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June 10, 2005

The Honorable Jennifer M. Granholm
Governor of the State of Michigan
Executive Office
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Lansing, MI 48909

RE: Michigan's Water Future – At Risk

Dear Governor Granholm:

Last week you took affirmative steps to safeguard Michigan's water: the filing of the MDEQ's Court of Appeals Amicus Brief in *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc.*, and Executive Directive 2005-5, the moratorium on diversion or export of bottled water outside of the Great Lakes Basin. While these steps appear to be in the right direction, we – Michigan Citizens for Water Conservation – believe they fall short of your vision. For the reasons noted below, we do not believe you have been informed of all of the ramifications of your actions, which at some important levels could be construed to contradict your leadership and work against each other and the position of Michigan and its citizens. It is for this reason that Michigan Citizens for Water Conservation has requested that I send you this letter. It is done in the spirit of helping you achieve the wisest and most prudent protection possible for Michigan, its citizens, businesses, and the quality of life so dependent on our State's water and the Great Lakes.

We believe the MDEQ's Amicus Brief filed last week undermined Judge Root's decision and existing Michigan law. Fundamentally, the position of the MDEQ went beyond the narrow facts and issues, and beyond the limits of sound water and property law in proposing a "balancing test" for all water withdrawals, including those intended for diversion or export out of our watersheds or the Great Lakes Basin, the watershed that defines our common denominator.

Given your prior statements, as Attorney General, candidate for Governor, and Governor on this matter, we do not understand why your Administration's positions appear to be so supportive of Nestlé's position, and so threatening to the future of Michigan's water security. From reading your press release last Thursday, it did not appear that you had been fully informed of the position the MDEQ has taken on your behalf in its Amicus Brief.

Of course, we appreciate the agency's recognition that the Inland Lakes and Streams Act requires Nestlé to get a permit before it can diminish a lake or stream, but we hope the MDEQ has not once again put the State's imprimatur on Nestlé's improper extraction, diversion and export of Michigan's water in bottles and other plastic containers. Our concern is heightened primarily by the MDEQ's arguments on the common law and on Michigan's Environmental Protection Act. The agency's criticism of the Court's decision is uncalled for and ignores the detailed critical findings of fact Judge Root made that were based on three years of work at great cost to MCWC, its attorneys and experts. It also undercuts your prior commitment to protect Michigan's environment from harm

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or impairment. Finally, it undermines your Executive Directive to prevent diversions of water outside of the Great Lakes Basin.

As you may know, we have taken the position that Michigan's common law prevents someone such as Nestlé, who simply wants to extract and sell our precious water elsewhere for private profit, from diminishing or damaging our lakes and streams. Judge Root's detailed and extensive analysis agreed with this position. The riparian doctrine that protects even small streams like the Dead Stream also provides critical protection for our Great Lakes. The position taken by the MDEQ in this matter runs counter to the common law. Unchecked by responsible jurists such as Judge Root, Nestlé's arguments and those advanced in the MDEQ's brief would lead to the situation where water extraction, including diversions out of the Great Lakes Basin, would under myriad circumstances be considered "reasonable." In other words, MDEQ has departed from long-standing principles and policy that prohibit or prevent diversions from watersheds where it would diminish the flow or level of a lake or stream – whether the lake is Thompson Lake in Mecosta County or Lake Michigan, and whether the stream is the AuSable or the Little Muskegon River. In contrast, the Michigan Department of Natural Resources has had a long-standing policy against the diversion of water out of watersheds. In effect, MDEQ takes a position that allows diversions of water for sale out of our watersheds, which significantly weaken the common law as compared to the more stringent standard of "no physical diminishment." Since the Great Lakes Basin is also a watershed, then MDEQ's argument for a "balancing test" on diversions out of a watershed would acknowledge the lawfulness of diversions and exports out of the Basin that meet this test. This effect runs contrary to your past statements and vision, and would make it more difficult for you or the Legislature to impose regulatory limits on diversions out of the Great Lakes Basin.

Further, under the MDEQ's "balancing test," the more money there is to be made (i.e., the greater the "economic value" of water bottling or other water export or marketing operations), the more harm companies like Nestlé may inflict on ordinary citizens and the hundreds of thousands of riparian owners on our lakes and streams. Thus, not only would a "balancing test" open a legal loophole to divert Michigan's water, competing economic or other special interests outside of Michigan could over-power traditional common law protections against diversions.

Judge Root found that Nestlé's water extraction: reduces the stream flow of the Dead Stream by 28%; drops the level of the stream by up to 2 inches and the lakes by 4 inches; narrows the stream by 4 feet; dries up wetlands that filter the water; increases the water temperature and sedimentation of the water; and harms fish. Since the trial and Judge Root's decision, the stream has been physically narrowed, lowered and altered, especially during periods of low flow. A large island of mud and now grass stands where the stream flowed in front of Mr. and Mrs. R. J. Doyle's home. (Photographs from the trial in May and June 2003, and May 2005, are enclosed for your review and comparison.) How can MDEQ so glibly call for a "balancing test" in the face of such grave harm, part of which is obviously due to pumping? Recent pumping and monitoring records show that the Dead Stream is at very low flows, yet, appallingly, the company is pumping sometimes at rates up to 300 gpm. MDEQ should not have supported the stay, and should be demanding that the Court of Appeals halt or decrease the pumping limit during low flow periods of less than 1200 gpm. This all demonstrates that Nestlé's so-called "substantial and direct effect" test and the MDEQ's "balancing test" leave too much room for interpretation, the result of which is inaction and serious harm and injury.

We believe the MDEQ made a significant mistake in advancing this balancing test for out of watershed diversions. MDEQ's brief claims that when he ordered Nestlé to stop pumping, Judge

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Root did not sufficiently appreciate or recognize the “economic and social benefits” of Nestlé’s water bottling operations. The brief repeatedly urges the courts to “balance” the harm done to our streams and wetlands against the benefits of Nestlé’s water extraction. The MDEQ is taking the position that even though Nestlé is simply bottling and selling water outside the watershed for a profit, its use should not be considered any less “reasonable” than traditional uses on the land such as farming irrigation and domestic usage. Moreover, if someone at the State would carefully review the record, she or he would find that Nestlé has already acknowledged that there is no public interest or public purpose to its water bottling operation. (Hearing Transcript, April 5, 2002, pp 38-46.) Specifically, we had requested production of Nestlé’s revenues, expenses, profits, and sales information to determine the extent to which any public or private benefit may exist in the case. Rather than turn this information over, Nestlé basically stipulated that for purposes of this litigation, Nestlé’s operation and purpose is entirely for private profit and benefit, and that for this reason we did not need the documents. Thus, not only would the “balancing test” be unsound for Michigan’s future, there can be no balancing under the stipulated facts, and a remand would be unfair and useless for this purpose. Indeed, it is difficult to conceive of Nestlé’s operation having any social value. It is not only for its own private profit, but removes up to 30% of the flow of the headwaters of a stream, solely for the marketing convenience of putting the words “spring water” on a bottle. MDEQ should not have requested a remand under these circumstances.

We also find it difficult to understand how the Administration and MDEQ can ask for a “balancing test” in the face of your commitment to enforce the ILSA, the proposed Michigan Water Legacy Act, or the current Annex Implementing Agreements purporting to protect the Great Lakes. What good does it do to extend regulatory powers on the one hand, but weaken the common law standard on the other hand. Very clearly, there is a glaring inconsistency here, with huge potential effects on the interests of citizens, businesses, and riparian owners of Michigan. Weakening common law riparian or watershed standards would only strengthen the interests and claims over Michigan’s water by those who want to oppose your regulations or divert the water elsewhere. For example, if your Administration’s or MDEQ’s efforts result in legislation or a court decision that recognizes the right to divert water for sale out of a watershed under a “balancing test,” it would be more difficult to oppose water diversion and sale out of the Great Lakes Basin. While MDEQ was correct in counseling the Court to reject Nestlé’s proposed “direct and substantial effect” test, the same negative effects, especially in terms of harmful legal precedent, would occur with the “balancing test.”.

We believe that after two years of patiently hearing the evidence on this case, Judge Root reasonably concluded that Nestlé was impairing and damaging the environment. See the previously referenced photographs taken at the home of plaintiffs R. J. and Barbara Doyle’s home near the Dead Stream staff gauge and flow meter at State Highway M-20. As you can see, the combination of low precipitation and pumping has once again diminished and substantially altered and impaired the stream. This is why the “no physical diminishment” standard is so critical to maintain under Michigan’s common law. Any responsible company would stop pumping when stream flow is as low as this. Not Nestlé. Not when it was asked to do so during trial. Not now. This shows how difficult it will be for affected riparian owners, businesses, citizens, or the State to fight obvious diminishment and harm under MDEQ’s “balancing test” or Nestlé’s “direct and substantial effect” test.

The MDEQ’s brief does not challenge the Court’s many findings supporting this conclusion. So why does MDEQ or your Administration continue to appear to be so defensive of Nestlé? How should the Court have “balanced” the harm done to the environment against the “social and

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economic” value of Nestlé’s operation? How does this “emphasize the importance of protecting Michigan’s precious water resources for the benefit of citizens and future generations across the state” or “ensure that we are not causing long term damage to the system” (quoting from your recent press release)? There is long term and short term damage, and more importantly, damage to important legal precedent. Michigan should not sell off the State’s water by urging a “balancing test” for all Michigan water diversions. This would shift the common law to allow, even promote, diversions and exports. As suggested above, what good does it do to extend the ILSA permit requirements to an operation like Nestlé’s or issue the moratorium directive, when Nestlé or others will be able to argue that the “balancing test” acknowledges a right to diversions or exports and approvals under the ILSA so long as it can show a counter-veiling economic or social benefit to offset harm or injury. This would even weaken the State’s position in the on-going Annex or Compact negotiations with other Great Lakes states and Canada.

Even when it comes to the Court’s conclusions with regard to the Michigan Environmental Protection Act, the cornerstone of environmental law in this state (and the embodiment of our constitutional recognition and requirement that the natural resources of the State are precious resources held in trust for the public, Mich Const. 1963, Art 4, Sec. 52), the MDEQ disputes the Judge’s straight-forward findings that apply the standards of the statutes to the facts, and reach the logical conclusion that Nestlé’s conduct impairs our water resources and violates the ILSA standards and MEPA.

The two statutes that Judge Root relied on are the Inland Lakes and Streams Act and the Wetland Protection Act—obviously critical programs administered by the MDEQ. The trial court found that Nestlé failed to meet the standards for a permit that you acknowledge is required under the ILSA, and also that Nestlé failed to meet the standards for a permit under the Wetland Protection Act, which your brief does not challenge. Yet the MDEQ brief finds numerous immaterial technical flaws in the Court’s decision that we feel are not justified by any fair reading of his opinion.

Additionally, the agency seems to be unwilling or unable to reconcile these critical statutes with the Michigan Environmental Protection Act, an act that more than any other is central to the function of the agency, protecting the environment from pollution, impairment and destruction. Instead, the brief hypothesizes that **perhaps** the Court could look to these critical statutes in applying MEPA. In any event, Judge Root’s decision applied the ILSA standards to the facts, and found that Nestlé’s extraction and diversion violated them.

Doesn’t the MDEQ recognize these statutes, clearly designed to protect the waters and public trust of the State from impairment, as setting forth appropriate standards for a court to use in evaluating the conduct of a corporation such as Nestlé? How can the MDEQ consider the statutory requirements contained in these laws and pretend there is some doubt about whether they are appropriate environmental protection standards?

Michigan Citizens for Water Conservation, and thousands of others, have supported your efforts to protect Michigan’s treasured waters from large water withdrawals or diversions (distinct authorization and standards for diversions and export of water are required). We want to continue this support, but must first seek a clarification of your Administration’s position on the “balancing test,” moratorium, and extending ILSA.

We, therefore, respectfully request that you clarify your position on this important matter as soon as possible. With the pending negotiations over the draft Annex Agreement and possible

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Compact to protect the Great Lakes, your Administration's position on Nestlé, including approval of the water-taking and export operation in the City of Ewart, and the issues raised in this letter must be carefully reviewed and understood.

Thank you very much for giving this request your utmost consideration. We deeply appreciate and look forward to your personal response.

Sincerely,

James M. Olson

For Michigan Citizens for Water Conservation

JMO:ral
Enclosures (photos)
xc Terry Swier, President, Michigan Citizens for Water Conservation