



Ensuring the Waters of the Great Lakes Basin
Are Healthy, Public, and Protected for All

Via Email

October 28, 2021

Mr. Eric Oswald, Director
Drinking Water and Environmental Health Division.
Michigan Department of Environment, Great Lakes, and Energy
525 Allegan Street
PO Box 30473
Lansing, MI 48909-7973
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Mr. Jim Milne
Water Use Assessment Unit Supervisor
Michigan Department of Environment, Great Lakes, and Energy
525 Allegan Street
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Lansing, MI 48909-7973
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Re: BlueTriton (Nestlé) Modification of Bottled Water Permit from 400 gpm to 288 gpm; Permit 1701, Safe Drinking Water Act (SDWA)

Dear Mr. Oswald and Mr. Milne:

On behalf of [For Love of Water \(FLOW\)](#), I am submitting this letter to the Michigan Department of Environment, Great Lakes, and Energy (EGLE or the Department) raising many of the same legal issues and concerns that our organization has raised with the State of Michigan since 2016 in multiple, substantive public comments regarding the Nestlé Waters application for water withdrawal well at White Pine Springs, near Evart, Michigan, in Osceola County.¹ The Department issued Permit No. 1701 under Section 17 of the Safe Drinking Water Act (SDWA). Michigan Citizens for Water Conservation (MCWC) filed a contested case, challenging this permit affirmed under the SWDA, and the matter is pending on appeal before the Ingham County Circuit Court. Notwithstanding the pending circuit court case, FLOW

¹ [Report – 2017 FLOW Letter to the MDEQ re: Nestlé Permit Application](#) November 13, 2017 [FLOW Letter and Expert Report to the MDEQ re: Nestlé Application](#) April 21, 2017 [FLOW Comments to the MDEQ re: Nestlé Application](#) April 12, 2017 [FLOW Letter to the MDEQ re: Lack of Adequate Information and Extension](#) February 22, 2017; [Report – 2016 FLOW Comments to the MDEQ re: Nestlé Permit Procedural Flaw](#) December 16, 2016 [FLOW Comments to the MDEQ on Nestlé Permit](#), November 3, 2016 [FLOW Comments to the Regional Body on the Waukesha Diversion Application](#). (See these reports at <https://forloveofwater.org/resource-library/>.) See also Briefs filed by parties in the Ingham County Cir. Ct. case.

remains actively engaged in this matter on behalf of our supporters and the public, and deeply concerned about the interpretation and application of the laws in this matter. Without careful consideration of the issues before the Circuit Court, and the similar and new issues raised by the recent withdrawal of Permit 1701 by BlueTriton Brands, discussed below, BlueTriton's attempted registration under Part 327 of a reduction from 400 gpm to 288 gpm presents serious legal precedents that likely continue and threaten harm the waters of Michigan and the Great Lakes.

After acquiring Nestlé Waters North America's bottled water division, including the Michigan wells and operations, BlueTriton notified the Department of Environment, Great Lakes, and Energy by letter on September 28, 2021 (Arlene-Anderson, BlueTriton, to Eric Oswald, Director, DWEH Division), stating that it will not be utilizing the 400-gpm water capacity authorized by the permit issued to Nestlé Waters. (Michigan Permit 1701, Sec. 1017, SWDA—576,000 gallons per day). The letter also stated that the registered capacity does not require a permit under Section 17 of the SWDA. In a recent *Associated Press* article, BlueTriton stated that it appreciated the Department's cooperation in its withdrawal of the 400-gpm permit and registration of the 288 gpm withdrawal capacity.

To date, the Department has not provided any public notice, opportunity for public comment, or other public participation in this matter. BlueTriton's purported registration does not excuse the necessity of notifying affected parties or those organizations who have spent considerable effort regarding a proper resolution of this matter. Moreover, in our view, similar to the arguments pending before the Circuit Court, BlueTriton's reduction of capacity from 400 gpm to 288 gpm (from approximately 576,000 gallons per day down to 414,000 gpd) does *not* mean no permit is required under Section 17 of the SWDA.

In fact, the cumulative capacity of PW 101 at White Pine Springs (the 2015 increase of 100 gpm plus the new increase to 288 gpm) is subject to Section 17 and requires an individual permit, including compliance with Section 32723 of Part 327. Taken together, the SWDA and Part 327 make clear that such segmentation of each permit or registration to avoid review and permit requirements intended by Section 17 is both improper and contrary to law. Moreover, the pending case is not moot because the questions involving the validity of the segmentation of each permit, approval, or registration in an attempt to avoid the required comprehensive review for bottled water withdrawals equal or greater than 200,000 gallons per day are before the Circuit Court.

A few of those issues, without giving less importance to others, include:

1. **Monitoring Plan:** The withdrawal of the 400-gpm permit may have removed or allowed BlueTriton to abandon the monitoring plan required by the Department as a condition to the 400-gpm permit. While the monitoring plan was a condition to that permit, the condition applied to the on-going pumping to determine better the effects of such pumping from the White Pine Well at lower rates, presumably between 150 to 250 gpm. The withdrawal of the 400-gpm permit or amount does not resolve or avoid the monitoring plan requirements, because the condition is a requirement of the overall amounts, including necessarily the reduction to 288 gpm from 400 gpm, which exceeds the 150-250 gpm amounts. Therefore, the

monitoring plan should remain a condition of BlueTriton's withdrawal, and the Department should insist on it.

2. **Segmentation:** The registration of the modified previous registration of 100 gpm to get to 133 gpm, or 198,000 gallons a day, and the exclusion of the 150 gpm approved by the Department subsequent to the amendments to the SWDA and Part 327 in 2006-2008, as noted above, are contrary to law. BlueTriton's new capacity of 414,000 gallons per day exceeds the threshold of 200,000 gallons per day, and is subject to the permit requirements of Section 17, including Part 327, NREPA, as set forth in Section 33723.
3. **Permit Designation Questions:** Moreover, the original permit was issued as a non-community public water supply well under the former SWDA, but was not approved for withdrawal, pumping, piping for truck and haul, or as to its water source until after the 2008 Parts 327 and 2006 and 2008 SWDA amendments, including Sections 1017 and 32723, *supra*.
4. **MEPA Triggered:** In addition, and equally important, it was not only improper to treat the BlueTriton modification as a registration. The Department has an independent duty under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 et seq., and common law public trust doctrine, to consider and determine the likely effects on the water resources, natural resources, and public trust in those resources in any permit, licensing, approval, or other proceeding leading to approval, such as under Part 327 and/or the SWDA, including a registration under the Water Withdrawal Assessment Tool, Part 327. *Vanderkloot v Highway Comm'n*, 392 Mich 159 (1974); *Ray v Mason County Drain Comm'r*, 393 Mich 294 (1975); *Buggs v Mich. Public Service Comm'n*, 2015 WL 159795 (2015). To date, the Department has not, separately, considered or determined whether the proposed withdrawal up to 288 gpm or 414,000 gallons a day is likely to impair, diminish, or harm the flows, levels, and water resources associated with Twin and Chippewa Creeks, adjacent wetlands, and aquatic resources. Even assuming the registration in this matter under Part 327, the registration does not satisfy the Department's independent duty under MEPA.

In summary, we urge the Department to take the following actions:

1. review the above matter to determine and make a decision, for the record, on the foregoing issues and questions;
2. advise BlueTriton that the registration it purports to hold is not final unless and until this matter has been reviewed in compliance with law;
3. notify interested parties what constitutes a final decision in this matter and when such final decision occurred;
4. make the required and necessary findings and decision under MEPA;
5. advise BlueTriton not to withdraw water under its new approved 288-gpm level until it has demonstrated to the Department based on actual data and calculations and other competent evidence that its withdrawals and diversions for sale at 288 gpm or 414,000 gpd are not likely to

impair or destroy the creeks, associated wetlands, fish habitat, and other natural resources and public trust; and

6. consult with Director Clark and Attorney General Nessel's staff to advise BlueTriton that the legal issues in the pending appeal in Ingham County are not moot.

Thank you for your consideration of the above. FLOW and our staff would be pleased to meet or engage in a conference call to discuss this matter. Our goal is to assure the proper and intended interpretation of the rules of law that protect our public trust waters, watersheds, the environment, and the rights of riparian landowners and citizens.

Sincerely yours,

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

James Olson
FLOW Sr. Legal Advisor

cc: Ms. Liesl Clark, Director, Department of Environment, Great Lakes, and Energy
Hon. Dana Nessel, Attorney General of Michigan