



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

**MICHIGAN LEGAL REQUIREMENTS AND STANDARDS AND SELECTED STATUTORY PROVISIONS
APPLICABLE TO WATER WITHDRAWALS FOR BOTTLED WATER
IN EXCESS OF 200,000 GALLONS PER DAY**

James M. Olson¹

April 12, 2017

Scope of this Specific Legal Comment

For Love of Water (“FLOW”), a Great Lakes Law and Policy Center, submits this specific comment on three critical legal matters² regarding the Nestlé Waters North America (“Nestlé”) application (“Nestlé Application”) under Section 17, Safe Drinking Water Act (“SDWA”), MCL 325.1017, and Section 32723, Great Lakes Preservation Act (“GLPA”), MCL 324.32723 *et seq.*, to remove 400 gallons per minute (“gpm”) by a large volume groundwater well PW-101, from the headwaters, creeks, and adjacent or nearby wetlands of Chippewa Creek/Twin Creek, in Osceola County, Michigan:

1. The applicable statutory requirements and standards that apply to the Department of Environmental Quality’s (“Department”) considerations, evaluations, and determinations on Nestlé’s application;
2. The common law standards applicable to the Department’s considerations, evaluations, and determinations under the SDWA and the GLPA; and
3. Other statutory water law standards and requirements.

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² FLOW will submit a comprehensive scientific and legal comment to the Department on the Nestlé Application before the end of the public comment period on April 21, 2017.

1. Applicable Statutory Legal Requirements and Standards

Section 17 of the SDWA imposes specific requirements and standards for a permit for proposals in excess of 200,000 gallons of water per day. Specifically, Section 17(4) mandates that the Department “shall only approve” a permit if the Department “determines both” of the following requirements: (a) the application establishes the applicable standards contained in Section 32723 of the GLPA or Water Withdrawal Law and (b) measures are imposed to prevent or address hydrologic effects commensurate with the nature and extent of the withdrawal. The following list summarizes the requirements and standards under both Section 17 and Section 32723:

- a. Section 17(3) of the SDWA requires that the applicant must provide sufficient information containing an “evaluation of environmental, hydrological, and hydrogeological conditions that exist and the predicted effects” that “provides a reasonable basis for the determination” of the requirements and standards of Section 17 of the SDWA and Section 32723 of the GLPA.
- b. Section 17(3) of the SDWA also requires the applicant provide sufficient studies that evaluate the conditions that exist, as well as the predicted effects based on those existing conditions.
- c. Further, there must be a “reasonable basis for the determination” by the Department. Only if there is sufficient information to evaluate existing conditions and effects and for a reasonable basis for determination can a permit be approved under Section 17(3). If this information does not exist or is unsupported by necessary and reliable data, an application must be denied.
- d. Similarly, Section 32723(2) of the GLPA requires that the application shall contain “information described in section 32706c” (Site Specific Review proposal) and an “evaluation of existing hydrological and hydrogeological conditions.”
 - i. Section 32706c requires information on “actual” stream flow data of the stream reach. Drainage area calculations in Section 32706a(2)(a),(b),(c),³ and Section 32706a(3),⁴ account for cumulative withdrawals under Section 32706e, and the proposed maximum monthly rates and volumes of proposed withdrawals, effects on seasonal fluctuations, location and amount of return flow.
 - ii. Both Section 17(3) of the SDWA and Section 32723 of the GLPA require sufficient information on existing conditions.

³ Sec. 32706a(2)(a),(b),(c) addresses adverse resource impact on cold, cold transitional, and cool water streams in the water withdrawal assessment tool information.

⁴ Sec. 32706a(3) requires information on location, capacity of equipment, water source related to proposed withdrawal.

- iii. Under Section 32723(6)(b), the information must consider both “individual” and “cumulative” adverse resource impacts.
 - 1. “Individual” includes adverse resource impacts, as well as the hydrological and hydrogeological effects underlying these impacts.
 - 2. “Cumulative adverse resource impacts,” also including such hydrological and hydrogeological effects, means (a) any effects and their impacts arising out of the previous permitted rate of 150 gpm, the 100 gpm increase in 2015, the 250 gpm increase requested by the instant application, and the total 400 gpm proposed for PW 101; and (b) that past, present, and future existing conditions and their predicted effects and impacts must be considered and determined.⁵
- iv. The Department must base its review and determination on information (existing environmental, hydrological, and hydrogeological conditions) “gathered by the department,” not just the information submitted by the applicant. *Id.*
- v. Under Section 17(4)(b) and 17(5), the applicant must provide information *on measures to prevent* hydrologic individual and cumulative effects and impacts, such as diminishment of flows and levels of streams, lakes, or wetlands. This is critical in this case. Once there is sufficient information submitted by the applicant and gathered by the Department to consider and make a reasonable determination, the Department may be required to limit pumping commensurate with effects and impacts; those effects and conditions, such as base or low flows and levels during summer months or during other seasons or changes over time, such as climate change, will vary. For example, if it is determined that over a weekly or bi-weekly average, up to 150 gpm can be withdrawn in wet seasons or years, but not more than 100 gpm during dry seasons or years, pumping can be limited based on a monitoring plan that measures flows and levels to comply with these limitations on a continuous basis to prevent likely individual and cumulative effects and impacts.
- vi. Further, the applicant “shall consult with local government officials and interested community members.” Section 17(5).
- vii. Under Section 32723(6)(c), the withdrawal must be implemented “in compliance with all applicable local, state, and federal laws.”

⁵ See also duty to consider and determine likely effects and feasible and prudent alternatives imposed by Section 1705(2), MCL 324.1705(2), and *State Highway Commission v. Vanderkloot*, 392 Mich. 159 (1974), discussed, *infra*, p.7.

- viii. Under Section 32723(6)(d), the Department must determine that the proposed use is “reasonable under common law principles of water law in Michigan.”
- ix. Section 17(9) of the SDWA and Section 32723 of the GLPA do not alter common law water rights or the “applicability of other laws providing for the protection of natural resources or the environment.” In this regard, the Department must determine that the proposed withdrawal “will not violate public or private rights and limitations imposed by Michigan water law or other Michigan common law duties.”

2. Michigan Common Law Standards

Common law standards are found in the common law of riparian and groundwater law. This is driven by the fact that Nestlé proposes to extract water from “White Pine Springs” (source of headwaters of Chippewa and Twin Creeks) so it can label its bottled water as “spring water” in order to comply with FDA regulations.⁶ These include standards that limit the quantity of water based on material effects on flows and levels, and/or material harm to other reasonable users and uses in a watershed, and to the conservation and nature and extent of wetlands, streams, and small lakes, or the environment.

- a. The withdrawal or removal will not materially interfere with other water uses or materially diminish flows and levels of streams, lakes, or wetlands where the withdrawn water is transferred off-track or out of the source watershed. *Schenk v. City of Ann Arbor*, 196 Mich. 75, 84, 163 N.W. 109 (1917) (following the “no material diminishment” “reasonable user” rule for off-track transfer and sale of water in the Eastern United States. *Meeker v. City of East Orange*, 77 N.J.L. 623, 636-639, 74 A. 379 (1909); *Smith v. City of Brooklyn*, 160 N.Y. 357, 54 N.E. 787 (1899); *Collens v. New Canaan Water Co.*, 234 A. 2d 825 (Conn. 1967)).
- b. However, in *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, 269 Mich. App. 25, 67, 69-71, 709 N.W.2d 174 (2005) (“MCWC”), the Court of Appeals ignored the binding standard for “off-track” transfers in *Schenk* in favor of a “reasonable use balancing test” (“RUBT”) for all groundwater uses, on-track or off-track. The Court laid down three primary principles with six factors to determine whether a proposed use is lawful under the RUBT.
- c. The three principles are:

⁶ 21 CFR 165.110(a)(2)(vi). In order to place “spring water” on a bottle, Nestlé must obtain water from a water source with a direct hydrologic and geochemical connection to a spring/aquifer. Ironically, it is this truth-in-labelling regulation that drives the effects and impacts on headwater creeks, streams, lakes, ponds, wetlands, other users, and the environment in this matter.

- i. There should be a “fair participation” for all users – private and public – of the water course; hence, there must be a “proper balance” to preserve as many uses by all affected persons or uses of the common water source. *MCWC*, 269 Mich. App. at 69-71, 79.
 - ii. The law protects a use “only” if it is “itself reasonable” as determined by the circumstances—all groundwater or riparian users are entitled to an adequate supply of water for a reasonable use. *Id.*
 - iii. The law will only address unreasonable harms; i.e., under the circumstances and six-factor test, below, the interference is substantial. *Id.*
- d. The six factors are:
- i. The purpose of the use. Traditional groundwater uses, riparian uses, or public rights and uses are preferred over artificial off-tract uses such as large-volume water off-tract diversions or consumptive uses for sale of water. *MCWC*, 269 Mich. App. at 71-72; *Thompson v. Enz*, 379 Mich. 667, 686, 154 N.W.2d 473 (1967).
 - ii. The suitability of the use to the location, including nature and size of stream, lake, wetlands, and amount of water. *MCWC*, 269 Mich. App. at 71.
 - iii. The extent and amount of the harm, including the nature of and effect on diminishment of water course or other uses, aquatic and natural resources, and environmental conditions; *Id.*; *People v. Hulbert*, 131 Mich. 156, 170, 91 N.W. 211 (1902); *Enz*, 379 Mich. at 686.
 - iv. The nature of benefits such as private or public. *MCWC*, 269 Mich. App. at 71-72.
 - v. The necessity, duration, and amount of the water use. *Id.*; *Hulbert*, 131 Mich. at 170.
 - vi. Any other factor that may bear on the reasonableness of a use. *Hulbert*, 131 Mich. at 170.
- e. In addition, the applicant, like Nestlé in this matter, must bear the burden at all times to assure there is adequate water in a stream, wetland, or lakes for continued use and enjoyment by others. *MCWC*, 269 Mich. App. at 71, 78-79.
- f. The Michigan Supreme Court has not decided which rule applies for off-tract sale of groundwater, the “reasonable user” standard in *Schenk* or the “RUBT” in *MCWC*. In any event, the *MCWC* court disfavored Nestlé’s artificial off-tract diversion for private bottled water sales that diminished or caused harm to riparian streams and lakes. *MCWC*, 269 Mich. App. at 75-76.

- g. Several of the Court of Appeals’ findings and conclusions in *Michigan Citizens for Water Conservation v. Nestlé Waters North America, Inc.*, 269 Mich. App. 25, 67, 69-71, are applicable to the instant application. The court in *MCWC* found that Nestlé’s proposed 400 gpm that had been permitted by the Department was unreasonable under the common law reasonable use standard, principles, and factors described above. In addition, the court specifically affirmed the injunction issued by the trial court. However, the court reversed the blanket prohibition from removing any groundwater, and remanded to the trial court (Mecosta County, same circuit court as Osceola County) to modify the injunction and imposed limits to maintain adequate water in the stream, lakes, and adjacent wetlands. *MCWC*, 269 Mich. App. at 80. On remand, the parties negotiated, and the trial court entered a Consent Judgment and Order that prohibited pumping beyond 100 to 150 gpm when flow and water levels reached stated limits required to protect the stream.⁷ Underlying the Court of Appeals opinion are the following rulings on the “RUBT” standards when applied to a large volume extraction of groundwater for bottled water.
- i. Traditional or natural riparian or groundwater users prevail against extraction for bottled water, an artificial use. *MCWC*, 269 Mich. App. at 75.
 - ii. Further, landowners who use riparian streams, lakes, or groundwater in connection with or to benefit their land are preferred over users, like Nestlé, that ship water away. *Id.* at 75.
 - iii. Large volume groundwater extractions connected to headwater streams are not well suited for headwater creek locations, because modest rates of pumping can have dramatic consequences. *Id.* at 76.
 - iv. Groundwater extraction by companies like Nestlé for “spring water” do not need to maintain high-levels of pumping, such as 250 to 400 gpm, because they have multiple water sources or can develop additional water sources elsewhere; on the other hand, competing water users that need or use water in connection with their land require adequate water. *Id.* at 77-78.
 - v. A bottled water user like Nestlé is in a better position to spread the costs by reduction in use, and it is unjust to deplete stream flow and place burden of harms on riparian landowners. *Id.* at 78-79.

⁷ A copy of the Consent Judgment and Order in *MCWC* is attached as **Exhibit 1** to this legal comment.

3. Other Applicable Statutory Water Law Standards and Requirements

- a. Part 17, NREPA, MCL 324.1701, *et seq.* (“Michigan Environmental Protection Act” or “MEPA”) applies to governmental agencies.
 - i. No likely impairment of water, natural resources, or the public trust, section 1703(1), MCL 324.1703(1), except where applicant demonstrates no feasible and prudent alternative location, manner, quantity or levels of pumping. *Id.*; MCL 324.1705(2). *Ray v. Mason County Drain Comm’r*, 393 Mich. 294 (1975); *Nemeth v. Abonmarche*, 457 Mich. 16 (1998).
 - ii. The state has an affirmative duty to prevent and minimize environmental degradation, *Ray*, 393 Mich. at 294, and to consider and determine whether the withdrawal and transfer of water is likely to impair the water, natural resources, or public trust in those resources; if there are such likely effects, the permit must be denied. Section 1705(2); MCL 324.1705(2). The duty to consider impacts and feasible and prudent alternatives applies to permit proceedings before state agencies. *State Highway Comm’n v. Vanderkloot*, 392 Mich. 159, 167-168, 184-187, 220 N.W. 2d 416 (1974); *Genesco, Inc. v. MDEQ*, 250 Mich. App. 45, 645 N.W. 2d 319 (2002); *Buggs v. MPSC* (Mich. App. unpublished opinion, Jan 23, 2015 p. 5; 2015 WL 159795).
 - iii. The determination of “likely pollution or impairment of water and natural resources” turns on the facts and circumstances; the determination is not limited to actual degradation, but “likely” or “probable” damage. *Nemeth*, 457 Mich. at 25. There are three separate grounds for finding “likely pollution or impairment:”
 - (1) Whether there has been a violation of a pollution or water standard. *Nemeth*, 457 Mich. at 35-36; *MCWC*, 269 Mich. App. at 88-89.
 - (2) Even if there is no violation of a pollution standard, “likely pollution or impairment” can be determined through the “aid” of other water and environment statutes, such as the Inland Lakes and Streams Act, MCL 324.30101 *et seq.*, and Wetlands Protection Act, MCL 30301 *et seq.*; *MCWC*, 269 Mich. App. at 88.
 - (3) Whether based on sufficient facts and information there is “likely pollution or impairment.” *Ray*, 393 Mich. at 294; *Nemeth*, 457 Mich. at 25; *MCWC*, 269 Mich. App. at 88.

Conclusion

The Department submitted a letter to Nestlé, February 14, 2017, demanding supplemental information. The Department requested Nestlé to submit specific information on “reasonable use” common law and

other water law standards and requirements applicable to the pending application and proceeding under Section 17 of the SDWA and Section 32723 of the GLPA. Nestlé's supplemental information filed with the Department in response to this item was inadequate and wrong.

To assist the Department on this significant water law and policy matter for Michigan, FLOW provides this summary of the requirements, standards, and court rulings on what Nestlé must demonstrate and the Department must consider and determine in this matter. Only if Nestlé submits sufficient information for such consideration and determination, the information forms a reasonable basis for the determinations, and Nestlé complies with all requirements and standards, can a permit be approved. Moreover, even if approved, the pumping allowed under the permit must be limited to prevent effects and impacts, must be measured with adequate monitoring to control pumping, and must at all times maintain adequate flows and levels in the stream and protect the uses, the streams, wetlands, and ponds, and natural resources dependent on them. Anything short of these requirements and standards requires denial of the application.

On behalf of FLOW, your consideration and application of the above are most appreciated. Should you, your staff, or the Attorney General have any questions, do not hesitate to contact me at jim@flowforwater.org and/or FLOW's Executive Director Liz Kirkwood at liz@flowforwater.org.

Thank you.

Respectfully submitted,



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cc: Peter Manning, Michigan Asst. Attorney General

Exhibit 1

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR MECOSTA COUNTY

MICHIGAN CITIZENS FOR WATER
CONSERVATION, a Michigan nonprofit
corporation; R.J. DOYLE AND BARBARA
DOYLE, husband and wife; and JEFFREY R.
SAPP AND SHELLY M. SAPP, husband and
wife,

Plaintiffs,

v

NESTLÉ WATERS NORTH AMERICA INC.,
a Delaware corporation; and DONALD
PATRICK BOLLMAN AND NANCY GALE
BOLLMAN, husband and wife, a/k/a Pat
Bollman Enterprises,

Defendants.

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Case No. 01-14563-CE

Honorable Susan H. Grant

**AMENDED AND FINAL STIPULATED
ORDER**

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At a session of said Court held in the Courthouse in the City of Big Rapids, Michigan, this 6th day of July, 2009.

PRESENT: Honorable Susan H. Grant
Circuit Court Judge, acting by assignment

This matter having come before the Court pursuant to paragraph V.B. of the Stipulated Order on Remand dated January 25, 2006; and the hearing pursuant to said paragraph V.B. having commenced July 6, 2009; and the parties having compromised and settled all of their claims, rights and obligations in this litigation; and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS ORDERED THAT THE STIPULATED ORDER ON REMAND IS AMENDED PURSUANT TO STIPULATION OF THE PARTIES TO NOW BE A FINAL ORDER WHICH READS IN ITS ENTIRETY AS FOLLOWS:

I. Groundwater Claim – Injunction.

A. The following levels of water extraction by Nestlé Waters North America Inc. (“NWN”) from the Sanctuary Springs location are deemed to meet the criteria discussed in the Court of Appeals Opinion (Part III), 269 Mich App 25, 53-82, and are hereby permitted:

<u>Period</u>	<u>Maximum Average Withdrawal Rate</u>
1. January 1 – March 15:	275* gpm monthly average (as defined below)
2. March 16 – April 15:	225 gpm monthly average (as defined below)
3. April 16 – May 15:	225 gpm monthly average (as defined below)
4. May 16 – May 31:	175 gpm monthly average (as defined below)

5. June 1 – August 31: The maximum average withdrawal rate during the June 1 – August 31 period is limited by the following stage and flow criteria:

	<u>Stage at SG-Doyle</u>	<u>Maximum Average Withdrawal Rate</u>
a.	if less than 959.9' amsl (2 consecutive weekly readings)	50 gpm bi-weekly average
b.	if 959.9' amsl – 960.0' amsl	100 gpm bi-weekly average, subject to flow criterion (i) below
c.	if 960.01' amsl – 960.2' amsl	125 gpm bi-weekly average, subject to flow criteria (i), (ii) and (iii) below
d.	if greater than 960.2' amsl	175 gpm bi-weekly average, subject to flow criteria in (i), (ii), (iii), and (iv) below
	<u>Flow at SG-102 (M-20 Bridge)</u>	
i.	if 925 gpm or below (2 consecutive weekly readings)	50 gpm bi-weekly average
ii.	if 926 gpm – 975 gpm	100 gpm bi-weekly average
iii.	if 976 gpm – 1150 gpm	125 gpm bi-weekly average
iv.	if 1151 gpm – 1250 gpm	150 gpm bi-weekly average
v.	if greater than 1250 gpm	175 gpm bi-weekly average
6.	September 1 – September 15:	175 gpm monthly average (as defined below)
7.	September 16 – October 31:	210 gpm monthly average (as defined below)
8.	November 1 – December 31:	275* gpm monthly average (as defined below)

*If and to the extent that NWNA's actual average water extraction for the period June 1 through August 31 in any year is less than 150 gpm, the maximum

water extraction level for the following November 1 through March 15 time period shall be increased (up to, but not more than 290 gpm), to make up the gallons not extracted during June 1 through August 31. For example, if the actual average extraction for the period June 1 through August 31, 2009 were 135 gpm, the water extraction level for November 1, 2009 to March 15, 2010 would be 285 gpm monthly average.

“Monthly average” as used above means the average for the calendar month, or for a period less than one calendar month, the average for such time period. “Bi-weekly” as used above means every two weeks beginning with the first day of the specified time period. “SG-Doyle” as used above means the staff gauge currently located in Dead Stream near the Doyle residence. “SG-102” as used above means the monitoring location at the south side of the M-20 bridge at the Dead Stream.

As to the June 1-August 31 time period, if a weekly reading of stage or flow indicates that a reduced pumping limitation or increased pumping limitation is to take effect, such changed limitation shall take effect beginning on the third business day following the reading, unless the reporting of the applicable reading was delayed pursuant to the last sentence of paragraph III.B.2. below. If the reporting of the reading was delayed pursuant to the last sentence of paragraph III.B.2., the changed limitation shall take effect on the next business day following the reporting and shall remain in effect for at least 7 days (i.e., no subsequent change shall take effect prior to the expiration of 7 days).

- B. Levels of water extraction by Nwana from the Sanctuary Springs location in excess of those set forth in paragraph A above shall be deemed to interfere with the riparian

rights of Plaintiffs in violation of the principles and criteria set forth in the November 29, 2005 Court of Appeals Opinion, and are hereby enjoined.

II. MEPA Claim.

- A. The levels of water extraction from the Sanctuary Springs location set forth in paragraph I.A. above are deemed not likely to pollute, impair or destroy the air, water or other natural resources in violation of the Michigan Environmental Protection Act (“MEPA”), MCL 324.1701(1), and are hereby permitted.
- B. Levels of water extraction by NWNA from the Sanctuary Springs location in excess of those set forth in paragraph I.A. above are deemed likely to impair the water or other natural resources in violation of MEPA, and are hereby enjoined.

III. Additional Provisions.

- A. NWNA shall measure and record the stage and flow of Dead Stream at the M-20 Bridge (SG-102/SG-106) and the stage of Dead Stream at SG-Doyle at a weekly frequency during the period May 16 – August 31. During the remainder of the year, the monitoring frequency for SG-102/SG-106, SG-Doyle, SG-103 (Cole Creek) and SW-Gilbert/SW-101 (Gilbert Creek) shall be at the same frequency as for the “every four weeks” monitoring events in the Revised Monitoring Plan dated May 12, 2006, unless otherwise agreed by the parties. NWNA shall advise Plaintiffs’ designated representative of the dates and times of measuring such monitoring data and Plaintiffs shall have the opportunity to have their designated representative present to observe and/or inspect NWNA’s measuring and/or to take comparative measurements.

B. Nwana shall furnish monitoring data to Plaintiffs' designated representative within three business days following the monitoring event, and the monitoring data so furnished may be made publicly available. Nwana shall furnish pumping data to Plaintiffs' designated representative on the following basis:

1. Raw data for Nwana's daily total pumping volumes from the Sanctuary Springs location shall be furnished on a weekly basis, within two business days following the end of the week.
2. Reports of (a) Nwana's daily average pumping volume for each well at the Sanctuary Springs location (in gpm), (b) Nwana's total daily average pumping volume from all wells at the Sanctuary Springs location (in gpm), and (c) Nwana's average pumping volume from all wells at the Sanctuary Springs location (in gpm) during the applicable monthly or bi-weekly period pursuant to paragraph I.A. above, shall be furnished within four business days following the end of the applicable monthly or bi-weekly period.
3. Except as otherwise expressly provided in this Amended and Final Stipulated Order, the monitoring, exchange, and verification of monitoring, precipitation, and pumping data shall comply with the Revised Monitoring Program and the Plans and Procedures to Ensure Continuing Compliance, both dated May 12, 2006, unless otherwise agreed by the parties.

All of the foregoing time periods for furnishing data are subject to reasonable extensions or exceptions (as applicable under the circumstances pertaining to the furnishing of the respective data) for weather; power outages; hunting restrictions on monitoring data measurement at the Sanctuary; malfunction of meters, computers

and/or computer software; or other natural causes not within the reasonable control of NWNA.

- C. NWNA shall reimburse to Plaintiffs their costs in obtaining expert review of the monitoring data up to \$10,000 per year for 22 years, beginning in 2006. Thereafter, all monitoring data shall be provided monthly to an expert designated by MCWC or its successors and such designated expert shall have the right to be present, inspect, take comparative measurements, and receive the monitoring data as provided in paragraphs III.A. and III.B. above; provided, however, that if MCWC or its successors is dissolved or has notified NWNA that it no longer wants to receive such data, it shall be made available to Ferris State University, or other public library in Mecosta County willing to receive and maintain the information.

IV. Enforcement.

- A. If any party violates any of the provisions of this Final Amended Stipulated Order, any party may seek to enforce such provision by motion filed in the Circuit Court for Mecosta County, Michigan, as provided by law, seeking relief including but not limited to injunctive or other equitable relief; reduction of maximum average withdrawal rates in a subsequent period(s) to offset any previous withdrawals in violation of this Order; ancillary damages; contempt; or other sanctions. Any plaintiff who prevails shall be awarded their reasonable attorney fees and costs in obtaining enforcement of this Order. The trial court retains jurisdiction for purposes of enforcing this Order.
- B. It is expressly stipulated and agreed that MCWC has standing in this action, as a matter of fact and law, and that such standing shall continue necessarily as part of its

right to enforce this Amended and Final Stipulated Order. Further, it is expressly stipulated and agreed as a matter of fact and law that MCWC or its successor organization shall have the legal standing and the right to enforce the terms of this Amended and Final Stipulated Order under the Michigan Environmental Protection Act, MCL 324.1701 *et seq.* It is also stipulated and agreed as a matter of fact that (1) MCWC has members who are riparian land owners or members of the public who specifically use and enjoy the Dead Stream and/or Thompson Lake for viewing, boating, kayaking, canoeing, or other recreation (it being understood, however, that there is no right of public access to either Thompson Lake or the Dead Stream); (2) any reduction of flows and levels of Dead Stream or the levels of Thompson Lake due to a violation of the terms and provisions of this Amended and Final Stipulated Order would directly and actually injure or interfere with such uses and enjoyment; and (3) such injury and interference will be redressed by enforcement of the terms and provisions of this Amended and Final Stipulated Order. Accordingly, MCWC, as representative of the interests of these members, has distinct and special interests unique from the public at large to maintain a civil action to enforce the terms and provisions of this Amended and Final Stipulated Order as provided in paragraph A above.

- V. **Amendment of Injunction.** The injunction set forth herein modifies, supersedes and fully replaces the injunction in the Stipulated Order on Remand dated January 25, 2006.
- VI. **Binding Effect.** The provisions of this Order shall be binding upon and shall inure to the benefit of the parties and their respective heirs, executors, representatives, successors and assigns.

VII. **Recording.** A copy of this Order may be recorded by either party with the Register of Deeds for Mecosta County, Michigan, as provided by law, and indexed with reference both to NRNA's interest in the Sanctuary Springs property and to the Doyle property and the Sapp property.

VIII. **MCR 2.602(A)(3) Last Order.** This Amended and Final Stipulated Order resolves the last pending claim and closes the case, and this being a complete compromise and settlement of all claims in this litigation, no appeals shall be filed by either party.

IT IS SO ORDERED.

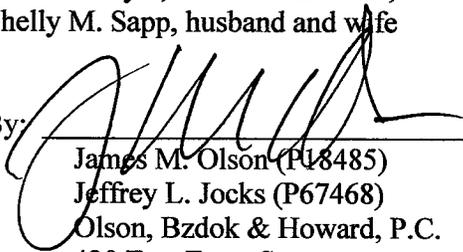
Dated: July 6, 2009



Honorable Susan H. Grant *P33079*
Circuit Court Judge, acting by assignment

We consent to the entry of this Order amending the Stipulated Order on Remand dated January 25, 2006:

Plaintiffs Michigan Citizens For Water Conservation, a Michigan nonprofit corporation; R.J. Doyle and Barbara Doyle, husband and wife; Jeffrey R. Sapp and Shelly M. Sapp, husband and wife

By: 

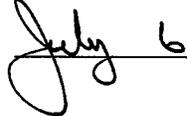
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Dated: July 6, 2009

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