

Congress of the United States
House of Representatives
Committee on Oversight and Government Reform
Assessing the Environmental Risks of the Water Bottling Industry's
Extraction of Groundwater

Written Testimony of Terrill (Terry) Swier

On Behalf of

Michigan Citizens for Water Conservation

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I appreciate the opportunity to testify today concerning the environmental risks of the water bottling industry's extraction of groundwater. I am president of the grassroots group Michigan Citizens for Water Conservation. I have held this position for seven years. Before retirement in 1999 and moving back to land that has been in my family for three generations, I was a reference librarian at University of Michigan Flint.

It has been seven years since the residents of Mecosta County, Michigan were made aware of Nestlé's plans to pump over 210 million gallons of spring water per year from a private hunting preserve, divert it through a 12 mile pipeline that crosses streams and wetlands to its plant, bottle it, and then truck it outside the Great Lakes Basin under the brand name Ice Mountain. As Nestlé moved into Michigan to privatize our water for its own profit, it announced there would be no adverse resource impact to the natural resources.

In December 2000, about 100 citizens met at an elementary school and Michigan Citizens for Water Conservation ("MCWC"), a non-profit corporation was formed. MCWC's mission is to conserve, preserve, and protect the waters and natural resources and public trust in those resources of Michigan and the Great Lakes. MCWC has grown to over 1,900 members, but works on water preservation and conservation issues with other organizations.

MCWC began at the local level, asking our elected township officials to place a moratorium on the Nestlé project to give us time to investigate and evaluate a proposal of this magnitude for the potential impact on neighboring wells, lakes, streams, wetlands, wildlife, and the community's quality of life. Elected officials did not hear or listen to our voices. This eventually led MCWC to three petition drives on rezoning ordinances and to three courts: the Mecosta County District Court, the Michigan Court of Appeals, and the Michigan Supreme Court. The findings of harm from Nestlé's pumping remain intact and unaffected in all three courts.

In early 2001, MCWC persuaded Nestlé Waters North America Inc. (then Perrier Group of North America) to release its complete hydrogeological assessment on its proposed 400 gallons per minute water pumping, pipeline, and water bottling operation near Big Rapids, Michigan. MCWC organized a public hearing with the Michigan Department of Environmental Quality

("MDEQ"), in which the citizens overwhelmingly opposed the Nestlé operation. MCWC organized a countywide petition drive and vote that opposed the project by a 2:1 margin. With the help of hired environmental experts, MCWC submitted comments to the MDEQ showing that Nestlé's assessment and modeling was flawed.

MCWC petitioned then Attorney General Jennifer Granholm to ban diversions and exports under the Federal Water Resources Development Act ("WRDA"). After hearing arguments from MCWC and Nestlé, Attorney General Granholm issued a letter of opinion to Governor Engler and the Legislature that the Nestlé proposal violated WRDA. Even after this, the MDEQ issued a safe-drinking water permit to Nestlé for pumping 400 gallons per minute in late summer of 2001.

In 2002, MCWC filed a lawsuit in Mecosta County Circuit Court. The issues in the case were:

- Who owns and controls Michigan's water?
- What are the limitations on diversion and export of water under the common law of property and water?
- What is the standing of citizens under the public trust doctrine and the Michigan Environmental Protection Act to protect water resources from harm?

On November 25, 2003, after 19 days of trial spanning three months, Judge Lawrence Root issued a landmark ruling. In his 60-page opinion, Judge Root found:

- Nestlé's assessment and model were not reliable
- Nestlé's extraction of water at *any rate* was unreasonable use of groundwater because the groundwater and spring formed Osprey Lake and Dead Stream
- Removal of groundwater would divert and diminish the flow of the stream by at least 27%
- The level of the stream and two lakes would be lowered by 4 to 6 inches
- The effects of pumping would impair the stream, lakes, and wetlands located on Nestlé's well field property or downstream on some of the plaintiffs' property
- The Court applied a common law rule that if water diverted or removed from a watershed diminished the flow or level of a lake or stream, it was unlawful or an unreasonable use
- Judge Root ordered Nestlé's operations to cease

Nestlé appealed to the Michigan Court of Appeals. With the help of the DEQ, Nestlé was granted a partial stay of the Judge Root's order. Nestlé was allowed to pump up to 250 gpm during the appeal. In November 2005, the Court of Appeals affirmed the trial court's findings on scientific facts and unreasonable harm and unreasonable use. However, the Court adopted a new "balancing test" that shifted water and property law to allow the diversion and export of water out of watersheds. The Court seems to have ruled that if there is surplus water and the benefits outweigh the harm, even if significant, water may be diverted or exported.

The Court of Appeals reduced the maximum pumping limit to 200 gallons per minute and remanded the case back to the trial court to (1) establish what level Nestlé could pump under its new “balancing test” and (2) finding an impairment in violation of the MEPA. As a result of the Court of Appeals ruling, MCWC and Nestlé met and set a schedule of pumping limits of 218 gallons per minute average in higher precipitation months and to around 125 gallons per minute from June 1 through October 1 each year. The limits are based on the flows and levels monitored in the stream. The remand order allows either MCWC or Nestlé to request the circuit court to reevaluate the pumping limits by written notice to the other party and the Circuit Court for the 20 years. This was done so both sides could appeal to the Michigan Supreme Court.

In early 2006, MCWC appealed to the Supreme Court arguing that the Court of Appeals’ “balancing test” would open the door for anyone outside the Great Lakes Basin to divert and export water as long as the benefit of exporting surplus water outweighs the harm. The balancing test would also imply that Michigan’s water is for sale in the context of economic benefits outweighing harm or efforts to restrict water for future use.

Nestlé cross-appealed asking the Supreme Court to reverse the Court of Appeals decision under the MEPA. Nestlé argued that MCWC or citizens do not have standing to protect wetlands and a lake on the property where Nestlé’s high capacity wells are located.

In February 2006, Michigan passed a weak water law that regulates withdrawals under limited impact standards, applies only to 2 million a gallons a day withdrawals, and exempts water packaged in containers smaller than 5.7 gallons.

In 2007, the Supreme Court heard oral arguments from both sides but only on the question of standing under the MEPA raised by Nestlé. On July 25, 2007, the Supreme Court ruled 4:3 that even though MCWC and plaintiffs had interests that were impaired and had standing under the MEPA as to the Dead Stream, Thompson Lake, and adjacent wetlands, they did not have standing to prevent harm to three wetlands and Osprey Lake located on Nestlé’s property. The Court let stand the remaining part of the Court of Appeals decision and remanded to the circuit court.

MCWC requested a rehearing because Osprey Lake and the three wetlands are in the same area affected by Nestlé’s pumping in which plaintiffs owned or used and enjoyed property. On September 28, 2007, the Michigan Supreme Court denied MCWC’s motion for rehearing in another 4:3 order. This ruling does not affect MCWC’s monumental victory under Michigan water law and the MEPA. The ruling does cripple the rights of citizens to file suits under the MEPA to protect the environment. We feel we have been denied individual liberty granted by the legislature in the Michigan Constitution. Citizens will have to address this problem through new legislation or constitutional amendments.

MCWC has won three court decisions. Judge Root’s findings of harm from the pumping in the Circuit Court and the Court of Appeals agreement with his ruling remain intact and unaffected by the Supreme Court decision. However, the Michigan Supreme Court has issued a remand order. If mediation fails, the issues not resolved are then referred to the circuit court for a

hearing and decision under the remand order, the existing trial record and Judge Root's findings, and relevant new data or facts that have become evident in the past two years. Flows and levels have been lower than expected, and for longer periods. MCWC believes that Nestlé's pumping limit should be lowered in the summer months and extended to other low flow months, especially during May and June.

MCWC believed then and it now has been proven that irreparable harm would occur and does occur to the waterways due to pumping by Nestlé at the Sanctuary Spring site. Nestlé's pumping has caused harm to the Dead Stream by reducing the flow and level, narrowing the stream, exposing mud flats, and restricting the enjoyment of many of the members of MCWC for fishing, boating, and kayaking on the stream. The findings of facts are in the court records that Nestlé pumping has created and will continue into the future to create adverse impacts to the riparian uses and rights. What will the area, including Thompson Lake, be like for future generations?

The lives of the 1,900 members, including the plaintiffs, those who live on the Tri-Lakes, and mine have changed since Nestlé came to Michigan. The issue has pitted neighbor against neighbor, friendships have been severed, and Nestlé has violated our lives either directly or indirectly with telephone polling, private investigators, the FBI coming to our homes, and a potential Strategic Lawsuit Against Public Participation (SLAPP suit) against my son. MCWC has spent nearly a million dollars on the lawsuit against Nestlé. We continue to hold fundraisers such as bake sales and garage sales to continue to pay our legal and environmental bills; Nestlé has affected families – emotionally, physically, financially, and mentally. This has spilled over into a statewide issue, and MCWC believes much of what it has done and stands for is supported by a majority of Michigan's citizens.

Since 2000, Nestlé has continued to actively pursue other spring and groundwater sources in Michigan. Nestlé is now trucking spring water in bulk from the City of Ewart's municipal well for a fraction of a penny per gallon to its plant in Stanwood. Ewart is located 20 miles to the north of Mecosta.

Nestlé purports to being a "good neighbor" company to our area, yet it continued to pump at high rates during a long period of low precipitation and lower recharge. Even when bottomland and other dramatic impacts and damage to the Dead Stream, Thompson Lake, and wetlands have occurred, Nestlé has continued to pump. Nestlé was cautioned by the trial judge that it proceed at it's own risk in building it's plant in Stanwood. True to form, Nestlé pushed ahead in building its plant and continued to use the possible loss of jobs as ways to push through with it's lobbyists in Lansing to get to the Governor and her staff and legislators to side with an international company and not the citizens.

MCWC has won three court decisions. Now the Michigan Supreme Court has issued a remand order. If mediation fails after 45 days, the issues are again referred to the circuit court for a hearing and decision.

MCWC would like to see:

- **No** pumping by Nestle, including the pumping in Ewart that causes harm to the environment where it diminishes the flow or level or impairs any lake or stream
- **No** diversion of spring water for export by Nestlé outside of the Michigan's watersheds. Spring water by definition is directly connected to lakes and streams.
- State laws passed to protect against diversions of water, including exports in bottles less than 5.7 liters.
- A license required from the legislature or an agency delegated with the power to license for water bottlers like Nestlé to withdraw and divert the waters for export, subject to strict public trust conditions. The state must always retain the right to revoke a license and stop a use that is not primarily in the public interest and/or causes adverse impacts to the water, air, and/or land.
- All water bottlers must meet standards to be set by the courts and state law.
- National laws or rules that require bottled water to meet all standards prescribed for public tap water, including frequency of testing, contaminants tested for and public information advisories.

Water grabbers, like Nestlé, undermine the interests of our sixth generation residents who live on the lakes and streams; the public that fishes, boats, swims, and enjoys our lakes and streams; farmers who rely on our groundwater; and industry and our economy that are so dependent on our water. Our water is our heritage and our culture. It must be protected for our future generations.