the point when pumping would be the most likely to cause serious negative effects on these waters, wetlands, wildlife, and other natural resources.

These and other serious legal and factual flaws in the application, permit, and PFD are more fully set forth below. For example, while Nestlé’s application⁴ characterizes the “PW-101” well as a “type IIA public water supply well,” the Michigan Court of Appeals recently declared⁵ this characterization to be invalid, chastising the Department by stating that “[a]lthough the [Department]’s interpretation of the MSDWA is entitled to respectful consideration, we are not bound to accept it, *especially where it clearly conflicts with the plain language of a statute.*”⁶ This is of crucial importance to this case because of how the Applicant utilized the improper characterization to avoid compliance with the above referenced legislative amendments to Section 17 of the SDWA which require an examination of the “predicted effects of the intended withdrawal.”⁷ Although the Applicant intends to withdraw water from PW-101 at a rate of 400 gpm, the Applicant used the invalid characterization of its operation to convince the Department that it had already established a “baseline capacity” for its “public water supply” system, thus

³ MCL §325.1017(3).

⁴ Exhibit I-21.

⁵ *Nestlé Waters North America v Township of Osceola*, unpublished per curiam opinion of the Court of Appeals, issued December 3, 2019 (Docket No. 341881) (hereinafter “*Nestlé v Osceola Twp*”). See Petitioners’ February 7, 2020 Supplemental Brief.

⁶ *Nestlé v Osceola Twp*, at 10 (citing *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 103-104; 754 NW2d 259 (2008)) (emphasis added). See MCL §325.1002 (the Applicant’s commercial bottling operations do not constitute a “public water supply” or “system” as those terms are defined in the Safe Drinking Water Act (SDWA).)

⁷ MCL §325.1017(3).

enabling the company to increase pumping from 150 gpm to 250 gpm by using the Water Withdrawal Assessment Tool without ever having provided the Department with baseline data as required by Section 17 of the SDWA. Although the Department conducted a site-specific review, the consequence of the Applicant's prior, active pumping from the well for a significant period of time meant that any subsequent investigation of resource conditions in the area would have necessarily been skewed by that pumping. How could the Department possibly analyze and predict the resource impacts in a resource *already* impacted by high-volume water withdrawal? That is the question the Department simply avoided, choosing instead to adopt the Applicant's self-serving characterization of its commercial bottling operation as equivalent to a municipal water supply with a pre-existing "authorization" to pump at high-volumes for commercial purposes without requiring the Applicant to follow the requirements of Section 17. The effect of all this is that the Applicant successfully, yet improperly, limited the scope of the Department's analysis of the likely effects of pumping to only a portion of the total "intended withdrawal" of 400 gpm (or 576,000 gallons-per-day (gpd)). As discussed below, the PFD similarly seeks to avoid addressing these issues by simply accepting the proffered yet invalid definition as valid and characterizing the issue as more appropriate for circuit court.⁸

In addition to the factual and legal errors relating to the Applicant's and Department's reliance on (1) a faulty computer model rather than true, baseline data on existing environmental, hydrological, and hydrogeological conditions, and (2) an invalid characterization of the Applicant's commercial, high-volume water extraction operations, the PFD contains numerous additional and important errors, including (3) the determination that Part 303 does not apply despite the existence of over 1,000 wetlands in the modeled impact area, (4) the Applicant's and Department's biologists overt and unambiguous reliance on the Applicant's model for predictions on resource and wildlife impacts rather than data collected on-site during pumping events using valid and accepted sampling methodologies. For these and other reasons detailed below, Petitioners contend that the permit should have been denied on this record.

⁸ PFD, at 14.

If the permit is not denied and/or the PFD is not rejected (or at least remanded), the Director and the Department will have forever undermined Michigan’s Safe Drinking Water Act, Part 327 - Great Lakes Preservation, the Great Lakes Charter, the Wetlands Protection Act, Part 365 – Endangered Species Protection, and the Department’s own ability to robustly analyze such proposals and enforce these and other applicable statutes in the future. Rather than requiring rigorous adherence to the legal requirements for submission of robust scientific data and evidence prior to approval of such high-profile and high-impact proposals, instead the state will send an unmistakable message – contrary to the over 80,000 citizens who submitted public comments in opposition to the issuance of this permit – that the waters of Michigan are open and available to anyone who wants to set up a high-volume water extraction operation with minimal oversight or environmental protection.

II. EXCEPTIONS & ARGUMENT

Petitioners’ exceptions will cite to various pleadings and materials submitted to the Tribunal throughout these contested case proceedings.⁹ When citing to specific pages of these materials, Petitioners are referring the final decision-maker to those pleadings and all references, attachments, and citations included in those pleadings.

1. Generally and Findings of Fact

Petitioners generally take exception to the entire PFD. It fails to consider the facts and legal arguments as set out in Petitioners’ pleadings, testimony, and exhibits. The PFD also fails to undertake any critical analysis of the Applicant’s and Department’s testimony and arguments, taking same at face rather than considering the flaws identified and substantive critiques provided by Petitioners’ witnesses,

⁹⁹ These filings will include, but are not necessarily limited to: Petitioners’ Motion for Summary Disposition or Alternatively for Partial Summary Disposition and Brief in Support (April 15, 2019), Petitioners’ Responses and Briefs in Opposition to Nestlé’s Motion for Summary Disposition Regarding Baseline Capacity and Nestlé’s Motion for Partial Summary Disposition Regarding Claimed Unacceptable Ecological Impacts (April 30, 2019), Petitioners’ Reply to Response of Nestlé and of EGLE to Petitioners’ Motion for Summary Disposition (May 7, 2019), Petitioners’ Closing Brief (Sept. 18, 2019), Petitioners’ Brief in Response to Nestlé and EGLE Closing Briefs (Oct. 16, 2019), and Petitioners’ Supplemental Brief on the *Nestlé v Osceola Township* Opinion (Feb. 7, 2020).

including, but not limited to, relying on the use of the model and its application to over 1,000 wetlands that have not been delineated for over ten years to conclude that no Part 303 permit is required for this application, the testimony of Dr. Hyndman relating to the serious problems with the computer model developed by the Applicant and accepted by the Department, and the testimony of Dr. Luttenton, Dr. Grobbel, and Mr. Garaviglia relating to the failure to adequately sample wildlife presence or to investigate potential negative impacts to habitat during actual pumping events rather than based on reliance on the predicted effects of the Applicant's computer model.

2. Conclusions of Law

a. **The PFD is contrary to law and violates the burden of proof, standards, rules, and requirements for the interpretation and application of the Safe Drinking Water Act (MCL §325.1001 *et seq.*).**

Section 17(3) of the SDWA requires (*inter alia*) an applicant pursuing a “new or increased large quantity withdrawal of more than 200,000 gallons per day” (gpd) to submit to the Department an application for such withdrawal containing specific information and evaluations. MCL §325.1017(3). First, as set forth in the Petitioners’ Brief in Opposition to Nestlé’s Motion for Summary Disposition Regarding Baseline Capacity,¹⁰ and as affirmed by the similar statutory interpretation proffered by the Michigan Court of Appeals in the *Nestlé v Osceola Twp.* opinion,¹¹ Nestlé’s interpretation of the classification of its PW-101 well is contrary to the plain language of the statute. Despite the 2008 passage of the amended provisions of the SDWA relating to high-volume water extraction, the Department failed to utilize these newly effective provisions of the law as it improperly authorized construction for the company’s “system” (using the improper characterization that was invalidated by the Court of Appeals) in August of 2008 as well as its water source approval as issued in 2009;¹² both decisions by the Department

¹⁰ Petitioners’ Brief in Opposition to Nestlé’s Motion for Summary Disposition Regarding Baseline Capacity, at 2-4.

¹¹ *Nestlé v Osceola Twp.*, at 6-10.

¹² PFD, at 20. *See also*, PFD, at 23 (where the PFD acknowledges confusion over the application of the definitions in the SDWA and Part 327 pertaining to withdrawal quantities and “baseline capacity”).

were subsequent to the effective date of those statutory amendments, which were then and now remain in effect and binding upon the Department and applicants like Nestlé.¹³ As a result, the Department failed to hold Nestlé to the requirements of Section 17 as to the “first” 150 gpm, despite the fact that the company was pursuing a new, large quantity withdrawal of 216,000 gpd.

Second, the PFD addresses this issue by first interpreting MCL §324.32702 as supportive of the Department’s position that ignoring the requirements of Section 17 as to the prior authorizations was then and continues to be warranted, despite that interpretation having been invalidated by the Court of Appeals in the *Osceola Township* opinion.¹⁴ The PFD then utilizes quotations from the portion of that opinion relating to zoning law (rather than the SDWA) to claim that since the Court of Appeals found that the Township’s zoning decision would not have the effect of regulating Nestlé’s withdrawal, that means the Court of Appeals was stating that its own opinion did not have an effect on Nestlé’s withdrawal – this interpretation is both wrong factually¹⁵ and is contrary to law. After having incorrectly interpreted the statute and this relevant Court of Appeals opinion, the PDF then inexplicably takes the position that the improper statutory interpretation and characterization of Nestlé’s commercial operations relied upon by both the Department and the Applicant is simply an issue as beyond the scope of its review in this case.¹⁶

By first making its own interpretation in support of the company’s characterization and then declining to consider a contrary interpretation of the law as set forth by the Michigan Court of Appeals, the PFD is internally inconsistent with respect to the scope of its authority to interpret the facts and law in this case. The permit application submitted by Nestlé contains a factual and legal error that the company had a valid and effective prior authorization to pump at 150 gpm, then 250 gpm, from the Department; the PFD fails to accept that the Department was wrong to accept that interpretation when it did, and it compounded the error by proceeding to consider the application for Permit 1701 as having a valid, “pre-

¹³ See Petitioners’ Brief in Opposition to Nestlé’s Motion for Summary Disposition Regarding Baseline Capacity, at 5-6; Petitioners’ Supplemental Brief on the *Nestlé v Osceola Twp.* Opinion, at 9-10.

¹⁴ PFD, at 13.

¹⁵ See *Nestlé v Osceola Twp.*, at 6 (rather than at pages 7-8 as indicated in the PFD).

¹⁶ PFD, at 12-14.

existing” baseline capacity to pump at a rate 150 gpm.¹⁷ The PFD’s conclusion that the baseline capacity of PW-101 is 150 gallons per minute (gpm) is contrary to law and is not based on a preponderance of credible evidence on the record.

Furthermore, this erroneous interpretation bleeds into the rest of the case – and the Petitioners respectfully request that the final decision-maker keep this in mind as it relates to all subsequent issues set forth herein – because the PFD, the computer model, and all the analyses and reviews based on the model presume that Nestlé only has to show the predicted effects of and no adverse resource impacts from a 150 gpm withdrawal, rather than the “intended withdrawal” rate of 400 gpm. Basically, Nestlé got a “free” 250 gpm withdrawal permitted by the Department after the effective date of the 2008 amendments to Section 17 without ever having to comply with the standards of that statute. The PFD’s adoption of this error represents both a factual and legal error that warrants reversal, or at least a remand back for further development of the analyses proffered by the company and the Department under the true scope of the intended withdrawal of 400 gpm as required by law.

b. The PFD is contrary to law and violates the burden of proof, standards, rules, and requirements for the interpretation and application of Section 17(3) of the Safe Drinking Water Act (MCL §325.1017(3)).

Petitioners contend that the Applicant failed to submit an evaluation of the existing environmental, hydrological, and hydrogeological conditions and the predicted effects of the intended withdrawal with information and data sufficient in detail and scope to both meet the statutory requirements of Section 17 and Section 32723 (as adopted through Section 17(4)) and to provide a reasonable basis on which a decision to issue a permit could be made. Petitioners contend that the PFD fails in its uncritical adoption of the Nestlé model as a stand-in for data obtained by direct observation of, and appropriate sampling to determine the predicted effects of the withdrawal on, the surrounding waterways and other natural resources over time.

¹⁷ PFD, at 14.

First, there is really no dispute that Nestlé did collect a variety of different data sets and developed a computer model to predict groundwater flows based on the median values of those limited data sets. However, as noted above, this data was not collected prior to the beginning of pumping from the PW-101 well, meaning much if not all of the data is not reflective of true baseline conditions free from potential impacts caused by pumping. Moreover, while pages 15-18 of the PFD cite to the various data sets proffered by Nestlé and the Department, the PFD uncritically concludes that the mere presence of a large volume of data and testimony relating to effects on environmental, hydrological, and hydrogeological conditions as predicted by a model negates any need to assess whether the data reflected those conditions as they presently exist, and whether it was reasonable for the Department to accept that the data and analyses proffered by the company only needed to relate to a portion of the overall total withdrawal, rather than the company's "intended withdrawal" of 400 gpm.

Second, although the PFD adopts the position of Nestlé and the Department with respect to the computer model developed by Nestlé's consultant Dr. Andrews and his company SSPA, pages 7-19 of Petitioners' Closing Brief succinctly summarize the Petitioners' position as to hydrogeological modeling and why the testimony of Petitioners' modeling expert Dr. David Hyndman should be credited as more credible in this matter. As stated above, Petitioners incorporate all of their filings, testimony, and exhibits by reference as if fully set forth herein, including those pages of Petitioners' Closing Brief on modeling which could be adopted independently as exceptions to the PFD's findings relating to modeling generally. In particular, however, it is notable that the PFD fails entirely to address one of the key issues Dr. Hyndman testified about, which was the problem with the Nestlé model's reliance on the median values in its data sets. Due to its importance as a clear failure of the Applicant's model, Dr. Hyndman characterizes the issue in his testimony on multiple occasions:

"SSPA fails to directly address the primary concern of water use in this area: pumping at 400 gpm will be most likely to diminish natural resources and cause adverse resource effects during dry periods of the year, particularly during periods of time with low water tables.

...

A serious attempt to allay the concerns of stakeholders and permitting agencies would show that their model can replicate conditions occurring during these critical resource

periods. Median flows, median water levels, and median recharge, to which SSPA's model has been calibrated and to which most of their predicted effects are compared, are largely irrelevant in questions of resource impacts.

...

For the most part, Nestlé and SSPA compare their later predicted effects to median conditions. At these levels, they claim their model shows no adverse impacts. However, median conditions were never the periods of greatest concern. Thus, median flows are presented and shown to match well.

...

[T]he thing that's important to me is thinking about when are the – the most significant impacts? They're any time you have a low flow. And I have concerns over looking at this just in a median case. ... So the model is all focused on median flows across all years with, again, very limited analysis of variation in a seasonal sense in a dry year and a wet year. And the focus really should be on when the most significant impacts will be and that's dry portions of dry years.”¹⁸

The PFD does not address this criticism of the model's reliance on the median values from limited data sets, which is problematic both for the PFD as well as the Department because it clearly shows that the model is actually incapable of accurately predicting the effects of the intended withdrawal. This is also emblematic of the problem with much of the data provided by the company, including, for example, its reporting of withdrawal figures, where the Applicant provided the Department with total quantities of water withdrawn in certain periods,¹⁹ which has no relationship to the enforceable criteria of gallons per minute, and which masks any potential extrapolation of climatic conditions or adverse resource impacts. There may be sizable *amounts* of data, but the PFD fails to ask or consider whether that data is capable of accurately depicting the existing conditions at the site; i.e. whether it is the *right* data.

Third, the question remains as to whether limited data and a model based on that limited data that does not integrate data regarding surface water interactions with groundwater can satisfy the requirement of Section 17(3) that an applicant provide “an evaluation of environmental, hydrological, and hydrogeological, conditions that exist and the predicted effects of the intended withdrawal.” In short, Nestlé argues that what it submitted was “enough,” while Dr. Hyndman's testimony contradicts that

¹⁸ Hyndman Testimony (direct) at 218:17-22; 219:11-18; 241:21-25; 242:1-5; (cross exam) at 327:2-10.

¹⁹ Petitioners further contend that it was factually erroneous for the PFD to classify the Intervenor's pumping prior to 2015 as *de minimis*.

assertion and identifies numerous flaws in the company's computer model's ability to accurately depict actual existing conditions and/or the effects of the intended withdrawal.²⁰

Fourth, the Department's decision to add numerous conditions to the permit requiring Nestlé to, among other things, undertake monitoring of the impacts of the withdrawal on local waterways *after* pumping has been authorized and begun reveals the flaw in the company's and Department's position. Section 17(3) does not authorize an "after-the-fact" evaluation of the actual environmental conditions beginning pumping at its sought-after rate, it requires submission of such data and information to the Department as part of the application and clearly *prior to* the Department's decision on the permit. The Department's decision to include such decisions on the back end, while somewhat helpful, puts the permit cart in front of the horse, and is clearly contrary to the plain language of Section 17(3). Furthermore, Dr. Hyndman also took issue with the impact of utilizing after-the-fact conditions instead of requiring such data and analyses in conjunction with consideration of the permit application:

"I believe that it is highly likely that adverse resource impacts will occur at a 400 gpm pumping level, and that conditions will arise that will lead to those conditions persisting for months to years. I note that this opinion is based on extrapolating from the results presented in reviewed reports because the modeling work conducted for Nestlé is inadequate to determine whether those impacts will occur. While the DEQ has attempted to address this in attaching conditions to their permit, it is not at all clear whether reducing pumping to 250 gpm will mitigate those adverse impacts, or merely lessen the degree of impacts. This condition seems somewhat arbitrary. Furthermore, language within the permit, including this statement 'Should the drawdown or water level declines observed in the monitoring data exceed what is predicted based on the groundwater model, pumping levels will be reduced to 250 gpm and drawdown and water levels shall be monitored on a monthly basis until water levels recover...' is vague enough as to be essentially unenforceable. After all, what, exactly Nestlé has predicted does not correspond to an actual moment in time, but rather median conditions; theirs is not a model driven by a time-series of real weather conditions, or even time-varying recharge scaled to input precipitation. Determining if any hypothetical excessive reductions in flow are due to pumping, or merely a period of extended lower water levels, cannot be done with this modeling approach."²¹

This testimony is largely ignored by the PFD, despite the devastating effect it has on the underlying validity of the Nestlé model, and Petitioners contend that Dr. Hyndman's extensive experience in

²⁰ Petitioners' Closing brief, at 9-13.

²¹ Hyndman Testimony(direct), 220:4-25; 221:1-5.

developing integrated surface water-groundwater models, including his twenty years of modeling the entire Muskegon River watershed,²² as well as his lengthy tenure teaching and researching as a Professor focused in this precise field (Hydrogeology and Environmental Geophysics) and as Chair of the Department of Earth and Environmental Sciences at Michigan State University should lend greater weight to his testimony than that accorded to him in the PFD. While the PFD notes Dr. Hyndman was not able to prepare a detailed, integrated surface water-groundwater model for comparison to the model Nestlé created,²³ the PFD leaves out that part of the problem in doing so was that “much of the data that purportedly was examined by SSPA was not provided, making it impossible for the DEQ (and the public) to independently analyze the information.”²⁴ The issue in this case is not whether Petitioners produced an alternate model for Nestlé to use or the Department to analyze instead of its own, the issue is whether Nestlé provided a competent, reasonably scientific, real-time set of data which shows that there are no substantial negative impacts or any direct effects on the flows & levels of streams, wetlands, and other nearby water bodies caused by the company’s intended pumping at these volumes that complies with its statutory duty under Section 17 and Section 32723. Petitioners contend that the company failed to do so, and the PFD’s adoption of Nestlé’s argument that its limited data and flawed model were sufficient to meet their statutory burden constitutes reversible error.

Fifth, and finally, it is of crucial import to this case to reiterate the depth to which nearly all of the witnesses put forward by EGLE and Nestlé relied on the SSPA model as the basis for their varying

²² Petitioners’ Closing Brief, at 10.

²³ PFD, at 30.

²⁴ Hyndman Testimony, 213:2-4. In truth, while Petitioners accept that they have a distinct burden of proof in these contested case proceedings, Petitioners contend that it is an error of fact and law to suggest, as the PFD seems to, that they were required to produce their own model to provide competing data to that produced by the Intervenor. Once the Petitioners satisfy their burden by putting on evidence such as the direct testimony of an expert that is unquestionably qualified in this field, they have satisfied their burden to show a *prima facie* case, which then shifts the burden of going forward back to, in this case, the Applicant to adequately rebut such a showing. *See Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, No. 01-14563-CE, 2003 WL 25659349 (Mich. Cir. Ct. Nov. 25, 2003) (“The Court noted, as the Legislature obviously did in referring development of the state’s environmental law to the courts, that what will constitute a *prima facie* showing by plaintiffs will vary from case to case depending on the nature of the resource and of the alleged degradation of it Finally, as relevant to the present case, the Court explained how a plaintiffs showing of a *prima facie* case shifts the burden of going forward to the defense to rebut such a showing The Court again emphasized the importance of the trial court’s factual findings on the presence or absence of a *prima facie* case and whether or not such was rebutted.”).

opinions as to the probable effects of the company's intended withdrawal. For example, Nestlé witness Dr. Workman testified that his opinions regarding ecological impacts rely on the model's predicted level of drawdown of certain water bodies, and that if the model's predictions were shown to be inaccurate, he stated: "I would reevaluate my opinions."²⁵

c. The PFD is contrary to law and violates the burden of proof, standards, and requirements for interpretation and application of Section 32723 of Part 327 – Great Lakes Preservation.

Section 17(4) of the SDWA incorporates several standards for high-volume water withdrawals of this type as set forth in a separate statute, Part 327 – Great Lakes Preservation, particularly, Section 32723 of Part 327 (MCL §324.32723). Of particular import to this case is Section 32723(6)(b), which requires that such a withdrawal must "be implemented so as to ensure that the proposal will result in no individual or cumulative adverse resource impacts."²⁶

First, as set forth above, the analysis set forth in the PFD is fundamentally flawed to the extent that it relies on the segmented and improper characterization that Nestlé had previously established a baseline capacity of 150 gpm, because all calculations, observations, and contentions related to adverse resource impacts proffered by Nestlé and EGLE assume that this artificially limited scope of review of these impacts, rather than evaluating the "intended withdrawal" rate of 400 gpm. Again, Petitioners have briefed the issue of the calculation of baseline capacity and the effect of the Michigan Court of Appeals' opinion in *Nestlé v Osceola Twp.* invalidating the contrary position of EGLE and Nestlé.²⁷ These briefs and the Court of Appeals' opinion demonstrate that the interpretation of baseline capacity as applied to

²⁵ Workman Testimony, 1249:21-25; 1250:1-5. *See also* Boote Testimony, 1121:5-7 ("...I'm taking calculated reductions in stream flow that are calculated by our groundwater model and applying it to my assessment of potential stream impacts."), and 1131:22-25 and 1132:1-13 ("I'm just going to evaluate my wetland effects based on the predicted drawdowns by whichever model is used. If those are different, then my analysis is different."); Kohlhepp Testimony, 506:12-17; Heintzelman Testimony, 584:25-585:5.

²⁶ MCL §324.32723(6)(b).

²⁷ *See* Petitioners' Brief in Opposition to Nestlé Waters North America's Motion for Summary Disposition Regarding Baseline Capacity; Petitioners' Closing Brief; and Petitioners' Supplemental Brief on the Court of Appeals Opinion in *Nestlé Waters North America v. Township of Osceola*.

determination of adverse resource impacts on page 35 of the PFD constitutes legal error that warrants reversal or remand of the PFD. Petitioners contend that this failure extends throughout the entirety of the PFD, but also with particular import with respect to the section of the PFD relating to adverse resource impacts.²⁸

Second, it is important to draw the final decision-maker's attention, however, to the significant error of fact and law relating to the requirement of Section 32723(6)(c), which requires the withdrawal to 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,"²⁹ which includes, among other laws, Michigan's Wetlands Protection Act (Part 303) and Part 365 relating to Endangered Species Protection. After conceding that more than 1,000 wetlands exist within area the Applicant's model considers in conjunction with possible effects from pumping, the PFD relies on the unsupported statement of Nestlé consultant Dr. Andrews to categorically dismiss the majority of said wetlands because the company contends they are almost all "perched" or disconnected from the groundwater table to an extent that pumping will not affect them. To the extent there is any evidence in the record to support this contention (and it is sparse), that evidence is based primarily on GIS and satellite mapping, rather than in-person site visits. Moreover, none of the various witnesses from Nestlé or EGLE testified that they had conducted a wetlands delineation on site, and according to the Applicant's own 2017 report ("Addendum to Assessment of Wetland Effects"), there has been a total of "[t]here wetland mapping efforts ... conducted throughout the history of the project," two of which involved only aerial and geospatial mapping and interpretation by consultant ECT in 2017. The only actual in-person wetland observation and mapping that the Applicant has conducted was work performed by Tilton & Associates, Inc. in 2004. As all Michiganders know, water levels in the Great Lakes and water bodies throughout the Great Lakes region have changed a great deal in the sixteen years since 2004 due to a variety of conditions and factors. EGLE's own rules promulgated pursuant to Part

²⁸ PFD, at 25-46.

²⁹ MCL §324.32723(6)(c).

303 only consider wetlands boundary and assessment reports to be good for three-years, after which a new boundary and assessment report would need to be conducted in order to update said report to account for any changes in conditions at the affected sites.³⁰ In this instance, Nestlé has proffered and the Department and the PFD accept, a wetlands mapping report that pre-dates the company's own application for this permit by eleven years. The Department was apparently content to simply accept such evidence as representative of presently existing environmental, hydrological, and hydrogeological conditions with only minimal updating from offices nowhere near the actual wetlands sites, coupled with a handful of brief site visits that did not involve comprehensive delineations or assessments to attempt to verify the aging maps and reports in the company's files. Relying on such evidence (the only evidence the company or EGLE put forward on this topic) as "sufficient" for the purposes of demonstrating (a) compliance with the requirement of providing data on existing conditions under Section 17(3), and/or (b) assessment of the potential individual or cumulative adverse resource impacts under Section 32723 undoubtedly constitutes reversible error.

Third, and finally, Petitioners incorporate by reference their February 21, 2020 Reply to EGLE's Supplemental Brief, as well as pointing the final decision-maker to the testimony Petitioners' expert witness Dr. Christopher Grobbel and his February 10, 2017 report³¹ as it relates to both wetlands and impacts to wildlife, in particular, threatened and endangered species.

III. CONCLUSION

As set forth above, the PFD failed to properly determine that the evidence in the record shows that: (a) Nestlé failed to carry its statutory burden to provide an evaluation of environmental, hydrological, and hydrogeological conditions that actually exist at the PW-101 site and in the surrounding area; (b) Nestlé failed as well as to provide an accurate depiction of the predicted effects of the company's intent to withdraw water from PW-101 at the rate of 400 gpm; (c) Nestlé failed to provide the Department

³⁰ See MICH. ADMIN. CODE R 281.924.

³¹ Exhibit P-24.

with information necessary to form a reasonable basis upon which it could arrive at a valid permitting decision; and (d) the Department failed to properly consider whether adverse resource impacts would result from company's intended withdrawal at PW-101. In sum, the PFD makes and adopts numerous errors of fact and law, and fails to uphold the requirements of Section 17 of the Safe Drinking Water Act and Section 32723 of Part 327 of the Natural Resources and Environmental Protection Act. As such, the PFD should be reversed and the Permit denied.

IV. RELIEF REQUESTED

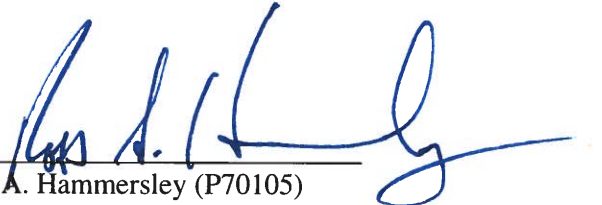
Petitioners request the following relief from the final decision-maker, the Director of the Department of Environment, Great Lakes, and Energy:

- A. Reverse the Proposal for Decision;
- B. Grant Petitioners' Motion for Summary Disposition;
- C. Deny Applicant's Motions for Summary Disposition;
- D. Vacate or refuse to issue the permit;
- E. Suspend the effect of the Permit until sufficient monitoring has been put in place upon which the impacts of pumping from PW-101 at the Applicant's intended withdrawal rate of 400 gpm can be definitively determined and any attendant adverse resource impacts assessed;
- F. Remand the matter to the Administrative Law Judge with directions to apply correct the legal standards as to the:
 - 1. Baseline capacity of PW-101;
 - 2. Section 17 of the Safe Drinking Water Act; and
 - 3. Section 32723 of Part 327 of the Natural Resources & Environmental Protection Act;
- G. Grant such other and further relief as the Director deems to be just under the circumstances.

[signature page follows]

Respectfully submitted,
OLSON, BZDOK & HOWARD, PC
Attorneys for Petitioner Michigan Citizens
for Water Conservation

Date: May 15, 2020.



Ross A. Hammersley (P70105)
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Date: May 15, 2020.



William C. Rastetter (P26170) (BY R. HAMMERSLEY WITH PERMISSION)