

Is Nestlé Really A Threat?

With regard to whether Nestlé is potentially a threat to the Town of Wells, two questions must be addressed:

- a) Is Nestlé actively pursuing a large scale water extraction operation in the Town of Wells?
- b) If Nestlé does begin such an extraction operation, is that extraction operation potentially a threat to the Town of Wells?

During 2008, Nestlé and the Kennebunk, Kennebunkport, and Wells Water District (KKWWD) negotiated a large scale water extraction contract that would give Nestlé the right to extract 158,000,000 gallons per year.¹ That summer, the KKWWD supposedly tabled the contract indefinitely; but, at the July 30th, 2009 public hearing regarding the Town of Wells Draft Water Extraction Ordinance, KKWWD Superintendent Norm Labbe indicated that he still hopes to eventually finalize that contract.²

In the spring of 2009, prior to a special Town meeting vote on a proposed rights-based ordinance, Nestlé spent tens of thousands of dollars opposing that ordinance, including the cost for the out-of-state telemarketing firm that made opposition calls to voters throughout the Town on behalf of the Wells Chamber of Commerce.

During 2009, at every meeting when the Town of Wells large scale water extraction ordinance has been on the agenda of the Ordinance Review Committee (ORC), the Planning Board, or the Board of Selectmen, Nestlé has had at least two representatives in attendance. One a public relations consultant from Portland; the other has been Philip Ahrens of Pierce Atwood, who is the lead attorney for Nestlé in Maine.

At the May 27, 2009, ORC meeting, Nestlé's attorney Ahrens was allowed to submit a list of changes to the ordinance; and, several of those changes were immediately accepted by the ORC.³

During the past two months, Nestlé has begun an advertising campaign of full-page ads in all of the major local newspapers and half-page adds in the Portland Press Herald.

It is undeniably clear that Nestlé is pursuing a large scale water extraction operation in the Town of Wells.

Therefore, if Nestlé does begin such an extraction operation, is that extraction operation potentially a threat to the Town of Wells?

Nestlé proponents argue that Nestlé has never damaged a neighboring well in Maine; and, before the Maine Supreme Judicial Court, when confronted with a justice's statement that, "Up to this point, it's rechargeable. And, we don't know what's going to happen in the future.",

¹ Based on the [proposed KKWWD/Nestlé contract](#), page 2, Recitals D value of 300 gallons per minute, averaged over any consecutive twelve month period.

² [if time, capture video of Labbe at July 30th hearing]

³ <http://www.youtube.com/watch?v=1hKUeTJol4> Attorney Ahrens submitted his list earlier in the meeting.

Nestlé's lawyer, Catherine Connors, argued that the company "...will never cause a net loss..." "...out of the water (it) takes from the locality".⁴

What Attorney Connors did not tell the Court is that there is undeniable documentation that Nestlé's extraction activities have caused problems in other states.

Testimony before Congress revealed that Nestlé harmed neighboring wells in Texas.⁵

However, that was a minor issue compared to the damage that was caused by Nestlé to a Michigan stream, connecting surface waters and associated wetlands, and the subsequent million-dollar lawsuit fought by Michigan residents over a span of 8+ years, that finally ended on July 6th, 2009.⁶

In this case, the Michigan trial court found that Nestlé's groundwater extraction at even low pumping rates had harmful effects and impacts and would get worse if the rates were increased to the maximum 400 gallons per minute (gpm) allowed by the company's Michigan State permit.^{7(p49)}

With regard to the Michigan State permit process, the court revealed, "One of the issues here is that, through the permitting process, review of Nestlé's pumping has occurred and permits were issued based on reports generated on behalf of Nestlé, that even the defense (Nestlé's attorneys) now admits were inaccurate, incomplete or otherwise flawed..."^{7(p51)} [Parenthetical clarification added]

The trial court ordered Nestlé to cease all pumping within 21 days. Nestlé, however, succeeded in getting an appeals court to order a stay with the condition that pumping not exceed a monthly average of 250 gpm.^{8(p5)}

On appeal, the appeals court upheld all of the trial court's findings; and denied Nestlé a new trial.^{8 p5)}

The appeals court disagreed, however, with the trial court's finding that Nestlé's damage to the environment was unreasonable. The appeals court concluded that, with regard to groundwater property rights, Michigan had established a reasonable use balancing test that allowed for

⁴ Town of Denmark et al and Nestlé Waters North America, Inc. v. Town of Fryeburg et al., http://www.youtube.com/watch?v=47_e3VWKJgc, January 13, 2009.

⁵ Noah D. Hall, "Federal and State Laws Regarding Bottled Water – An Overview and Recommendations for Reform", Testimony Before the United State House of Representatives Oversight and Government Reform Committee Domestic Policy Subcommittee Hearing on "Assessing the Environmental Risks of the Water Bottling Industry's Extraction of Groundwater", December 12, 2007, p17, <http://domesticpolicy.oversight.house.gov/documents/20071212195927.pdf>

⁶ Battle Ends for Michigan Citizens for Water Conservation v Nestlé, <http://www.savemiwater.org/news/Press%20Releases/Battle%20Ends%207-7-09.htm>

⁷ Michigan Citizens for Water Conservation, et al. Vs. Nestlé Waters North America Inc. et al., Case No. 01-14563-CE, November 25, 2003, <http://www.envlaw.com/decisions/MCWC%20decision.pdf>

⁸ Michigan Citizens for Water Conservation et al. v Nestlé Waters North America Inc et al, No. 254202, Mecosta Circuit Court, LC No. 01-014563-CE, November 29, 2005, http://coa.courts.mi.gov/documents/OPINIONS/FINAL/COA/20051129_C254202_116_2090.254202.OPN.COA.PDF

some harm to the environment.^{8(p23)} Consequently, the appeals court remanded the issue to the trial court to determine the level of water extraction that would be permitted; but, the appeals court modified its stay to permit Nestlé to pump not more than a weekly average of 200 gpm.^{8(p49)}

The July 6, 2009, settlement permits Nestlé to continue its groundwater extraction pumping at a monthly average of 218 gpm, with restrictions on spring and summer withdrawals.⁹

The damage that Nestlé caused in Michigan should serve as a warning to Wells voters.

Similar to the Michigan case, in Wells, Nestlé would extract groundwater that ordinarily flows directly into the headwaters of a stream, in this case, the Branch Brook. The Branch Brook, in turn, flows several miles through its associated watershed and out to a surface body of water, the ocean.

Unlike the Michigan case, however, the Branch Brook provides at least 60 percent of the water supply for our public water district.

Therefore, any unanticipated adverse effects caused by a Nestlé extraction operation could do far more than harm the environment and landowners along the course of the Branch Brook watershed; the harm could extend to every residence and business that's connected to the water district.

The Southern Maine Regional Water Council's October, 2008, in-depth technical study concluded that the KKW Water District is projected to approach the safe yield of its existing supplies in the near future.¹⁰

We question the logic of ever permitting Nestlé to extract groundwater that would otherwise normally flow directly into the Branch Brook.

Town of Wells officials and the State's DEP would have us believe that their regulatory permit approval process will be based on such sound science that there's little chance of a permitted groundwater extraction operation having any adverse impacts.

It appears, however, that other knowledgeable individuals would disagree. The Michigan trial court concluded that geologists are not yet very adept at predicting how rapidly an extracted aquifer will recharge,

“...the science of recharge study, an area of science Dr. Hyndman refers to as being in its infancy and still a subject of open research. While a lot of numbers carried out to several decimal points gives the impression of exactitude, such is certainly not the case with recharge.”⁸

Dr. Andy Tolman, geologist, of the Maine DHHS Drinking Water Program Staff states, “There's a limit to how much you can take from any one place; and, knowing that limit is an art right now. We use science to get there; but, it's an art.”¹¹

⁹ Nestlé Waters, enviro group settle over MI water, July 8, 2009, <http://www.warws.com/documents/NestleWatersenvirogroupsettleoverMIwater.pdf>

¹⁰ Wright-Pierce, Regional Water System Master Plan Study, Southern Maine Regional Water Council, page 6-8, October, 2008, <http://www.defendingwaterinmaine.org/SMRWCStudy.pdf>

Town and State officials would also have us believe that, should an adverse impact occur, the Town and the State can force Nestlé to stop pumping by withdrawing the Town and/or State permits.

But, from the Michigan case, we see that Nestlé can go to court and continue to pump for years.

The Maine courts are likely to be no different.

Maine's groundwater property rights laws are even less restrictive than Michigan's; and, do not protect groundwater to the same extent as other Maine laws protect Maine's lakes, ponds, rivers, and streams.

Maine adheres to the Absolute Dominion Rule, which is based on the premise that groundwater is the absolute property of the owner of the land.¹² Therefore, a groundwater extractor may damage neighboring groundwater supplies and resources with little legal liability. The Maine Supreme Judicial Court has affirmed the Absolute Dominion Rule regarding groundwater; and, has indicated that it is up to the State Legislature, and not the Court, to decide whether to move away from the Absolute Dominion Rule.¹²

Until the State Legislature passes legislation that will provide a private right of action to any landowner who is harmed by a large scale groundwater extraction operation, such operations are a threat to residents of the State.

By extension, until the State Legislature passes legislation that would provide a private right of action to any landowner who is harmed by a large scale groundwater extraction operation such as that desired in the Town of Wells by Nestlé, Nestlé is potentially a threat to the Town of Wells.

By voting "NO" on Article 1 of the Town ballot on November 3rd, Wells voters can send a clear message to the State and to the Town of Wells selectmen that now is not the time to start permitting large scale water extraction within our town.



For additional information, please visit www.ProtectWellsWater.com

¹¹ Andrews L. Tolman, C.G., Maine DHHS, Bulk Water Law (as it was), July 25, 2008, <http://www.youtube.com/watch?v=qKjwgPKNIkc>, beginning at time 4:05.

¹² Maddocks v. Giles, 1999 ME 63, http://www.courts.state.me.us/court_info/opinions/documents/99me63ma.htm