

STATE OF MICHIGAN
MECOSTA COUNTY CIRCUIT COURT

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,

Case N^o: 01-14563-CE

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.

Hon. Susan Hennigan Grant
By Assignment

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**PLAINTIFFS' MOTION TO EXCLUDE AND/OR LIMIT THE
TESTIMONY AND REPORTS OF DEFENDANT'S EXPERT DR. ANDREWS**

May 1, 2009

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REQUEST FOR RELIEF 17

Plaintiffs, through their counsel, move this Court to exclude and/or limit the testimony and reports of Nestlé's Expert Dr. Andrews. Plaintiffs present the following as their motion and brief on this issue:¹

1. Introduction

This Court has ruled that “the parties may introduce evidence of facts and circumstances, including, without limitation, monitoring and pumping data through the date of the hearing in this matter and may also introduce analysis by the parties’ experts interpreting such evidence to assist the Court with its determinations.”² Even in light of this order, it has become clear through depositions and expert reports that Nestlé intends to introduce evidence well beyond the “facts and circumstances” and their experts’ interpretation of the “facts and circumstances.”

In this motion, MCWC will present the findings of fact and issues tried in this Court’s original Opinion and Order, and the findings of fact and issues tried and affirmed by the Court of Appeals. It will then present the evidence and issues that Dr. Andrews has presented in his depositions and expert reports. It will become clear that his testimony will focus on retrying the facts and issues already ruled upon by this Court which are well beyond the facts and circumstances that have arisen since the Stipulated Order on Remand.

By making these arguments, MCWC is in no way admitting that if Nestlé’s expert testimony and reports were allowed it would result in a modification of the injunction in favor of Nestlé. MCWC’s experts have reviewed Nestlé’s expert reports and depositions and believe them to lack credibility and support. MCWC is making these arguments to simplify the hearing before this Court and to limit the already skyrocketing costs that Nestlé has forced upon MCWC. MCWC requests that this Court issue an order, prior to the scheduled hearing, that excludes and/or limits the

¹Exhibits in support of the instant Motion are likewise being used in support of other motions simultaneously filed in this case. Whenever possible, Plaintiffs will refer to documents contained in other exhibit packages. For example, exhibits filed in support of Plaintiffs’ Motion for Summary Disposition will be referred to as **MSD Ex** ____.

²**MSD Ex 8** (Order dated December 15, 2008).

testimony and reports of Nestlé's Expert Dr. Andrews on all findings of fact and issues that this Court has already ruled upon.

2. Facts

a. The Findings of Fact and Rulings of This Court and the Court of Appeals

i. Summary of this Court's Opinions and Findings of Fact

This Court issued an Opinion and Order and halted Nestlé's pumping on November 25, 2003, based on its "unreasonable use" test for groundwater law and impairment under the MEPA. **MSD Ex 3**, Tr Opinion, pp. 48-50, 65-66. The Court denied Nestlé's motion for new trial, stay, and reopening proofs on February 14, 2004. **MSD Ex 4**, New Tr Opinion, pp. 34-35. This Court made the following findings of fact:

(1) There is a direct hydrological connection between the aquifer or tributary groundwater from which Nestlé extracts water for its bottled water and the springs, stream, Osprey Lake Impoundment, Thompson Lake, and the Tri-Lakes. **MSD Ex 3**, Tr Op, p 11, 13-15.

(2) Roughly, every gallon removed is a gallon from the springs, stream, and lakes.³ Specifically, the Dead Stream loses flow of 345 gpm for every 400 gpm pumped. *Id.* at 22. "There is no dispute but that Osprey Lake, Thompson Lake, Dead Stream and the seeps entering the Dead Stream will suffer a reduction in flow/stage." *Id.* at 13. Pumping 400 gpm exceeds the gallons per day rate of evaporation for Osprey Lake. *Id.* at 39.

(3) Pumping at 400 gpm reduces the flow of Dead Stream by as much as 28.75 percent., *Id.* at 22, and will reduce the level of the Dead Stream 2 inches or more on top of the effects caused by the other variables, including but not limited to evaporation, Gilbert Creek, beaver dams, vegetation, and culverts. *Id.* at 18-20, 22. Pumping at lower rates reduces the level proportionately, so 200 gpm reduces it by 1 inch and 100 gpm by ½ inch. *Id.* "For example, with the pump rate at the time of trial being at or near 200 gpm, Dead Stream's stage was down by about one inch and its

³"Nestlé's removal is on a 1:1 ratio of water removed from the subject watershed." **MSD Ex 3**, Tr Op, p 11.

flow loss was near 15 percent.” *Id.* The Court rejected Dr. Andrews’ opinion that the level would drop only ½ inch at 400 gpm. *Id.* “I have found that Dr. Andrews’ opinions on such are substantially below what has and will occur...” *Id.* at 32.

(4) Dr. Andrews’ testimony is less credible than Dr. Hyndman’s on the stage and discharge (level and flow) relationship of the Dead Stream and the effect of pumping. *Id.* at 10-11, 20-22. Dr. Andrews overstated flows by almost double and underestimated the effects. *Id.* at 21. “In listening to their analyses and opinions I came to the generalized opinion that Dr. Hyndman’s testimony and opinions are more credible and supportable than those of Dr. Andrews.” *Id.* at 10. This Court observed that Dr. Andrews testimony made him look like a “company man.” *Id.*⁴

(5) “Nestlé’s pumping operation will result in a narrowing of the channel of the Dead Stream over time in an amount greater than four feet” – a physical loss of the stream. *Id.* at 32.

(6) Pumping at 400 gpm will lower the level of Osprey Lake and Thompson Lake by 4 to 6 inches. *Id.* at 29. Thompson Lake and Osprey Lake are directly connected and their levels drop the same amount based on pumping. *Id.* Dr. Andrews opined that the drop at 400 gpm would be 2.5 to 3.5 inches; the court found “Osprey Lake and Thompson Lake will drop 4 to 6 inches.” *Id.*

(7) The hydrological effects are masked by variables, such as beaver dams, precipitation, and winds. *Id.* at 12.⁵

(8) “Dead Stream wetlands will lose at least two inches of water level, and maybe more, at a pump rate of 400 gpm, with lesser losses at lower pump rates on a straight-lime calculation.” *Id.* at 23.

(9) “This record has much evidence regarding those flats, how much water was lost to expose them and how much water is needed to cover them.” *Id.* at 24. The exposed mudflats

⁴“Dr. Andrews’ outburst regarding the importance of his work in this case to his client, Nestlé, and his view of Nestlé’s interest in understanding the subject of his analysis here (June 6th transcript of his testimony at pp 182-183) throws a glimmer of light on him in the role of being a ‘company man.’” **MSD Ex 3, Tr Op, p 10.**

⁵“As such, they must be determined largely by observing changes in surface waters over time in an environment that is already subject to seasonal, cyclical and climatic variations, along with other variabilities, all of which we have little direct evidence of. Such variabilities can mask or can exacerbate the effects of Nestlé’s pumping.” **MSD Ex 3, Tr Op, pp 17-20.**

interfere with Doyles' riparian property rights, use, and enjoyment. "This area is where the infamous mud flats so often referred to at trial are located. We tried to paddle into and around the flats, but could not because of the mud that falls into the category of 'too thick to drink, too thin to plow'. The nature of the mud as rotting organic matter becomes immediately apparent as its surface is disturbed, as with a canoe paddle. Stench is not too strong a word." *Id.* at 17.

(10) The Court found that the drop in levels will increase the temperature and render fishing in the even more shallow areas marginal, and pumping and reduction of flow and level will increase nutrient loading. *Id.* at 31.

(11) Shallow areas of the stream, like the "mudflats" at Doyles', will be affected by vary small decreases in level from pumping, making navigation difficult and adversely impacting the stream and fishing. *Id.* at 32. Most harms such as this will occur during the low flow periods. *Id.* Drops in higher flows also adversely impact the system because of the need to maintain the range of flows. *Id.* at 33. Dead stream wetlands were adversely impacted. *Id.* at 34.

(12) Thompson Lake will be reduced by 6 inches at 400 gpm, and a proportional amount corresponding to the level of pumping, and this will result in loss of fish spawning habitat and area for swimming. *Id.* at 29, 38.

ii. New Trial and Post-Judgement Opinion and Order

(1) "The question is not merely what has happened since the proofs closed but, rather, how does that new data move the existing data analysis in totality one way or the other." **MSD Ex 4**, New Tr Op, p 15. "The trial evidence clearly showed that it is important to look at as long a range of information as is available to 'flatten the curve' of short term anomalies ... Since Nestlé has not shown how the overall analysis would be changed If the newly-accumulated data were incorporated into it, balancing it against the long-term assessment of the trial evidence, it has not proven that merely having new information would move forward the controlling inquiries." *Id.*

iii. The Court of Appeals Affirmed this Court's Findings of Fact.

(1) "Defendant argues that the trial court's findings are speculative and not supported by the record. We disagree." **MSD Ex 13**, 269 Mich App at 41.

(2) “[T]he record supports the trial court’s finding that the Dead Stream will lose 345 gpm in flow and that this loss will correspond to a drop of approximately 2 inches in stage, with lesser losses at lower pump rates on a straight [line] calculation.” *Id.* at 45.

(3) “The trial court found that it [Dead Stream] would lose approximately 24 percent of its base flow and 2 inches in stage beyond the stream’s natural fluctuations given a withdrawal rate of 400 gpm.” *Id.* at 76.

(4) “The trial court determined that the reduction in flow would raise the stream’s temperature and cause the stream to become choked with plant life,” and “that the channel would narrow by more than four feet.” *Id.*

(5) “[T]he trial court noted that it was already a low flow stream subject to many natural variables. For these reasons, the trial court found that even a modest drop in water level would have dramatic consequences for the stream.” *Id.* at 75-76.

(6) “The trial court determined that these effects would impair the Dead Stream’s aesthetic value and its usefulness as a fishery, and would impair recreational navigation of the stream.” *Id.* at 76. “The loss of recreational use and the physical alteration will directly and substantially harm the riparian value of the Dead Stream.” *Id.* at 76,

(7) “[T]he trial court did not abuse its discretion in refusing to reopen the proofs.” *Id.* at 52. “Because the trial court did not clearly err in making its findings and did not abuse its discretion, a new trial is not warranted.” *Id.* at 50, 53.

iv. The Court of Appeals Affirmed the Groundwater Claim and Injunction Remedy, but Remanded to Modify the Injunction on a Determination of “Fair Participation” and “Maintaining An Adequate Supply of Water.”

(1) “In the present case, plaintiffs will suffer substantial harm to their riparian rights if defendant’s pumping rate of 400 gpm is permitted. In addition to loss of recreational uses ..., there will be lasting changes to the natural characteristics of the stream ... Plaintiffs also have no adequate remedy at law. Consequently, the only just way to prevent harm is to enjoin defendant ... to the extent such withdrawals are inconsistent with plaintiffs’ correspondent rights to make use of the same water resources.” **MSD Ex 13**, 269 Mich App at 80.

(2) “[W]e are now confronted with the daunting task of determining what level of water extraction ... will provide a *fair participation* in the *common water supply* for defendant, but leave plaintiffs with an *adequate supply of water* for their own water uses.” *Id.* at 80-81 (emphasis added).

(3) “[A]t trial Dr. Hyndman testified that the adverse effects ... vary depending on the current level of flow and suggested that the remedy might have to be tied to these fluctuations. [W]e are unable to determine on appeal what level of pumping ... is reasonable under the circumstances.. Therefore, we must remand this issue for determination by the trial court.” *Id.* at 81.

(4) “Because we have found no reason to question the validity of the findings of fact already made by the trial court, no new evidence shall be permitted ... except as determined to be necessary by the trial court, and the trial court shall give due regard to the trial court’s earlier findings and credibility assessments.” *Id.*

(5) “At the hearing, the trial court shall ... determine what level of water extraction ...will meet the *criteria discussed above.*” *Id.* at 81. (emphasis added).

(6) “Once the trial court has made this determination, it shall enter an order modifying the previous injunction accordingly.” *Id.* at 81-82. “Therefore, we affirm the judgement of the trial court in favor of plaintiffs’ groundwater claim, but remand ... to *determine the appropriate parameters of the injunction and modify it* accordingly.” *Id.* at 82 (emphasis added).

v. The Stipulated Order on Remand

In lieu of a hearing on remand, Plaintiffs and Nestlé modified the injunction and established parameters for limiting pumping by mediation and Stipulated Order on Remand, January 25, 2006. **Ex 1**, pp 1-3. Section I, A. and B. of the Stipulated Order established withdrawal or pumping limits based on the stage and flow parameters for various weeks, months, and seasons of the year. *Id.* at 2-3.

If the water withdrawals exceed the limits imposed under the stage and flow criteria, it is deemed an unreasonable use under ground water law and likely impairment under the MEPA, and

the pumping is prohibited by injunction. *Id.* at 4. If pumping does not exceed these limits, it is deemed reasonable use and not an impairment under the MEPA.

The Stipulated Order provided that if an appellate court “modifies or reverses the COA November 29, 2005 Opinion and Order,” then the contents of the stipulated order “shall be subject to *modification* pursuant to and *in accordance with the judgment or order of the appellate court.*” *Id.*, V.,A., p. 6. (emphasis added). The Stipulated Order also provided that after the COA order or the Supreme Court order, either party could request to mediate a modification of the injunction pumping limits. *Id.* V.,B., p. 6. If mediation fails, the Order provides that the

appropriate maximum *withdrawal rates and stage and flow criteria* shall be determined by the Circuit Court *in accordance with those principles and/or standards* and the trial record and the facts and circumstances (including without limitation monitoring and pumping data) through the date of such circuit court hearing. *Id.*, V.,B., p. 6 (emphasis added).

vi. This Court’s Order Regarding the Evidence

This Court has ruled that “the parties may introduce evidence of facts and circumstances, including, without limitation, monitoring and pumping data through the date of the hearing in this matter and may also introduce analysis by the parties’ experts interpreting such evidence to assist the Court with its determinations.”⁶

b. The Reports and Deposition Statements of Dr. Andrews

Dr. Andrews reports in great deal speak for themselves.

i. Dr. Andrews’ First Report

The title of Dr. Andrews’ first report is “Hydrologic Effects of Groundwater Production, Sanctuary, Mecosta County, Michigan.”⁷ In its introduction he states that Nestlé retained him to evaluate the hydrologic effects of pumping “on the flow of Deadstream, the stage of Deadstream at

⁶MSD Ex 8 (Order dated December 15, 2008).

⁷Ex 2 (Andrews Feb 2, 2009 Report).

Doyle, the water-level elevation in the Deadstream wetlands, the temperature of Deadstream, the nutrient level in Deadstream, and the stage of Thompson Lake.”⁸

Dr. Andrews’ Summary of Opinions are as follows:

- Groundwater production at the Sanctuary reduces the flow of Deadstream downstream of Osprey Lake Impoundment. The reduction in flow at the Highway M-20 bridge, on any given day, is approximately equal to the average groundwater production rate during the past thirty days multiplied by the factor 0.86.
- The water level in Deadstream at the Doyle residence is affected by many factors. These factors include the flow of Gilbert Creek, blockages in the Deadstream channel downstream of the Doyle residence, vegetation in the Deadstream channel, the flow of Deadstream at the Highway M-20 bridge, precipitation and the level of the Tri-Lakes.
- Blockages in the Deadstream channel (beaver dams, debris and vegetation) and the flow of Gilbert Creek are the primary factors that control the level of Deadstream at the Doyle residence.
- Groundwater production only affects one of the factors that influence the water level in Deadstream at the Doyle residence. Groundwater production affects the flow of Deadstream which is one of the minor factors that control the level at the Doyle residence.
- The effect of a given change in flow on the water level in Deadstream is the same regardless of the cause of the flow change.
- The magnitude of the change in the water level in Deadstream at the Doyle residence that is caused by a change in the flow of Deadstream, when all other factors are constant, varies with the level of Deadstream. At a level of 960.00 feet MSL, a decrease in the flow of Deadstream by 86 gpm (as the result of groundwater production at a rate of 100 gpm) results in a decline in the level of Deadstream at the Doyle residence of about 0.13 inches (0.01 feet). At a level of 960.40 feet above MSL, a decrease in the flow of Deadstream by 86 gpm results in a decline the level of Deadstream at the Doyle residence of about 0.07 inches (0.006 feet).
- The water levels in the Deadstream wetlands respond only slightly to changes in the level of Deadstream. The reduction in wetland water levels caused by groundwater production is significantly less than the reduction in Deadstream levels caused by groundwater production.
 - In the summer, the reduction in flow through the Osprey Lake Impoundment outlet culvert which would be caused by the proposed groundwater production at NRNA’s proposed rates will result in a slight decrease in stream temperatures downstream of the outlet

⁸Ex 2, p 1 (Andrews Feb 2, 2009 Report).

culvert. In the winter, the reduction in flow will result in a slight increase in stream temperatures downstream of the outlet culvert.

- Nutrient levels in Deadstream will not be materially affected by the reduction in stream flow caused by groundwater production at Nwana's proposed rates.

- The water level in Thompson Lake is controlled by groundwater levels south of Osprey Lake Impoundment. Less than 1.8 inches (0.15 feet) of water level reduction in Thompson Lake (from its level if there were no pumping) will occur as the result of groundwater production at Nwana's proposed rates.⁹

3. Argument

When this Court's Opinion and Order is compared to Dr. Andrews' report, it is apparent that the goal is to reverse this Court's prior findings.

a. **Facts and Circumstances Does Not Mean New Expert Testimony On Facts and Issues Already Ruled Upon by This Court**

This Court has ruled that "the parties may introduce evidence of facts and circumstances, including, without limitation, monitoring and pumping data through the date of the hearing in this matter and may also introduce analysis by the parties' experts interpreting such evidence to assist the Court with its determinations."¹⁰ The inclusion of new facts and circumstances does not include the ability to reverse this Court's previous findings of fact and conclusions of law or the Court of Appeals' affirmance. It does not include use of tests, the use of other references, or the expansion of arguments that were clearly available at the time of the original trial. It is and must be limited to *new* facts and circumstances that have directly occurred as a result of Nestlé's pumping.

The following addresses some of Dr. Andrews' opinions to provide examples for this Court. However, MCWC does not waive challenge to any and all of Dr. Andrews' opinions by virtue of not

⁹Ex 2, pp 7-8 (Andrews Feb 2, 2009 Report).

¹⁰MSD Ex 8 (Order dated December 15, 2008).

including them in this motion.¹¹ To address every issue in full detail would require many more pages than presented here.

b. Dead Stream Stage-Discharge Relationship

i. Variables Affecting Dead Stream's Stage-Discharge Relationship Have Been Tried and Ruled Upon

This Court heard a great deal of testimony concerning the variables that effect the stage-discharge relationship in the Dead Stream. **MSD Ex 3**, Tr Op, p 18-20, 22. After considering all of the evidence and testimony, this Court concluded that even in consideration of the variables, Nestlé's pumping at 400 gpm would reduce the flow of Dead Stream by as much as 28.75%, *Id.* at 22, and will reduce the level of the Dead Stream 2 inches or more. *Id.* at 22. It also found that pumping at lower rates would reduce the level proportionately, so 200 gpm would reduce it by 1 inch and 100 gpm by ½ inch. *Id.* "For example, with the pump rate at the time of trial being at or near 200 gpm, Dead Stream's stage was down by about one inch and its flow loss was near 15 percent." *Id.* The Court rejected Dr. Andrews' opinion that the level would drop only ½ inch at 400 gpm. *Id.* "I have found that Dr. Andrews' opinions on such are substantially below what has and will occur..." *Id.* at 32

Dr. Andrews' new report attempts to re-argue and re-litigate the effect of the other variables on the stage-discharge relationship in Dead Stream. He argues that the variables *already tried by this Court* actually have much more impact than Nestlé's pumping.¹² Dr. Andrews cannot present expert testimony that attempts to reverse the findings of this Court. He clearly could have made and presented these arguments at trial. His failure to do so does not mean that these arguments are new facts and circumstances. Dr. Andrews' opinion on the affect of variables on the Dead Stream's

¹¹In addition, MCWC reserves all of its rights to object on these grounds, and others, to the testimony and reports of Nestle's other experts. MCWC simply chose to use Dr. Andrews to highlight this issue.

¹²**Ex 2**, pp 10-14 (Andrews Feb 2, 2009 Report).

stage-discharge analysis should be excluded. This Court has already heard and ruled on the affect of the variables.¹³ **MSD Ex 3**, Tr Op, p 18-20, 22.

ii. Dr. Andrews' Culvert Blockage Tests Cannot Be Introduced and Should be Excluded

Dr. Andrews' report includes a new test to determine the stage-discharge relationship in the Dead Stream.¹⁴ However, this Court has already heard evidence and ruled on the stage-discharge relationship. **MSD Ex 3**, Tr Op, p 18-20, 22. After considering all of the evidence and testimony, this Court concluded that notwithstanding the variables, Nestlé's pumping at 400 gpm would reduce the flow of Dead Stream by as much as 28.75%, *Id.* at 22, and will reduce the level of the Dead Stream 2 inches or more. *Id.* It also found that pumping at lower rates would reduce the level proportionately, so 200 gpm would reduce it by 1 inch and 100 gpm by ½ inch. *Id.* "For example, with the pump rate at the time of trial being at or near 200 gpm, Dead Stream's stage was down by about one inch and its flow loss was near 15 percent." *Id.* The Court rejected Dr. Andrews' opinion that the level would drop only ½ inch at 400 gpm. *Id.* "I have found that Dr. Andrews' opinions on such are substantially below what has and will occur..." *Id.* at 32

Dr. Andrews' new test is one that he could have applied during trial, but did not. He blocked the culvert at Osprey Lake, measured the stage and flow of the Dead Stream and then unblocked the culvert and took the same measurements.¹⁵ This is not a new fact or circumstance, but instead is a

¹³Dr. Andrews Supplemental Report offers additional testimony arguing that Gilbert Creek is the major variable. Again, this Court has already ruled on the variables affecting the stage-discharge relationship in Dead Stream and this part of Dr. Andrews' Supplemental Report should be excluded as well.

¹⁴**Ex 2**, pp 15-16 (Andrews Feb 2, 2009 Report).

¹⁵**Ex 2**, pp 15-16 (Andrews Feb 2, 2009 Report).

test that could have been utilized at trial. In fact, Dr. Andrews admits that he discussed blockages at trial in 2003¹⁶ and admitted in deposition that he had the idea for the test during trial.¹⁷

What it comes down to again is that Dr. Andrews' new test is an attempt to reverse this Court's findings on the stage-discharge relationship in the Dead Stream. Dr. Andrews cannot present expert testimony that attempts to reverse the findings of this Court. He clearly could have made and presented these arguments at trial. His failure to do so does not mean that these arguments are new facts and circumstances. Dr. Andrews' opinion on the affect of variables on the Dead Stream's stage-discharge analysis should be excluded. This Court has already heard and ruled on the affect of the variables. **MSD Ex 3**, Tr Op, p 18-20, 22. Dr. Andrews cannot offer a test that could have been utilized at trial, but was not.¹⁸

iii. Dr. Andrews' Hec-Ras Model is offered to corroborate his "experimental" culvert blockage "test" or "experiment."

Dr. Andrews' report relies on his already discredited Hec-Ras model.¹⁹ For the same reasons noted above for excluding his report, the Hec-Ras Model should be excluded from the hearing. It could have been done at trial, but was not done. It does not offer any opinion on the "discharge and flow" relationship already decided by this Court and the Court of Appeals.

In addition, Dr. Andrews has not even changed the "suspect" variables that this Court found were not reliable.

Q Are those areas that were formerly as high as 18 -- have they been reduced or are they still there?

¹⁶Ex 2, pp 15 (Andrews Feb 2, 2009 Report).

¹⁷Ex 3, Andrews dep 2-11-09, p 106

¹⁸Dr. Andrews' Supplemental Report adds a test concerning the culvert from Osprey Lake designed to support his conclusions regarding the blockage test. His Supplemental Report cannot be introduced for the same reasons.

¹⁹Ex 2, p 17 (Andrews Feb 2, 2009 Report).

A As I stated previously, I have not changed any parameters in the groundwater model.²⁰

This Court's previous findings and rulings make Dr. Andrews use of his model almost unbelievable. However, it demonstrates that Nestlé truly wants to retry this case from top to bottom and hopes that this Court will "get it right this time."²¹ Dr. Andrews' use of his Hec-Ras model should be excluded. This Court has already heard and ruled on the suspect nature of Dr. Andrews' underlying 2003 Groundwater Model and found it not reliable. **MSD Ex 3**, Tr Op, p 21-22.

c. Dead Stream Temperature

Dr. Andrews presents his expert opinion on the temperature impacts on the Dead Stream from Nestlé's pumping and concludes that the temperature will decrease in the summer and increase in the winter.²² He concludes:

The evaluations described above as well as my experience and training are the foundation for concluding that the reduction in flow in the summer through the Osprey Lake Impoundment outlet culvert, which is caused by the proposed groundwater production, will result in a slight decrease in summer stream temperatures downstream of the outlet culvert and a slight increase in winter stream temperatures downstream of the outlet culvert.²³

Again, this Court has already ruled on this issue.

Defendants argued, and presented expert opinion, that the temperature of Dead Stream will drop slightly as the result of pumping, making it a better fisheries habitat. The evidence they presented was that a drop in flow from Osprey Lake, a shallow warm-water lake, through the culvert in the Osprey Lake Dam will mean that the cooler groundwater going into Dead Stream from seeps will become a greater percentage of its volume, thus reducing the stream's temperature.

Plaintiffs argued, and presented expert opinion to the effect, that the loss in Dead Stream flow will result in greater "residence time" for the water in the stream. The effect of such, they argue, is that the

²⁰Ex 3, Andrews dep 2-11-09, p 61.

²¹Ex 3, p 100-101 (2-11-09 Andrews Dep) (emphasis added).

²²Ex 2, p 20-21 (Andrews Feb 2, 2009 Report).

²³Ex 2, p 21 (Andrews Feb 2, 2009 Report)

water will warm up while in the stream, resulting in a warming of the water to the detriment of it as a fishery, especially in light of the fact that it is a marginal one now in terms of temperature.

On the issue of the temperature, I believe the Plaintiffs' position is the more rational one and is better supported in the record. The extent that the seeps add to the flow of Dead Stream has never been quantified in this record. Also, while the water in the seeps may be at cool groundwater temperatures, it is highly likely that, as the water from the seeps flow through the wetlands that are adjacent to the Dead Stream, its temperature will increase, reducing the effect the Defendants claim regarding temperature. On the other hand, Plaintiffs' position regarding retention or residence time for water in the Dead Stream, a shallow stream, and the effect of such on water temperature there is logical and hereby is accepted.

I find that Nestlé's pumping operation, to the extent that it reduces the flow in Dead Stream, will adversely impact the stream's temperature, which is already marginal for most fishery purposes. **MSD Ex 3, Tr Op, p 30-31.**

When comparing the quoted Dr. Andrews' conclusion with the first paragraph from this Court's Opinion above, it is clear that Dr. Andrews is not only arguing the same issue, but arguing it on the same discredited basis. At his deposition, February 11, 2009, Dr. Andrews testified that "my recollection is that the judge didn't accept my opinion regarding temperature, so I thought I would use a more thorough evaluation this time." **Ex 3, p. 100.** Then Mr. DeVries added, "the idea is the judge will get it right this time." In other words, like the rest of Dr. Andrews' testimony and report, it is offered for the purpose of retrying a case that Nestlé lost in the trial court, and as too all such findings of fact, on appeal.

Dr. Andrews' testimony on Dead Stream temperature should be excluded. This Court has already heard and ruled on it. *Id.*

d. Dead Stream Nutrients

Dr. Andrews presents his expert opinion on the nutrient impacts on the Dead Stream from Nestlé's pumping and concludes that there will be no increased nutrient increase.²⁴ He argues:

An evaluation of the potential effects of reducing groundwater discharge to Osprey Lake Impoundment on phosphorous concentrations in the impoundment and its outflow was conducted to determine the effect of groundwater production on nutrients in

²⁴**Ex 2, p 21** (Andrews Feb 2, 2009 Report).

Deadstream. This evaluation is described in detail in Appendix H. Reducing groundwater discharge to the lake, as the result of groundwater production, would result in a decrease in the outflow from the impoundment, an increase in the residence time of water in the impoundment, but negligible change in phosphorous loading to the lake. A mass balance analysis indicates that the phosphorous concentration in the lake would increase only slightly as the decrease in diluting groundwater is almost entirely compensated by an increase in sediment retention due to longer residence time for water in the impoundment. Therefore, the result of reducing groundwater inflow to the impoundment, as the result of groundwater production, is to slightly increase phosphorous concentrations in the water flowing through the outlet culvert of the impoundment.²⁵

Again, this Court has already ruled on this issue.

Another adverse impact claimed by the Plaintiffs is that the reduction in flow will result in excess nutrient-loading of the water to the effect that the stream will become choked with plant life. This position is based, in part, on the increased retention time for water in Osprey Lake as well as its longer residence time in the Dead Stream. Plaintiffs point out that Osprey Lake is in a commercial whitetail deer operation owned and operated by Defendants Bollman. The high concentration of deer in this area means that there is a large amount of deer feces on the land over which surface water runoff occurs, with the result that nutrients are added to Osprey Lake in abnormal quantities. Also, the deer herd has eaten most of the understory plant life which makes the area subject to surface water runoff and eliminates a source of nutrient uptake before it reaches the lake. The result, Plaintiffs argue, is that an already heavily nutrient-laden lake will retain the nutrients longer at lower flows out of the lake such that the contribution of volume to Dead Stream from the lake will be even more nutrient laden than in the past. Also, the nutrients will remain in Dead Stream longer at the lower flows, meaning that it will be available for uptake by plant life, including algae, such that there will be an increase in such, to the detriment of the stream. Plaintiffs further argue that the natural cycle of plant life will result in the retention of released nutrients from decaying plant matter because it will not be flushed out as the result of lower flows.

The defendants countered that, while the abstract concepts may have validity, the Plaintiffs have not proven what the condition of Dead Stream was before pumping was started and, thus, cannot quantify the impact, if any. They also offer contrary evidence to the effect that there will be no adverse increase in nutrient loading.

I am satisfied that the impacts posited by Plaintiffs on nutrient loading are logical and the evidence and arguments supporting their position is more persuasive than Defendants'. The lack of much history on the algae growths in Dead Stream, other than to note it does exist, doesn't mean that an increase cannot be predicted. While

²⁵Ex 2, p 21 (Andrews Feb 2, 2009 Report)

there is insufficient history to note much nutrient increase since pumping started, the theory is sound and I find it will increase at greater pump rates. While this is not Plaintiffs' strongest argument, I find the Plaintiffs' argument regarding nutrient-loading persuasive and adopt it, particularly at high pump rates. **MSD Ex 3, Tr Op, p 31.**

Dr. Andrews is merely trying to bolster Nestlé's position on nutrients from trial by making additional arguments. Nestlé had a full and fair opportunity to litigate the issue of nutrient impacts and this Court ruled that Nestlé's pumping will cause adverse nutrient impacts. Again, Nestlé and Dr. Andrews cannot simply reargue this issue and hope that this Court will "get it right this time."²⁶

e. Dr. Andrews' "Culvert Blockage Test" Report and Opinions Should Be Excluded for the Purpose of Evidence on the Flow-stage Relationship of the Stream That Has Already Been Determined by this Court and Affirmed on Appeal.

At Dr. Andrews deposition, he stated that he was not using his "culvert blockage test" (Appendix E of is Report) to address or counter the established flow-discharge relationship for the Dead Stream. "... as I stated before, I wasn't using any of the information in Appendix E to construct a flow-stage relationship at the Dead Stream." **Ex 3, p. 149-150.** Moreover, as noted above, he got the idea for the "test" in October, 2002, and later during the trial, but did not do it. He wanted to resurrect his opinion at trial with this "test," and that is all it is about. His opinion and 2003 Reports were discredited and the trial court found that the stream would drop 2 inches or more at 400 gpm, and on a straight-line proportional basis for all other levels; i.e. 100 gpm would drop stream 1 inch, and 50 gpm ½ inch. Again, Dr. Andrews and Nestlé want a "second bite at the apple" by using the narrower scope of this hearing to modify the injunction to retry the findings of fact and unreasonable use issues in the case.

²⁶Ex 3, pp 100-101 (2-11-09 Andrews Dep) (emphasis added).

f. Dr. Andrews' Supplemental and Rebuttal Reports

Dr. Andrews offered a Supplemental and a Rebuttal Report. The same issues as set out above apply to those reports. Dr. Andrews' testimony and reports concerning issues already decided by this Court and affirmed by the Court of Appeals cannot be introduced.

4. Conclusion

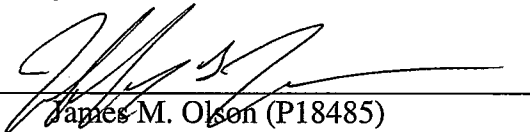
Nestlé has made it no secret that it hopes that this Court will "get it right this time."²⁷ However, that is not how our laws work and it is not what the Stipulated Order on Remand allows. Nestlé cannot introduce evidence or testimony on facts and issues already decided by this Court. However, Nestlé wants to retry this case so re-arguing all of those issues is the focus of its expert reports. Any expert testimony and reports attempting to reverse this Court and the Court of Appeals should be excluded.

REQUEST FOR RELIEF

MCWC requests that this Court issue an order to exclude and/or limit the testimony and reports of Nestlé's Expert Dr. Andrews, and all of Nestlé's other experts, on all findings of fact and issues that this Court has already ruled upon.

Date: May 1, 2009

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²⁷Ex 3, p 100-101 (2-11-09 Andrews Dep) (emphasis added).