ERT Case No. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

Nestlé Canada Inc. v. Director,
Ministry of the Environment

In the matter of a request for a Hearing by Nestlé Canada Inc. filed on October 11, 2012 pursuant to section 100 of the *Ontario Water Resources Act,* R.S.O. 1990, c. O.40, as amended with respect to Permit to Take Water (Ground Water) No. 3716-8UZMCU issued by the Director, Ministry of the Environment, on September 28, 2012 under section34 of the *Ontario Water Resources Act* permitting taking of ground water from one bedrock drilled well located at Lot 24, Concession 7, Geographic Township of Erin in the County of Wellington, Ontario; and

In support of a motion under Rule 200 to withdraw an appeal as part of a settlement agreement.

REPLY SUBMISSIONS OF THE DIRECTOR AND SUPPLEMENTARY DOCUMENTS

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In support of a proposed withdrawal of an appeal as part of a settlement agreement pursuant to Rule 200 of the Rules of Practice and Practice Directions of the Environmental Review Tribunal.

REPLY SUBMISSIONS OF THE DIRECTOR

PART 1 - OVERVIEW

1. Wellington Water Watchers and the Council of Canadians (the "Respondents") ask that the Environmental Review Tribunal (the "ERT" or "Tribunal") deny Nestlé's request to withdraw its appeal pursuant to the proposed Minutes of Settlement and to require that this matter proceed to a hearing, in accordance with Rule 200 of the Rules of Practice and Practice Directions of the Environmental Review Tribunal ("ERT Rules").

2. The test to be applied in determining whether to dismiss this proceeding is clearly set out in Rule 200, which provides that where there has been a proposed withdrawal of an appeal not agreed to by all parties, the Tribunal shall consider whether the proposed withdrawal is consistent with the public interest and the purpose and provisions of the relevant legislation.

3. It is the Respondents' position that the Minutes of Settlement are contrary to the public interest and the *Ontario Water Resources Act*, R.S.O. 1990 c. O.40 ("*OWRA*") on the basis that the agreement is not consistent with the "public trust doctrine."

4. The Director submits that there is no legal basis for the application of the public trust doctrine in the manner suggested by the Respondents to the Tribunal's determination on this motion to terminate the proceedings. To do so would go beyond the subject-matter of the appeal and risk undermining the statutory scheme of the *OWRA* and the *Environmental Bill of Rights, 1993,* S.O. 1993, c. 28 ("*EBR*").

5. Nonetheless, the Director acknowledges that the Respondents have raised several legal and factual concerns that are specific to the Minutes of Settlement and proposed amendments to the Permit. Generally speaking, the Respondents' concerns relate to the uncertainties regarding the potential consequences of not restricting the amount of water takings during low water conditions. As set out in the Director's submissions and supporting affidavits, the proposed Minutes of Settlement do not purport to increase the amount of water taken above the amounts historically permitted. Given the lack of any observed adverse impacts from this level of taking to date, there is no scientific basis to require a reduction in takings. While there will always be a degree of uncertainty with regards to the potential impacts from a water taking, those risks are minimal in this case, given the extensive body of data available. Should any unforeseen impacts occur, the Director is committed to taking all appropriate and necessary measures to mitigate risks to the environment.

6. As discussed below, where addressing the Respondents' concerns serves to strengthen the proposed settlement agreement, the Director asks this Tribunal to incorporate such changes into any order approving the Minutes of Settlement. In this respect, the Director commends the participation of the Respondents for their positive contribution to these proceedings.

7. The Director submits that with the clarifications and modifications discussed herein, the proposed Minutes of Settlement are consistent with both the public interest and the wording of the applicable legislation and thus satisfies the requirements of ERT Rule 200.

PART II – GENERAL

Position of the Respondents

8. The Respondents raise several issues and concerns with the proposed Minutes of Settlement and amendments to the Permit. Their primary concern is that the proposed changes would effectively remove conditions restricting water taking during drought conditions. The Respondents have chosen to frame their concerns by reference to an American legal concept known as the *public trust doctrine*. Accordingly, the Respondents assert that the proposed settlement agreement fails to satisfy the Director's "obligation" to manage important water resources in accordance with the public trust doctrine.

Submissions of the Respondent, para. 3

9. The Respondents go on to assert that because the proposed settlement agreement "breaches the Director's public trust obligations" it cannot be consistent with the public interest for the purposes of ERT Rule 200. The Respondents also assert that the agreement is contrary to the wording and purpose of the *OWRA,* on the basis that the *OWRA* must be interpreted in a manner consistent with with the public trust doctrine.

Submissions of the Respondent, para. 4

10. Lastly, the Respondents ask this Tribunal to require a hearing in order to determine which substantive conditions should be imposed to properly protect the environment, as required by the dictates of the public trust doctrine.

Submissions of the Respondent, para. 5

Position of the Director

11. Based upon the foregoing, it is abundantly clear that the Respondents are intent upon using this appeal and motion to advance their argument for the application and acceptance of the public trust doctrine in Ontario. Towards this end, the Respondents ask this Tribunal to engage in a two stage process for the determination of this motion: first, the Tribunal is asked to determine whether the Minutes of Settlement are consistent with the public trust doctrine; and second, the Tribunal is asked to determine whether the public trust doctrine is a valid consideration under Rule 200 of the ERT Rules.

12. The Director submits that this two-stage process is simply unnecessary given the clear test set out in Rule 200, which affords the Tribunal the discretion to evaluate whether a settlement agreement is consistent with

the public interest and the applicable legislation. Unless the Respondents are suggesting that the sole reason the proposed withdrawal should be rejected is due to the unique operation of the public trust doctrine, there is simply no need to determine whether this principle is an aspect of the public interest grounded in Canadian common law.

13. In other words, the Respondents have failed to articulate how their proposed application of the public trust doctrine will add a different analytical dimension that would not already be captured by the existing legislative and policy framework for water management in Ontario. The Tribunal therefore does not need to consider the applicability of the public trust doctrine in order to determine this motion under Rule 200.

14. In the alternative, it is the Director's position that there is no legal basis to apply the public trust doctrine in the manner suggested by the Respondents.

15. Finally, the Director submits that the Respondent's request to proceed to a full hearing to determine which new substantive conditions should be imposed in accordance with the public trust doctrine goes well beyond the subject-matter of this appeal, and therefore not a valid basis to dismiss this motion.

The Public Trust Doctrine is Not Applicable to this Motion

16. As stated above, there is no legal basis for the Respondent's claim that the public trust doctrine should be considered as part of the "public interest" for the purposes of ERT Rule 200.

17. The public trust doctrine, as advanced by the Respondents, is a creature of the American legal system. Its use in the American system arose through adoption of English and Roman legal principles respecting access to and use of resources important to public welfare. These concepts were transformed by American courts into a doctrine that limits the authority of the state to alienate certain resources, and which imposes constraints on both public and private use of those resources.

> ***British Columbia v. Canadian Forest Products Ltd.,*** **[2004] 2 SCR 74 at para. 74-80, Book of Authorities of the Respondents, Tab E Case 2 ("Canfor")**

18. Although it initially applied to rights of navigation, fishing, and access to water, the public trust doctrine has been expanded in American law to protect environmental values more broadly, through a common law right of action which can be brought to constrain harm to public ecological resources. The doctrinal jurisprudence has developed at the state level in the United States, and as such there is a great deal of variation between states in terms of the doctrine's scope and even legal foundation.

Consequently, the public trust doctrine is a broad and variable legal principle specific to the American legal and federalist system.

> **Jerry V. DeMarco, Marcia Valiante, & Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in British Columbia v. Canadian Forest Products Ltd." 15 J. Env. L. & Prac. 233 at 11, attached to the email from C. Hatt, dated 24 April, 2013.**
>
> **Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention", (1970) 68 Mich. L. Rev. at 668 and 676, Book of Authorities of the Respondents, Tab E-13.**

19. It should therefore be borne in mind that the Respondents are advancing a selective formulation of the public trust doctrine when they propose that it should apply to groundwater and surface water resources such that "the prioritization of public purposes or uses over private ones" is required. Although construed as a flexible legal principle, the public trust doctrine has never been applied in the Canadian legal context. More significantly, the Respondent's particular formulation of the doctrine as a principle of general application to aid in statutory interpretation has never been judicially considered, yet alone applied, in Canada. Rather, the doctrine's limited judicial consideration in Canada has been limited to its use as a basis for compensatory damages in a civil cause of action.

> **Submissions of the Respondent, para. 65-66, 75-76**
>
> **Jerry V. DeMarco, Marcia Valiante, & Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in British Columbia v. Canadian Forest Products Ltd." 15 J. Env. L. & Prac. 233 at 11-12, attached to the email from C. Hatt, dated 24 April, 2013.**

20. In the 2004 Supreme Court case *British Columbia v. Canadian Forest Products Ltd.* ("*Canfor*"), the Court cited that there is no Canadian case where the public trust doctrine had been advanced. More recently in a 2012 decision, the Federal Court held that, "[the defendants] cannot be subject to obligations under a public trust because no such trust exists in Canadian law." There is currently no reported Canadian case where a court has applied the public trust doctrine.

> ***Canfor*, *supra*.**
>
> ***Burns Bog Conservation Society v. Canada (Attorney General)*, [2012] F.C.J. No. 1100, at para. 39, Reply Submissions of the Director, Tab 5C ("Burns Bog").**

21. With regards to paragraph 59 of the Respondents' submissions, it is inappropriate to analogize the public trust doctrine with the precautionary principle and the principle of intergenerational equity. While it is correct that following the Supreme Court's detailed discussion of the

precautionary principle in *Spraytech,* that principle was widely applied by Canadian courts and tribunals, it is inappropriate to rely upon *Spraytech* for the proposition that the court need not actually apply a legal doctrine for it to become part of Canadian law. Nor can *Spraytech* be analogized to the Supreme Court's discussion of the public trust doctrine in *Canfor* as a basis for applying this principle as the Respondents purport to do.

22. The Supreme Court's discussion of the precautionary principle in *Spraytech* was markedly different from its holding in *Canfor* for two reasons. First, the court in *Spraytech* found that the precautionary principle was already enshrined in domestic legislation at that time, including in the *Canadian Environmental Protection Act*. Secondly, the court relied on the ruling in *Baker v. Canada (Minister of Citizenship and Immigration)* ("*Baker*") for the principle that the values reflected in international human rights law may inform domestic statutory interpretation. As the precautionary principle was a codified principle of international law at that time, it was appropriate for the court to adopt it as a tool for statutory interpretation.

> ***114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 30-32, Book of Authorities of the Respondents, Tab E Case 1 ("Spraytech").**

23. Arguably, there was no need for the Supreme Court in *Spraytech* to explicitly rule on whether or not the precautionary principle should be imported into Canadian law, since it was already codified in domestic statutes, as well as properly applicable through the *Baker* principle. By contrast, the public trust doctrine is not recognized as a customary principle of international law, nor is it explicitly enshrined in domestic legislation.

24. Furthermore, the Supreme Court's decision in *Canfor* related to a tort action in which the Crown sued a private party for damages. It is clear from this decision that what Binnie J. was contemplating in his discussion of the public trust doctrine was an action in tort that would allow the Crown to sue and obtain monetary compensation for, "public nuisance, or negligence causing environmental damage to public lands". There is no mention of the doctrine being used for any purpose other than to ground a claim for damages. In short, the public trust doctrine has not been judicially considered as a guiding principle, an interpretive aid, or a contextual value in Canadian law. Accordingly, it is inappropriate to suggest that the discussion of the principle in *Canfor* provides a basis for applying the doctrine in the manner suggested by the Respondents in this case.

> ***Canfor*, *supra* at para. 81.**

25. Finally, the Supreme Court in *Canfor* noted a number of policy concerns associated with the application of the doctrine, including:

    a. the Crown's potential liability for inactivity in the face of threats to the environment;

    b. the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard;

    c. the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources; and

    d. the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.

    Canfor, _supra_ at para. 81.

26. It is clear that Binnie J. had serious reservations about the use of the doctrine in Canadian law, and in light of this clear warning it ought to be applied with caution.

27. Only three Canadian cases apart from *Canfor* have considered the application of the public trust doctrine to date, and in all three cases the courts have declined to apply it. In the most recent such case, *Burns Bog Conservation Society v. Canada (Attorney General)*, the Federal Court held that, "no such trust exists in Canadian law. The Plaintiff says this kind of trust is created by operation of Canadian environmental law, but no court in Canada has recognized a public trust which requires the Crown to protect the environment." Further, the court found that as the federal Crown did not own the land in question, there was no basis in law to impose a trust obligation.

    Burns Bog, _supra_, at para. 39-40.

28. As this principle has not been applied as a feature of the common law by Canadian courts, there is no legal obligation on the Director to apply the public trust doctrine in the exercise of his statutory discretion. Similarly, there is no legal foundation for the assertion that the *OWRA* must be interpreted in accordance with the public trust doctrine, as formulated by the Respondents.

29. To the contrary, the Director's exercise of discretion under section 34 of the *OWRA* must be guided by the purpose and requirements of the said Act, Ontario Regulation 387/04, and any applicable Ministry policies such as the Statement of Environmental Values and the Permit to Take Water

Manual ("PTTW Manual"). The Director's decision to issue the original Permit and the proposed Minutes of Settlement were made in accordance with the existing legislative and policy framework in this province to manage the water resources. Significantly, this framework does not include a reference to the public trust doctrine, as described by the Respondents.

30. Moreover, to the extent that the Respondents assert that the "essence" of the proposed public trust doctrine is that it "dictates priority for core public uses" of water resources, it is clear that the *OWRA* already contains a statutory scheme for the prioritization of certain water uses in light of the applicable ecological conditions. For example, section 5 of Ontario Regulation 387/04 (the "Water Taking Regulation") specifically limits the taking of water for certain purposes, such as water bottling, in high use watersheds.

Submissions of the Respondent, para. 60

Ontario Regulation 387/04 ["O.Reg. 387/04"], s. 5 and s. 5(5), Reply Submissions of the Director, Tab 5A

31. The Respondents have failed to describe how their proposed prioritization of water uses in accordance with the public trust doctrine is not superseded by these legislative enactments. To apply the doctrine in the manner suggested by the Respondents thus risks undermining the statutory scheme set out in the *OWRA*.

32. Similarly, to the extent that the public trust doctrine can be interpreted as a basis for a civil action related to harms to the environment, the Legislature has chosen instead to grant the public a civil right of action in certain circumstances in respect of harms to public resources in Part VI of the *EBR*. While the *EBR* establishes a comprehensive rights regime respect of environmental matters, the Legislature chose not to create a statutory public trust in that there is no right of action to sue the Crown for dereliction of a protective duty.

33. The Respondents concede that the Director's exercise of discretion under s.34 of the *OWRA* is primarily informed by the purpose of the Act, which is "to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being." Nonetheless, the Respondents state that the Director's decision to remove the mandatory reductions in water taking in Conditions 3.4 and 3.5 of the Permit is biased towards the economic benefits of private water use over "essential domestic use and ecosystem health."

***Ontario Water Resources Act*, R.S.O. 1990, Chapter O.40 [OWRA], s. 0.1, Reply Submissions of the Director, Tab 5A**

Submissions of the Respondent, para. 64-65.

34. This submission simply does not accurately reflect the stated nature and purpose of the proposed amendments. The stated purpose of the supplementary monitoring plan is to assess the impact of the elevated rate of water taking during Level 1 and Level 2 low water declarations on existing groundwater uses and surface water features. At paragraph 38 of his affidavit dated March 22, 2013, the Director expressly states that he will decide whether to approve the elevated rates of taking during low water conditions if doing so is "consistent with the purpose of the *OWRA*" and based upon the advise of Ministry technical staff and the consideration of any stakeholder comments.

Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 38

35. The original permit and the proposed Minutes of Settlement were both developed in accordance with the purpose of the existing legislative and policy framework. The OWRA, Water Taking Regulation, PTTW Manual and the SEV all provide the appropriate guidance to the Director's exercise of discretion under s. 34 of the *OWRA.* These legislative and policy directions specifically require the Director to take into consideration the concerns which the Respondents have highlighted in their description of the public trust doctrine. For example, section 4 of the Water Taking Regulation requires the Director to consider factors such as the need to protect the natural functions of the ecosystem, water availability, and the purpose of the water taking when amending or composing conditions in a permit.

O.Reg. 387/04, s. 4, Reply Submissions of the Director, Tab 5A

36. As noted above, these considerations are subject to express limitations on the Director's discretion in s. 5 of the regulation. Clearly these varied considerations require a careful balancing of numerous issues and factors, and the Legislature has afforded the Director broad discretion to carry out this balancing. To impose a specific requirement on how this balancing must be carried out, without a legal basis, risks undermining the Legislature's intention and the statutory scheme. This risk is especially present where the Legislature has specifically prescribed the circumstances in which private uses such as water bottling should not be permitted relative to the public uses.

Ministry of Environment, "Permit To Take Water (PTTW) Manual" (April 2005) ("PTTW Manual") at p 4, Book of Authorities of the Respondents, Tab E-14

PTTW Manual, *supra*, at pp. 30-31, Book of Authorities of the Respondents, Tab E-14

O.Reg. 387/04, s. 5, Reply Submissions of the Director, Tab 5A

37. For all of the above reasons, it is inappropriate and unnecessary to apply the public trust doctrine, as described by the Respondents, to the review of the Minutes of Settlement for the purposes of Rule 200 of the ERT Rules. The ERT Rules clearly set out the applicable test for the review of settlement agreements, and given the existing legislative and policy framework in Ontario, there is no legal basis to apply the public trust doctrine in this case.

Scope of the Appeal

38. At paragraphs 51 to 57 of their submissions, the Respondents assert that they are not precluded from casting their position on Conditions 3.4 and 3.5 of the Permit in broader terms than originally expressed at the preliminary hearing.

39. The Respondents submit that the subject matter of this appeal "is the determination of the substantive conditions in Nestlé's Permit necessary to best protect the environment, broadly construed, from the risks of maximum pumping at Nestlé's well during droughts." In effect, the Respondents seek to broaden the scope of the appeal beyond the affirmation of the original terms of Conditions 3.4 and 3.5, to require the inclusion of groundwater indicators for the bedrock aquifer itself and any surface water features which may be affected by the aquifer's discharge flows in "remote areas".

Submissions of the Respondents, para. 51, 53

40. Indeed, the Respondents argue that the agreement prejudices the public interest by preventing the Tribunal from exercising its jurisdiction to order that the Permit contain "improved" conditions to address all potential impacts from maximum pumping during droughts. Accordingly, the Respondents are asking this Tribunal to deny this motion and require a hearing on the basis that "improved" conditions should be imposed in the Permit, as opposed to the affirmation of the original Conditions 3.4 and 3.5. At paragraph 56 of their submissions, the Respondents set out the three criteria which any new "improved" conditions should conform with in order to be consistent with the public trust doctrine. Needless to say, these criteria go beyond the original conditions in the permit, which only required mandatory reductions in water taking based on surface water indicators set out in the Ontario Low Water Response ("OLWR").

Submissions of the Respondents, para. 44, 56

41. The Director submits that seeking to amend the original terms of Conditions 3.4 and 3.5 of the Permit by going beyond the proposed Minutes of Settlement is outside the scope of the present appeal, and thus not a proper basis upon which to deny this motion.

42. It is undisputed that the Respondents were granted party status in these proceedings on the basis that they sought to have the original terms of Conditions 3.4 and 3.5 of the Permit affirmed. The Tribunal specifically acknowledged this position as part of the basis upon which it granted the Respondents party status at the preliminary hearing.

***Nestlé Canada Inc v Ontario (Ministry of Environment)*, [2013] OERTD No 22 at para. 20, 38, 50, Book of Authorities of the Respondents, Tab E-8**

43. There is an important distinction between the Respondent's position at the preliminary hearing that the original terms of Conditions 3.4 and 3.5 should be affirmed, and the Respondent's position in their submissions, which ask this Tribunal to hold a hearing to determine whether "better" or "improved" conditions should be imposed. These are distinct grounds of appeal. The former position is predicated on the view that the original conditions are adequate, whereas the latter position asserts that the original conditions are inadequate.

44. The parties were given no notice of the Respondents' change in position, prior to receiving their responding submissions.

45. While the Tribunal did not preclude the Respondents from seeking leave to raise new issues or expand the grounds of appeal, the Respondents have not brought such a motion, nor has the Tribunal issued an order to that effect. In short, the scope and subject matter of this appeal has not changed since the preliminary hearing, at which the Respondents were granted status on the basis that they sought to have the original conditions affirmed.

46. In this case, it is significant that the Respondents did not seek leave to appeal pursuant to s. 38 of the *EBR*, which if obtained, would entitle the Respondents to raise any new issue set out in its notice of appeal. Indeed, an independent challenge to the adequacy of the impugned conditions is a typical ground of appeal in a third party leave application.

47. To allow persons who are granted party status at the preliminary hearing to raise additional grounds of appeal that could or ought to have been raised through a third party leave to appeal application would be contrary to the requirement to seek leave under the *EBR* and risks undermining the statutory scheme. Moreover, in *Uniroyal* the Tribunal held that there are

several policy considerations that require a restrained exercise of the Tribunal's discretion to allow an appellant to expand or alter proposals that are the subject of a settlement agreement.

> ***Uniroyal Chemical Ltd. v. Director, Ministry of the Environment*, [1992] O.E.A.B. No. 63, Book of Authorities of the Respondents, Case 11 at p. 11**

48. Indeed, by asking this Tribunal to require a hearing in order to impose new or improved conditions than in the original Permit, the Respondents raise a number of issues that go beyond the subject-matter of this appeal. The following issues which could have been raised through a third party leave application, but which were raised for the first time in the Respondents' submissions:

    a. To the extent that the Respondents are arguing that the Director failed to consider a relevant legal principle or policy (i.e. the public trust doctrine) is an independent basis for requiring a hearing, this is clearly a matter which should properly have been raised as part of a third party leave application, and directly relates to the first arm of the leave test in s. 41(a) of the *EBR*.

    b. At paragraphs 11-12, the issue of whether bottled water is an entirely consumptive use or if it is unnecessary for human or ecosystem health relates to the entire Permit and its purpose, and not just the impugned conditions. In any event, there is no evidence to support this submission.

    c. At paragraphs 22 to 31, the issue of whether the Ontario Low Water Response ("OLWR") protocol adequately protects groundwater in drought conditions; sets appropriate standards for Level III low water declarations; or provides guidance on prioritization of certain water uses during droughts is also outside the scope of this Appeal. This issue in particular could have been raised by the Respondents in an application for leave to appeal, as it relates to the adequacy of the OLWR and its use in the original terms of the Permit. The proposed Minutes of Settlement do not purport to provide new information in this regard, which the Respondents were unaware of prior to the preliminary hearing.

49. As none of the above issues are properly raised in this proceeding with notice to the other parties and by leave of the Tribunal, the Tribunal should disregard such issues as outside the scope of this motion and the subject matter of this appeal. In *Tembec*, the Tribunal refused to expand the scope of the appeal to consider the issue of improving a decision of the Director, where the positions of the parties leading up to the hearing did not include a proposal to change the wording to better accomplish

environmental objectives and no notice of such a proposal was provided to the parties in advance.

> ***Tembec Industries Inc. v. Ontario (Ministry of the Environment),*** **[2011] O.E.R.T.D. No. 49, Book of Authorities of the Respondents, Case 10 at paras. 48 to 51**

50. Accordingly, the "high water mark" at the hearing of this appeal is assessing whether the Minutes of Settlement satisfy the requirements of ERT Rule 200, or whether the original terms of the Permit should be confirmed. It is not whether new or improved conditions should be substituted in accordance with the public trust doctrine.

PART III – SPECIFIC ISSUES RAISED BY THE RESPONDENTS

51. Setting aside the issues related to the public trust doctrine, the Respondents have nonetheless raised several specific legal and factual issues with regards to the proposed Minutes of Settlement.

Managing Uncertainties in the Assessed Impact of the Water Taking

52. First, it should be noted that many of the Respondents' concerns appear to be focused upon a degree of uncertainty about the potential impacts of the water taking during drought conditions. To the extent that the Respondents ask this Tribunal to affirm the original terms of the Permit, this approach appears to be predicated on a precautionary approach to addressing uncertain impacts.

53. While a precautionary approach is one aspect of environmental decision-making, the Ministry's Statement of Environmental Values and the PTTW Manual incorporate other principles, including a science-based adaptive management approach to managing ecological resources. The principle of adaptive management is one of the six principles set out in the PTTW Manual that applies to decisions made under s. 34 of the *OWRA*, and is described as follows:

> **Principle #3: The Ministry will employ adaptive management to better respond to evolving environmental conditions.**
>
> Adaptive management is a process that explicitly recognizes changes in natural systems, stresses learning from experience and monitoring, and revisiting management goals and objectives to adapt them as required in light of new information gained. As applied to the PTTW program, it comprises evaluating permit applications in light of available information on potential impacts,

setting of permit conditions, monitoring, evaluating, and adjusting of water taking and permit conditions, as necessary.

In cases where the Director believes that the taking poses an unacceptable adverse effect, or where there is no additional water available, the Director may refuse to issue the permit in response to an application, or curtail or revoke an existing permit.

PTTW Manual, *supra*, at p. 4, Book of Authorities of the Respondents, Tab E-14

54. The Director submits that the proposed Minutes of Settlement appropriately balances the precautionary approach and an adaptive management approach by recognizing that a change to the rate of the existing water taking should be permitted only after a technical assessment of whether this change is likely to result in adverse impacts on surface water or ground water features. The purpose of the supplementary monitoring plan states that it is to assess whether the short term elevated rate of water taking during Level 1 and 2 low water declarations will have an impact on groundwater or surface water features.

55. The Director acknowledges that any pumping test will have a margin of error and thus a degree of uncertainty will remain despite best efforts to predict impacts on surface and ground water through the supplementary monitoring plan. The Director also recognizes that additional monitoring and the ongoing review and assessment of the monitoring results is necessary to address any uncertainties that may arise as a result of new information.

56. Accordingly, the Director commits to addressing those concerns through an adaptive management approach and will exercise his discretion to take all appropriate regulatory actions in the event that unacceptable impacts on groundwater or surface water result from the taking. Indeed, the imposition of additional monitoring requirements for elevated rates of taking included in the Permit will enable the Director to respond rapidly and effectively if any unexpected adverse impacts are detected.

Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 5

See Erin Spring Supplementary Monitoring Plan, Director's Book of Documents, Tab 2B

Location of the Well in Relation to the Watersheds

57. At paragraph 17 of their submissions, the Respondents describe an apparent discrepancy between the Director's statement that the well is in the headwaters of the Eramosa and Credit Rivers and the GRCA's

description that the well is located in the headwaters of the Speed and Credit Rivers. The Respondents state that this discrepancy creates a degree of uncertainty that prevents the Director form accurately estimating the potential impacts of allowing an elevated rate of taking at the well during low water conditions.

58. Despite the apparent differences between the Director's and GRCA's descriptions, both statements are accurate. Well TW1-88 is located in the Eramosa sub-watershed, and the Eramosa River flows into the Speed River. Therefore the headwaters of the Speed River include the headwaters of the Eramosa River, and there is no contradiction in the descriptions of the GRCA and the Director.

Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para. 8

59. In any event, regardless of which watershed the permitted taking is located in, any potential negative impacts from the groundwater taking on the base flow or behavior of the rivers would only be observed if it is confirmed that the taking at TW1-88 has an impact on the overlying overburden aquifer or surface water features. To date, there is no evidence that that the bedrock aquifer in which TW1-88 is located has any impact on the overburden aquifer.

Supplementary Affidavit of Abdul Quyum, Reply Submissions of the Director, Tab 3 at para. 12-15

60. At paragraph 7 of their submissions, the Respondents indicate that the local municipal drinking water systems within the Town of Erin both draw from the same bedrock aquifer as TW1-88. The Town of Erin's own consultant concluded that there is no evidence that the zone of influence of TW1-88 extends to the municipal wells, however. Nor is there any evidence that the water taking has any impact on the surrounding surface water features.

Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 3

61. At paragraph 10 of their submissions, the Respondents identify four important surface water features in the area of Nestlé's well. There is no evidence that the pumping from the well has an impact on any of these surface water features, however. To the extent that there exists an indirect hydraulic connection between the bedrock aquifer and these surface water features, the lack of any observed impacts indicates that any potential connection is likely insignificant.

Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para. 2-7

Connection Between Groundwater and Surface Water Features Near the Well

62. Throughout their submissions, the Respondents have relied upon the caution expressed by the GRCA in its letter to the Director, dated June 20, 2012 regarding the PTTW renewal, that "it is important that all water takings, including deep groundwater takings, reduce pumping rates during periods of low water."

Submissions of the Respondents, para. 9, 10(iv), 33, 47

63. This broadly stated concern has since been qualified by the GRCA however, in its letter to the Director, dated February 1, 2013, regarding the proposed amendments to the original wording of Conditions 3.4 and 3.5 of the Permit. Significantly, despite its general caution, the GRCA specifically recommends that the current wording in Conditions 3.4 and 3.5 of the Permit be amended to remove the mandatory reductions of water takings in Level 1 and 2 low water conditions. Moreover, the GRCA addresses the Respondents' concerns about the potential ecological impact of the water taking on surface water features during low water conditions:

> Well TW1-88 draws from a deep bedrock source, which does not respond immediately to recharge from daily precipitation nor does it instantaneously reduce surface water flows during pumping. Thus, it is deemed that **these takings do not pose an immediate impact on ecological sustainability of local surface water systems when low water levels are called**. (Emphasis added)

Page 2 of Exhibit "E" of the Affidavit of Carl Slater, Director's Submissions and Book of Authorities, Tab 3E

64. It is also significant to note that in its recommendations for controlling water use during low water conditions in the Speed and Eramosa River watersheds, the GRCA emphasizes that the potential for groundwater impact on stream flow depends upon the amount of taking, as opposed to the rate of taking:

> With surface water takings, the rate at which the water is taken is important. With groundwater takings, it is the amount of water taken that is significant.
>
> Surface water takings: Impacts on the river from surface water takings can be greatly reduced by taking water slowly over a longer period of time.

> Groundwater takings: Impacts from groundwater takings are more difficult to reduce, because groundwater takings can lower the water table and reduce, or stop altogether, discharge to streams and the river. **For this reason, it is the total amount of water taken that must be reduced to lessen the impact on streamflow. (Emphasis added)**
>
> **Exhibit H attached to the affidavit of Mike Nagy at pg. 2, Book of Authorities of the Respondents, Tab C**

65. The Minutes of Settlement and proposed changes will not result in any increase to the amount of water taken from the historic amounts previously permitted to be taken during low water conditions. Since monitoring of surface water features and stream flow was initiated in 2005, there has been no observed impact on surface water features as a result of taking from Nestlé's well. In any event, Nestlé has reaffirmed its commitment to voluntarily reduce the amount of any takings during low water conditions. Accordingly, the focus of the Minutes of Settlement is on assessing the potential impact of an increase to the rate of taking during low water conditions.

> **Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para 5**

66. At paragraphs 13 to 16 of their submissions, the Respondents state that there is no scientific support for "the Director's assertion" that "Nestlé's pumping will not interfere with surface water levels because the bedrock aquifer form which it draws is 'not hydraulically connected' to the water table above it." The Respondents indicate that the "bedrock aquifer is undoubtedly recharged by flows from surface and near-surface waters" but that the "exact sources and pathways of these flows are unknown."

67. First, the Respondents' suggestion that the bedrock aquifer could be recharged "primarily by precipitation in remote areas distant from the site, or from water leaking down from the overburden aquifer" is entirely speculative and not based on any evidence or data. There is no indication in the Respondent's submissions or the affidavit of Professor Howard that this assertion is based on any review of site-specific data, reports or information such as the 2011 annual monitoring report.

68. To the contrary, both the March 22, 2013 affidavits of Sarah Day and Abdul Quyum and their supplementary affidavits set out the clear scientific basis for the assessment that the groundwater taking from Nestlé's well is expected to have no unacceptable impact on surface water features or long term groundwater levels. These opinions are based upon a review of site-specific annual reports, which have been submitted to the Ministry and technically reviewed over the course of several years. This analysis is

further substantiated by both the GRCA and Credit Valley Conservation in their letters to the Ministry.

69. Secondly, the Respondents' statement at paragraph 13 misrepresents and overstates the Director's submission at paragraph 18, which is that "there is no evidence of a hydraulic connection between the two aquifers" and thus "it is unlikely that pumping at TW1-88 will interfere with surface water levels, private residential wells, or any existing overburden wells" (emphasis added).

70. There is no dispute that the concept of the hydrological cycle indicates that on a regional or a large scale, or at other specific sites (such as Aberfoyle), there is clear connection between groundwater and surface water. However, at this particular site, the scientific evidence clearly shows that there is no evidence that the Nestlé groundwater taking at TW1-88 impacts on nearby surface water features. While it is true that there is no perfect aquitard, the evidence at this specific site and taking demonstrates that this aquitard is sufficiently robust to prevent the water taking from impacting nearby surface water features.

Supplementary Affidavit of Abdul Quyum, Reply Submissions of the Director, Tab 3 at para 2 to 11

Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para 2 to 7

Impacts of Water Taking on Groundwater or Surface Water Beyond Nestlé's Monitoring Network

71. At paragraph 18 of their submissions, the Respondents note that there have been six major droughts in the area of Nestlé's well since 1998. The Respondents fail to indicate whether any of these affected the Eramosa sub-watershed in which Nestlé's well is located, and if so, what level of low water declaration was made in that sub-watershed.

72. In any event, the conclusions in the affidavits of Abdul Quyum and Sarah Day are based in part on a review of annual monitoring reports, which include several drought years, and the technical review of the 2011 annual monitoring report, which includes long term trend data. These reports all conclude that the Nestlé taking does not have any long term impact on the groundwater levels in the area of influence of that taking. The consultant for the Town of Erin came to similar conclusions.

Exhibit "A" attached to the Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2B at p. 2 to 3

73. At paragraph 20 of their submissions, the Respondents also note that

there is a potential that elevated rates of taking during low water conditions may impact on surface water features which may lie beyond the range of the Nestlé's existing monitoring network. The Respondents also state that the drought resilience of the bedrock aquifer is uncertain as the recharge and discharge flows between the bedrock aquifer and surrounding aquifers are not quantitatively understood.

74. The Director does not dispute that that on a regional scale, surface and near-surface sources likely recharge the bedrock aquifer, as Professor Howard states in paragraph 6 of his affidavit. It is important to note, however, that the impugned conditions will not result in a net increase to the amount of water which has historically been taken at TW1-88. The resilience of the aquifer will therefore not be affected by the proposed amendments to the Permit.

Supplementary Affidavit of Abdul Quyum, Reply Submissions of the Director, Tab 3 at para. 7

75. Moreover, within the zone of influence of the well, surface water does not appear to be contributing to the bedrock aquifer as the pumping of TW1-88 does not appear to have an impact on the local surface water features. Nestlé's existing surface water monitoring network is sized such that the local surface water features located within the zone of influence are captured. As there is no evidence of any unacceptable impacts on the local surface water features, it is unlikely that there will be impacts on surface water features outside of the zone of influence.

Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para 9 to 11

76. Therefore, contrary to paragraphs 39 and 40 of the Respondents' submissions, the proposed Erin Spring Supplementary Monitoring Plan is adequate to assess the potential impacts of water taking during low water conditions on the bedrock aquifer and the surrounding surface water features.

77. As noted above, to the extent that there remains the potential for unacceptable impacts that are not reasonably predictable, the Director is committed to taking any and all appropriate regulatory actions to address these impacts in accordance with an adaptive management approach.

The Minute of Settlement Do Not Fetter the Director's Discretion

78. At paragraph 21 of their submissions, the Respondents state that the Director fettered his discretion by revising and removing the drought-based restrictions from the permit "on the basis that they are not required under the non-binding Ontario Low Water Response Plan."

79. Contrary to these submissions, nothing in the Minutes of Settlement or the Director's submissions bind the Director from exercising his authority under the *OWRA* or any other statute. Indeed, condition 6 of the Permit specifically provides that nothing in the Permit shall prevent the Director from taking actions to suspend or reduce the water taking under the Permit if necessary.

Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 4-5

80. Moreover, the Respondents narrowly construe the basis for the Director's decision to recommend the proposed Minutes of Settlement. As set out in the Director's submissions, the Director based his decision on a number of considerations beyond just the wording of the OLWR, including the applicable legislation and Ministry policies, the ecological characteristics of the Site and proposed taking, the technical review of current and historic monitoring data, and the revised recommendations of the GRCA.

81. The Minutes of Settlement are specifically designed to obtain additional data so that the Director can better exercise his discretion in accordance with a precautionary, science-based approach prior to allowing a change in the historic water taking. In this regard, the Minutes of Settlement and the Permit are predicated upon the Director exercising his discretion in accordance with all applicable legislation and Ministry policies.

Removal of Condition 3.5 of the Permit

82. At paragraph 38 of their submissions, the Respondents state that the proposed removal of Condition 3.5 from the current permit would remove any guidance on possible restrictions in the case of a Level 3 low water declaration from the Permit.

83. Condition 3.5 of the Permit does not purport to provide any guidance to the Permit Holder in the event of a Level 3 low water declaration however. Rather, this condition only requires that in the event that the Ontario Water Director's Committee issue a Level 3 declaration, the maximum daily water taking shall be reduced in accordance with any response issued by the Committee. This condition neither stipulates that a reduction in the maximum permitted water taking will be required, nor the extent of any such reduction.

84. To the contrary, this condition presumes a particular response to be issued by the Ontario Water Director's Committee, and to that extent actually risks confusing the appropriate actions to be taken by the permit holder in the face of the Committee's actual response to a level 3 declaration.

85. The removal of this condition can therefore in no way negatively impact on the Permit Holder, and may in fact avoid any potential conflict or confusion with the actual direction issued by the Ontario Water Director's Committee in the event of a level 3 low water declaration.

Modifications to the Minutes of Settlement

86. As noted above, the Respondents have identified several specific areas in which the proposed Minutes of Settlement can be improved. In this section, the Director will briefly address these issues and respectfully asks that, where appropriate, the Tribunal incorporate these additions or commitments into any order dismissing the appeal pursuant to Rule 200.

87. At paragraph 36 of their submissions, the Respondents state that the agreement provides no criteria to guide the Director in his decision about whether or not to authorize maximum pumping during low water conditions. The Director is committed to applying all applicable legislative and policy criteria to the exercise of his discretion under s. 34 of the *OWRA* to this decision. In addition, the Director has identified some of the technical criteria to be relied upon in any decision to be made under paragraph 7 of the Minutes of Settlement. The Director respectfully rejects the Respondents' characterization of the Minutes of Settlement and the supplementary monitoring plan as a "low bar" which is likely to be cleared.

> **Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 6**
>
> **Supplementary Affidavit of Abdul Quyum, Reply Submissions of the Director, Tab 3 at para. 20-21**
>
> **Supplementary Affidavit of Sarah Day, Reply Submissions of the Director, Tab 4 at para. 14-15**

88. At paragraph 37 of their submissions, the Respondents state that the agreement does not require the Director to consider the submissions of the public nor does it require the Director state the scientific justification for his decision approving or denying the use of an elevated rate of taking.

89. It should be noted that at paragraph 38 of the Director's affidavit, sworn on March 22, 2013, the Director did indicate his commitment to basing his decision in part upon any stakeholder comments. Nonetheless, the Director wishes to reaffirm that any comments submitted by the public will be considered as part his decision to approve an elevated rate of taking under the proposed Minutes of Settlement.

Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 8

90. Further, the Director is committed to providing his justification, in writing, for either approving or denying the use of an elevated rate of taking during low water conditions. A copy of these written reasons will be made publicly available and provided directly to the parties to this proceeding.

Supplementary Affidavit of Carl Slater, Reply Submissions of the Director, Tab 2 at para. 9

CONCLUSION

91. The Director submits that the terms of the Minutes of Settlement are in the public interest, consistent with the purpose and provisions of the relevant legislation, and that there will be no prejudice to the interests of the public or other parties.

92. Accordingly, the Director asks that the Tribunal accept the proposed withdrawal of the appeal pursuant to the terms and conditions of the Minutes of Settlement, and dismiss this proceeding.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Justin Jacob
Counsel for the Director
Ministry of the Environment

Alexa Mingo
Student-At-Law
Ministry of the Environment

ERT Case Nos. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

Nestlé Canada Inc. v. Director,
Ministry of the Environment

In the matter of a request for a Hearing by Nestlé Canada Inc. filed on October 11, 2012 pursuant to section 100 of the *Ontario Water Resources Act,* R.S.O. 1990, c. O.40, as amended with respect to Permit to Take Water (Ground Water) No. 3716-8UZMCU issued by the Director, Ministry of the Environment, on September 28, 2012 under section 34 of the *Ontario Water Resources Act* permitting taking of ground water from one bedrock drilled well located at Lot 24, Concession 7, Geographic Township of Erin in the County of Wellington, Ontario; and

In support of a proposed withdrawal of an appeal as part of a settlement agreement.

SUPPLEMENTARY AFFIDAVIT OF CARL SLATER
(Sworn April 29, 2013)

I, **CARL SLATER**, of the City of Hamilton, in the Province of Ontario, MAKE OATH AND SAY:

1. I have had the opportunity to review the affidavit of Ken Howard, sworn on April 16, 2013, the affidavit of Mike Nagy, sworn on April 21, 2013, and the affidavit of Mark Calzavara, sworn on April 22, 2013. I have also reviewed the submissions of Wellington Water Watchers and the Council of Canadians ["the Respondents"] on the motion to approve the minutes of settlement. I provide the following comments:

No Expected Impacts on the Town of Erin Municipal Water Systems

2. With regard to paragraphs 7 and 8 of the Respondents' submissions, there is no evidence that the water taking from Nestlé's well has any impact on the municipal drinking water systems for the Town of Erin.

3. A technical review of Nestlé's 2011 annual monitoring report by the consultant for the Town of Erin, concludes among other things that:

   (a) There is no apparent impact on surface water features as a result of pumping.

   (b) Based on the water level monitoring conducted to date, the current rate of pumping of the Nestlé well does not appear to have any sustained impact on groundwater levels in the vicinity of the well.

   (c) The zone of influence of pumping does not extend to the Hillsburgh municipal wells and the capture areas are different (i.e. groundwater captured by the wells are from a different source area).

   Attached as Exhibit "A" to this affidavit is a true copy of the letter from Ray Blackport, P. Geo, consultant for the Town of Erin to Ms. Kathrine Ironmonger, Town Clerk, Town of Erin, dated May 11, 2012.

Exercise of Discretion

4. Paragraphs 21 through 23 of the Respondents' submissions suggest that I have fettered my own discretion by amending or removing conditions. At this time, no conditions have been amended or removed. The proposed settlement agreement would provide a decision-making framework for the exercise of discretion, by obtaining appropriate technical and science-based information to make an informed decision as to whether to allow short term elevated rates of taking during certain low water declarations. Conducting pumping tests to evaluate the impact of the proposed short term elevated rate of water taking is a science-based, precautionary approach, which allows the Ministry to obtain appropriate technical advice so that an informed decision can be made as to whether to allow a change in the water taking.

5. The Minutes of Settlement in no way fetters my discretion to take any and all appropriate regulatory actions to respond to any observed impacts on groundwater or surface water that may arise as a result of water taking under the Permit in accordance with an adaptive management approach. Indeed, condition 6 of the Permit specifically provides that nothing in the permit shall fetter my discretion to suspend or reduce the water taking under the Permit. Further, in the event of an elevated rate of taking, Condition 4.7 of the Permit requires additional reporting which will enable a timely assessment of any potential impacts observed and enable the Director to take any action indicated to address any adverse impacts that may occur.

Decision Regarding the Erin Spring Supplementary Monitoring Plan Results

6. Paragraph 36 of the Respondents' submissions notes that the settlement agreement provides no direction to the Director for evaluating the results of the pumping tests. This is useful input. The supplementary affidavits of Sarah Day and Abdul Quyum provide some of the criteria upon which they will evaluate the pumping test assessment report to provide advice or recommendation to the Director. Accordingly, I commit to basing any decision under paragraph 7 of the proposed Minutes of Settlement in part upon these technical criteria and recommendations, in addition to the considerations set out in any applicable legislation or Ministry policies.

Consideration of Public Comments

7. Paragraph 37 of the Respondents' submissions suggests that the settlement agreement does not require the Director to seek or consider public submissions or to state the justification for any potential decision. This is not completely correct. Paragraph 5(ii) of the settlement agreement requires Nestlé to submit the pumping test assessment report to the parties. Paragraph 6 of the settlement agreement allows any interested person, including the parties, to provide written comments to the Director for consideration. Paragraph 38 of my initial affidavit clearly states that the Director's decision will be based on the advice of Ministry technical staff and on any stakeholder comments. In addition, the Director is required by regulation to consider the interests of persons beyond the Permit Holder.

8. I confirm that I am committed to considering all submissions provided to me as part of this process.

Publication of the Director's Decision

9. The suggestion to publish or state the justification for any potential decision is helpful input. A decision note will be prepared and shared with the parties, technical stakeholders or others who have registered their interest with the Tribunal. This decision note will set out the scientific basis for any decision made for the purposes of paragraph 7 of the minutes of settlement.

10. I make this affidavit in support of an order of the Environmental Review Tribunal approving the Minutes of Settlement, and for no other or improper purpose.

SWORN BEFORE ME)
at the City of Hamilton,)
in the Province of Ontario,)
this 29th day of April, 2013.)
)
)

Carl Slater
CARL SLATER

B. BYRNELL BARRISTER + SOLICITOR
A Commissioner for Taking Oaths, etc.

This is Exhibit A referred to in the affidavit of CARL SLATER sworn before me, this 29th day of APRIL 20 12.

A COMMISSIONER, ETC.
B. BYRNELL
BARRISTER & SOLICITOR

Blackport HYDROGEOLOGY INC
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Waterloo, Ontario
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Phone: 519-884-5549
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May 11, 2012

Ms. Kathryn Ironmonger
Town Clerk
Town of Erin,
5684Trafalgar Road
RR # 2 Hillsburgh, Ontario
N0B 1Z0

Dear Ms. Ironmonger:

RE: NESTLES WATERS CANADA, PERMIT RENEWAL – TW1-88, PERMIT TO TAKE WATER NO. 6480-74BKR4

Nestle Waters Canada (Nestle) has a water supply well (TW1-88) located west of Hillsburgh. It is operated under MOE Permit to Take Water (PTTW) No. 6480-74BKR4 issued August 24, 2007 and expiring August 31, 2012. Nestle has applied to the Ministry of the Environment (MOE) for a permit renewal. The current permit specifies a maximum rate of 773 litres per minute (Lpm) and a maximum volume of 1,113,000 litres per day (Lpd). The permit is for 24 hours a day, 365 days a year. The same conditions have been on the PTTW since 1999. Nestle, and previous owners of the well, have had five permits since 1989. The well has only been actively pumped and routinely monitored since 2000, when the well was brought into commercial use. Previous permits ranged in duration from 2-5 years with the last permit being a five year permit. Monitoring programs have been developed and increased in scope and scale over the last 10 years, to assess potential impacts from long-term water taking.

Nestle is proposing that the permit be renewed at a similar rate; however, for a 10-year period. Nestle is also proposing that a "spike" rate of 1,135 Lpm be incorporated in the renewal, allowable for 7-day periods each year. The maximum daily pumping will not change.

The Town has previously commented on the PTTW applications and has typically received quarterly updates of pumping rates and selected monitoring data. The comments for the 2007 application are attached to this letter for background information.

A Stakeholders committee has been created to address potential issues or concerns related to water taking at the Hillsburgh well. A technical meeting is being held on May 18th to discuss the PTTW renewal application. Stakeholders include: Nestle, MOE, MNR, GRCA, Town of Erin and Wellington Water Watchers. Information presented and discussed at this meeting will be taken under advisement by MOE, in their assessment of the PTTW renewal.

I am currently reviewing the data and findings summarized in the 2011 Annual Monitoring Report, prepared by Conestoga-Rovers & Associates (CRA) on behalf of Nestle. As part of my review, a request was made to Nestle to provide some of the data in raw electronic form to analyze in more detail (e.g. look at water level changes on a smaller scale such as monthly, and compare with pumping rates and precipitation data). Data were provided on May 4th and are currently being analyzed. The assessment is not complete but should be complete by early next week. Any issues or concerns will be brought forward at the Stakeholders meeting on May 18th.

The following discussion provides an overview to Council of the overall monitoring program conducted by Nestle and a preliminary assessment of the most recent data and long-term trends in the data. Any issues or concerns that might arise from current more detailed assessment will be provided at the May 15th Council meeting.

There are a number of conditions under the current PTTW that need to be satisfied. One of the conditions is an annual report, which was received on April 22, 2012 for the reporting year of 2011. This report is also supporting documentation for the PTTW renewal. A major requirement is the monitoring of an extensive set of dedicated monitoring wells and private domestic wells, as well as several surface water monitoring locations. The monitoring program has been updated since 2007. The 2011 Annual Monitoring Report, prepared by Conestoga-Rovers & Associates (CRA) provides the full data set for locations monitored from 2000 to present.

Water level monitoring is conducted monthly (manually) at 49 monitoring points and surface water flows are measured at three surface water locations. In the last five years automated water level recording devices (data loggers) have been installed in 27 of the 49 monitoring points and water levels recorded on at hourly intervals.

The conditions of the PTTW require water level monitoring at 18 bedrock wells, 10 overburden wells, 7 shallow piezometers and 6 surface water locations. Surface flow monitoring is required at 3 locations. Pumping rates and daily pumping volumes are also required. Nestle also monitors additional wells on site, but these are not required as part of the conditions of the PTTW.

Monthly and annual pumping volumes have varied since pumping commenced in 2000. Annual water taking volumes have ranged from a high of 69.6% of the permitted volume in 2001 to a low of 13.3% in 2007. Since 2007 there has been a steady increase in annual pumping to 40% of the permitted rate. Monthly pumping volumes vary from less than 10% of the permitted volume to about 78% of the permitted volume. Since 2007 the highest monthly volume pumped about 55% of the permitted volume.

Water level monitoring, conducted at a number of the original monitoring locations, has provided a general assessment of long-term water level trends. The updated monitoring program has added additional locations and provided a much more detailed data set using automated water level recorders. Based on previous reviews of annual monitoring reports and a preliminary assessment of the most recent data I can provide the following general comments. As indicated above, any issues or concerns that might arise from the detailed assessment will be discussed at the May 15th Council meeting.

Monitoring data collected to date indicate the following:

- The pumping well has not shown a substantial variation in water levels under pumping and non-pumping conditions. There has typically been about a six-metre decline in water level at the well itself, under pumping conditions; however, the water level recovers back to or close to the historical static water level when the well is not being pumped. There is no apparent long-term decline in water levels at the pumping well since pumping commenced in 2001.
- There are slight downward trends in local bedrock water levels during periods of extended pumping at higher rates (e.g. in 2001), however water levels recover when pumping is reduced. There are slight fluctuations in water levels during periods of low precipitation. These water levels appear to recover when precipitation to back to normal conditions.

Additional data collected through automated water level monitoring in the last four years support this.

- Long-term water level trends in overburden wells appear to follow the general precipitation trends, typically declining during lower than normal precipitation periods (e.g. 2002-2004 and 2007) and increasing during higher than normal precipitation periods.

- There is no apparent trend related to pumping of the Nestle well in the overburden wells. More detailed data collected by the automated data loggers show that upward gradients are typically present in the shallow overburden near the pumping well, except during times of higher precipitation, which results in a rapid rise in the water table. The water level data indicate that water levels in the upper overburden are not impacted by pumping.

- There is no apparent impact on surface water features as a result of pumping.

- Based on the water level monitoring conducted to date, the current rate of pumping of the Nestle well does not appear to have any sustained impact on groundwater levels in the vicinity of the well.

- The zone of influence of pumping does not extend to the Hillsburgh municipal wells and the capture areas are different (i.e. groundwater captured by the wells are from a different source area).

Recommendations

Current recommendations are similar to previous recommendations and re-iterated below, with some additional discussion regarding the proposed modifications to the PTTW. Although the current volume of water taking by Nestle has not shown any apparent long-term impact on water levels in the area of the well or a general lowering of water levels in the aquifer, it is critical to continue monitoring and reporting as Nestle currently does. Reporting the information to the Town of Erin on a quarterly basis is important. Although Nestle is currently not pumping close to the permitted volume, on an annual basis, the pumping could be increased by about 40% and still be within the permitted volume. Pumping close to the permitted volume has occurred for short periods of time, in particular back in 2001, but not for extended periods. There may have been a local decline in water levels during the pumping in 2001, although difficult to determine, but water levels recovered when pumping decreased.

The proposed "spike" rates, if implemented, could mean an increased rate of water taking for short periods of time, but still be within the same maximum daily volume of water taking as currently permitted. If pumping were to increase to the permitted volume for an extended time the potential impact on local water levels is not known. This is the purpose of having an extensive monitoring program in place. Receiving information on a quarterly basis allows the Town to see the volumes pumped on a monthly basis and provide an independent assessment of potential impacts on local water levels.

The following is recommended:

- The Town not support a Permit to Take Water renewal of 10 years for the Nestle well TW1-88. Given that the previous permit was for five years and there were no issues, a five year permit renewal is recommended. There are no apparent long-term impacts on

groundwater and surface water, based on the current volume of water pumped. There is sufficient monitoring in place and appropriate mechanisms to address any potential issues that may arise from increased pumping.

- If Nestle is proposing to "spike" the pumping rate for more than a 7-day period, no timeline is proposed between spike periods. An operational timeline should be put in place, specifying the time between spikes.

- If Nestle pumps the well at volumes greater than 70% of the permitted volume on a monthly basis (e.g. this could be during a month when there are several 7-day spike periods) for more two consecutive months, the Town should receive data on the pumping volumes and water levels on monthly basis, rather than quarterly. This would allow an assessment of potential impacts from increased pumping in a timely manner when higher volumes of water are pumped on a continuous basis.

I trust these comments address technical issues associated with the Nestle PTTW renewal application for their Hillsburgh well. If you require clarification or more detail we can discuss at the Council meeting.

Sincerely,

Blackport Hydrogeology Inc.

Ray Blackport, P. Geo
Hydrogeologist

ERT Case Nos. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

Nestlé Canada Inc. v. Director,
Ministry of the Environment

In the matter of a request for a Hearing by Nestlé Canada Inc.filed on October 11, 2012 pursuant to section 100 of the *Ontario Water Resources Act,*R.S.O. 1990, c. O.40, as amended with respect to Permit to Take Water (Ground Water) No. 3716-8UZMCU issued by the Director, Ministry of the Environment, on September 28, 2012 under section34 of the *Ontario Water Resources Act* permitting taking of ground water from one bedrock drilled well located at Lot 24, Concession 7, Geographic Township of Erin in the County of Wellington, Ontario; and

In support of a proposed withdrawal of an appeal as part of a settlement agreement.

REPLY AFFIDAVIT OF ABDUL QUYUM
(Sworn April 29, 2013)

I, **ABDUL QUYUM**, of the City of Hamilton, in the Province of Ontario, MAKE OATH AND SAY:

1. I have had the opportunity to review the affidavit of Ken Howard, sworn on April 16, 2013, the affidavit of Mike Nagy, sworn on April 21, 2013, and the affidavit of Mark Calzavara, sworn on April 22, 2013. I have also reviewed the submissions of Wellington Water Watchers and the Council of Canadians on the motion to approve the minutes of settlement. I provide the following comments:

Response to Concerns Regarding the Hydraulic Connection Between Aquifers

2. I agree with the general statement of Professor Howard that there will always be some leakage (either upwards or downwards) through an aquitard in a semi-confined aquifer situation under natural hydraulic gradient. – that is, no induced

change in the vertical hydraulic gradient caused by active groundwater pumping However, in the case of the TW1-88 well, the question is whether pumping of that well causes any change or impact to any pre-existing natural leakage between overburden and bedrock aquifers, and between overburden groundwater and surface water.

3. It is not possible to prove or disprove any such change directly because no baseline data on vertical hydraulic gradients exists at this site for comparison. This permit was issued in the late 1980s, at a time when monitoring requirements were different than they are now. Since that time, the comprehensive monitoring program has evolved considerably.

4. However, one way to confirm that there is no hydraulic connection between the overburden and bedrock aquifers, and that the overburden aquifer is not leaking water through the aquitard into the underlying bedrock aquifer as a result of induced change in vertical hydraulic gradients due to pumping from the bedrock aquifer, is to measure and monitor changes in the water levels of the overburden and bedrock aquifers.

5. The hydraulic data presented in the 2011 Annual Monitoring Report clearly shows no change in the water levels of the overburden aquifer, bedrock aquifer, or piezometers that can be attributed to pumping of TW1-88. My review of the water level data indicates that the changes in the overburden water levels are not caused by pumping of TW1-88, and that these changes are attributable to precipitation. The taking from TW1-88 has not induced or increased a downward vertical hydraulic gradient between the overburden and bedrock aquifers.

6. Given the lack of baseline data discussed above, no baseline data is available for the vertical hydraulic gradients to compare and quantify any change in this gradient that can be attributed to TW1-88. I have therefore relied on water level response data (Figure 4.7A-G) to confirm whether the bedrock aquifer is in direct hydraulic contact with the overburden aquifer. My review of this data indicates that no changes in the overburden aquifer monitoring wells' water levels have been observed that can be attributed to pumping of TW1-88.

Attached as Exhibit "A" to this affidavit is a true copy of Figures 4.7 A-G, 2011 Annual Monitoring Report.

7. Furthermore, if there is no observed interaction between the groundwater and surface water within the zone of influence, then it is unlikely that any such connection exists outside the mapped zone of influence of TW1-88. Therefore, I conclude that this taking from the bedrock aquifer is not hydraulically connected with the overburden aquifer at this site, and that the pumping from TW1-88 has not negatively influenced the groundwater regime.

8. No long-term decline in the water levels of the bedrock and overburden aquifers

where TW1-88 is located has been observed. Such a decline is unlikely to occur even with the elevated rate of taking because there will be no net increase in taking based on an annual average. In other words, there is no evidence to indicate that the proposed elevated rate of water taking at TW1-88 will result in any significant change to the water levels of the bedrock or overburden aquifer. The proposed pumping test is adequate to capture any changes in aquifer water levels as well as any potential enlargement in the zone of influence.

9. In 2007, a comprehensive monitoring program was instituted. Since that time, the water level data has shown a stable water level trend in the bedrock and overburden aquifers. An enlargement in the zone of influence or changes in flow patterns have not been observed. Since the enhanced pumping rate does not allow any net increase in the amount of taking, a change in aquifer behaviour on a long-term basis, such as a significant enlargement in the zone of influence or an unacceptable decline in water level, is not expected. The hydraulic data collected between 2006 and 2012 for MW5A-05 (Figure 4.7A), a bedrock well located about 70 m from TW1-88, indicates that the water level varied within a 5 m range in the production aquifer, including during any low water advisory declaration made in the watershed since 2007. The water level variations in the private wells which are part of the monitoring plan are also consistent with the historical water level trend. Finally, there is no history of water quantity or quality interference complaints from the existing groundwater water users in the area, which indicates that there is no unacceptable impact on the local groundwater supply in the area.

10. Based on all of the above, it is my opinion that there is significant evidence to support the conclusion that pumping from TW1-88 will not cause unacceptable impact on the groundwater resources within the mapped zone of influence of TW1-88.

The Location of the Well and its Watersheds

11. Though TW1-88 is physically located about 300 m west of the Credit River Watershed in the Grand River Watershed, TW1-88 primarily draws its water from the Credit River Watershed. In 2001, the well's zone of influence at the maximum permitting capacity (773 lpm) was assessed to extend about 1000 m to the east and northeast.

12. Regardless of which watershed this taking is located in, any potential negative impact on the groundwater contribution to the stream base flow or surface water loss to the underlying aquifers as a result of induced stress and resulting negative impact on stream behaviour would only be observed if it is confirmed that the TW1-88 were hydraulically connected with the overlying overburden and near surface features. There is no technical evidence to suggest that the bedrock aquifer in which TW1-88 is located is hydraulically connected with the

overburden aquifer. Nor is there evidence that the bedrock aquifer is locally recharged by the overlying overburden aquifer and surface water. The till layer thickness of about 5 to 35 m effectively isolates the bedrock aquifer from the overlying overburden aquifer. Hence, I conclude that the groundwater taking at this location has not caused, and is unlikely to cause, any negative impacts on the shallow overburden and surface water levels within the mapped zone of influence of TW1-88.

13. On June 20, 2012, Credit Valley Conservation Authority staff confirmed these technical findings in a letter to me.

See a copy of the letter from Dan Banks, Manager – Hydrogeology, Credit Valley Conservation Authority letter to Abdul Quyum, dated June 20, 2012, attached as Exhibit "D" to the affidavit of Carl Slater, dated March 22, 2013, Director's Book of Documents, Tab 3D.

Adequacy of Nestlé's Existing Monitoring Network

14. The current groundwater monitoring plan is outlined in Condition 4.1 of the PTTW. Following this, the current monitoring network includes water level monitoring at 18 bedrock observation/private wells and 11 overburden observation/private wells. Thirteen further monitoring locations required for water level monitoring are situated off-site at private wells.

15. The monitoring plan was designed to focus on recording water level changes within the assessed zone of influence. For this reason, monitoring locations such as D15 (located about 1000 m east/northeast of TW1-88), D8 (700 m east/northeast of TW1-88), D19 (about 950 m north/northwest of TW1-88), MW12A/B-08 (about 950 southeast of TW1-88) and D36A/B (about 1000 m south of TW1-88) were included in the permit in order to provide adequate and acceptable spatial coverage, and in order to monitor the impact of TW1-88's takings on the overburden and bedrock aquifers in terms of induced water level variations within the zone of influence of TW1-88.

Attached as Exhibit "B" to this affidavit is a true copy of Figure 4.1A, 2011 Annual Monitoring Report

16. Since 2007, the monitoring network has provided adequate and acceptable hydraulic data for the assessment of impact on the groundwater receptors associated with the pumping of TW1-88 and any change in the extent of the zone of influence. Given this, it is expected that the monitoring network will able to capture any changes in the water level caused by short-term increased taking.

17. Based on the information available to date on the size of the well's zone of influence, it is my opinion that the current groundwater monitoring program will adequately record the response of the bedrock and overburden aquifers TW1-88

pumping under spiked rate testing. In my opinion, the monitoring required by the permit will provide sufficient hydraulic data that can be utilized to assess any potential negative impacts on the behavior of the aquifers as a result of the enhanced taking during the pumping test.

Evaluation of the Erin Spring Supplementary Monitoring Plan Results

18. The groundwater review of the results of the Supplementary Erin Spring Monitoring Plan will rely in part upon an assessment of the following criteria:

- If there is an unacceptable enlargement in the extent of the zone of influence at the spiked rate;
- If there is any change or increase in the vertical hydraulic gradient at the spiked rate within the zone of influence;
- Whether there is any additional significant drawdown in the water level of the bedrock aquifers within the zone of influence caused by the enhanced rate of taking;
- If the taking at the spiked rate under a low water advisory is sustainable in terms of whether it causes any unacceptable interference with the well water quantity of existing groundwater users within the zone of influence of TW1-88.

19. I make this affidavit in support of an order of the Environmental Review Tribunal approving the Minutes of Settlement, and for no other or improper purpose.

SWORN BEFORE ME)
at the City of Hamilton,)
in the Province of Ontario,)
this 29th day of April, 2013.)
)
)

B. BYRNELL BARRISTER & SOLICITOR
A Commissioner for Taking Oaths, etc.

ABDUL QUYUM

This is Exhibit ..A.. referred to in the affidavit of ..ABDUL QUAYUM.. sworn before me, this ..2-9 14.. day of ..APRIL.. 20 17..

..... A COMMISSIONER, ETC.

B. BYRNELL BARRISTER + SOLICITOR

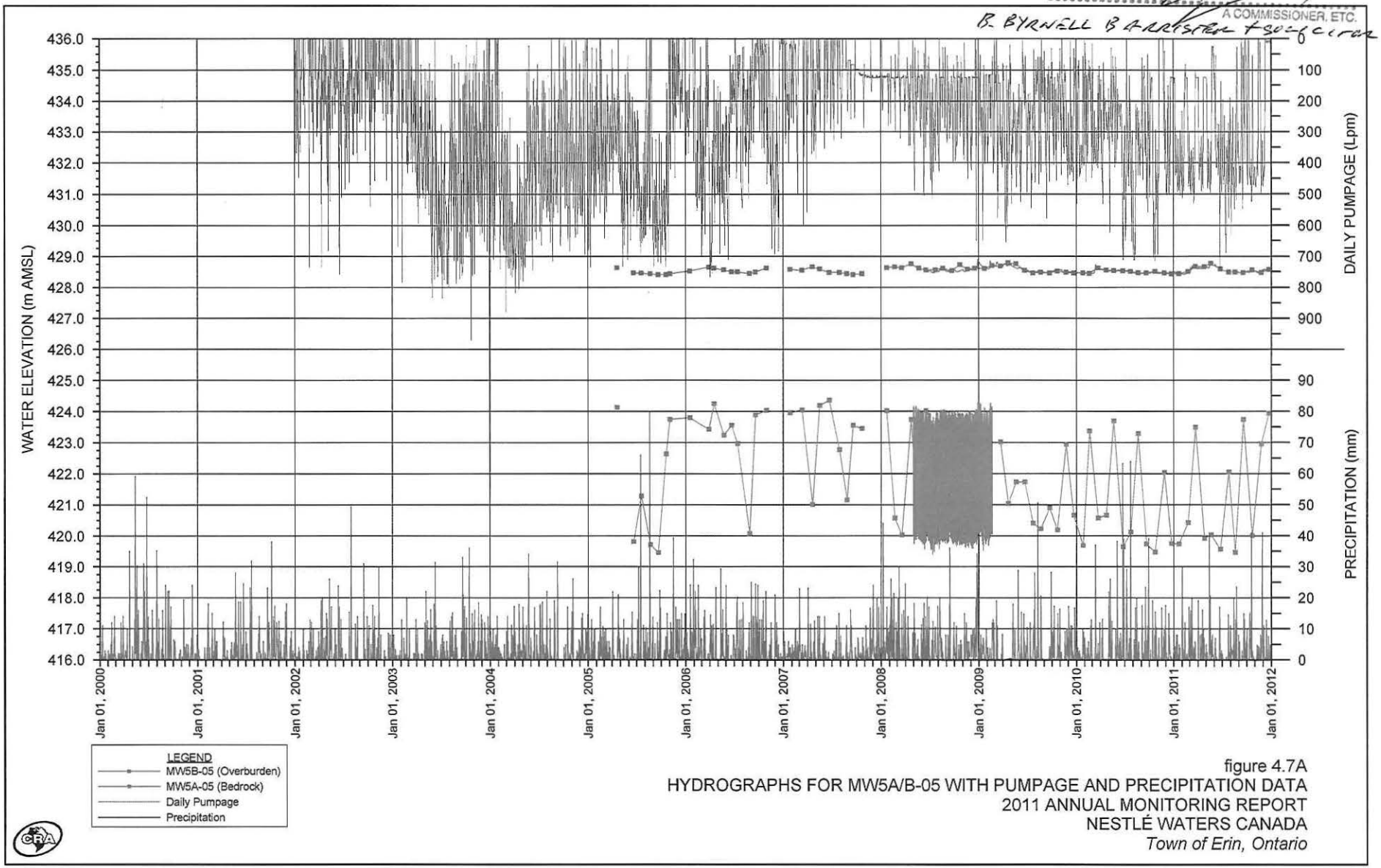


figure 4.7A
HYDROGRAPHS FOR MW5A/B-05 WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

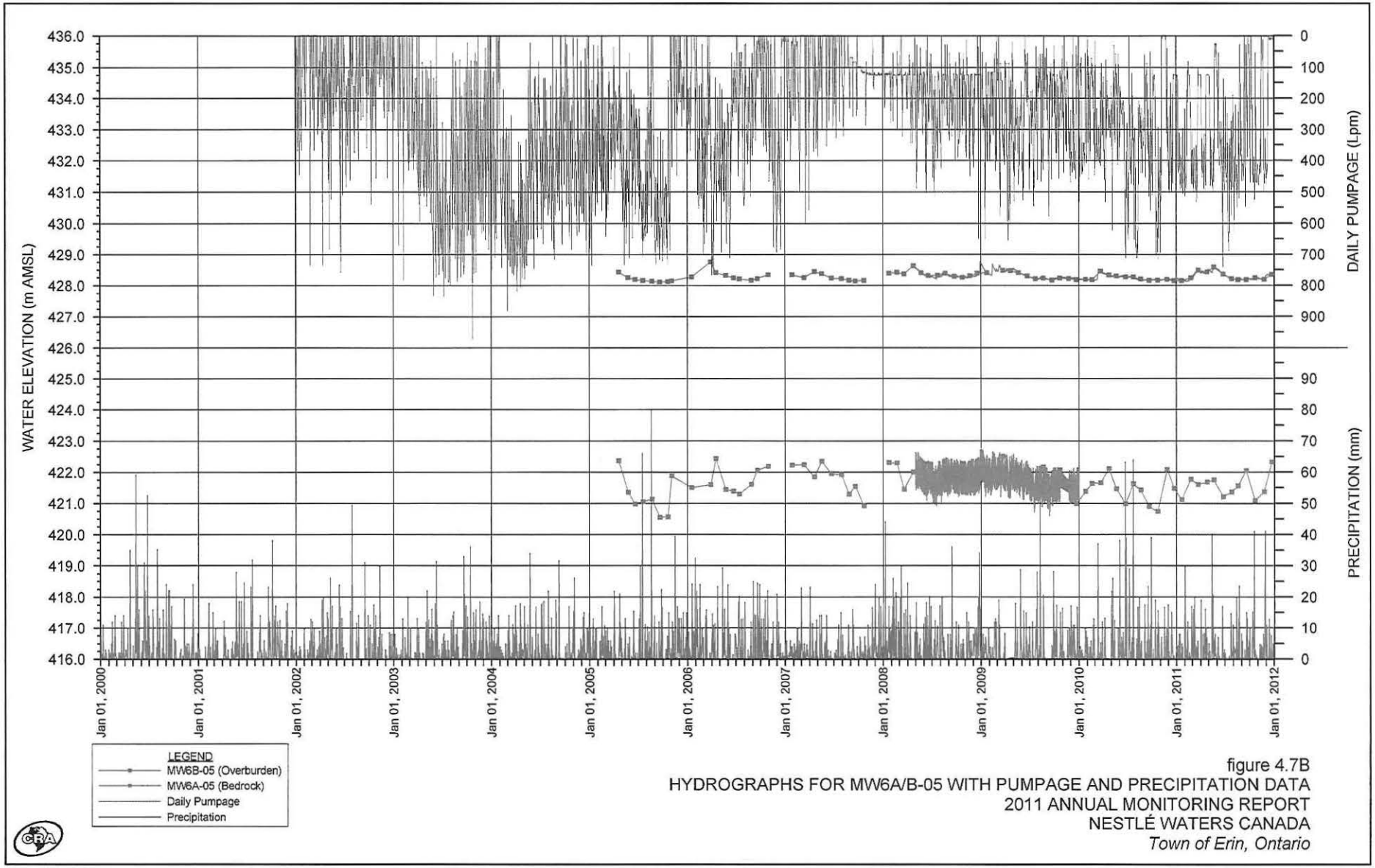


figure 4.7B
HYDROGRAPHS FOR MW6A/B-05 WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

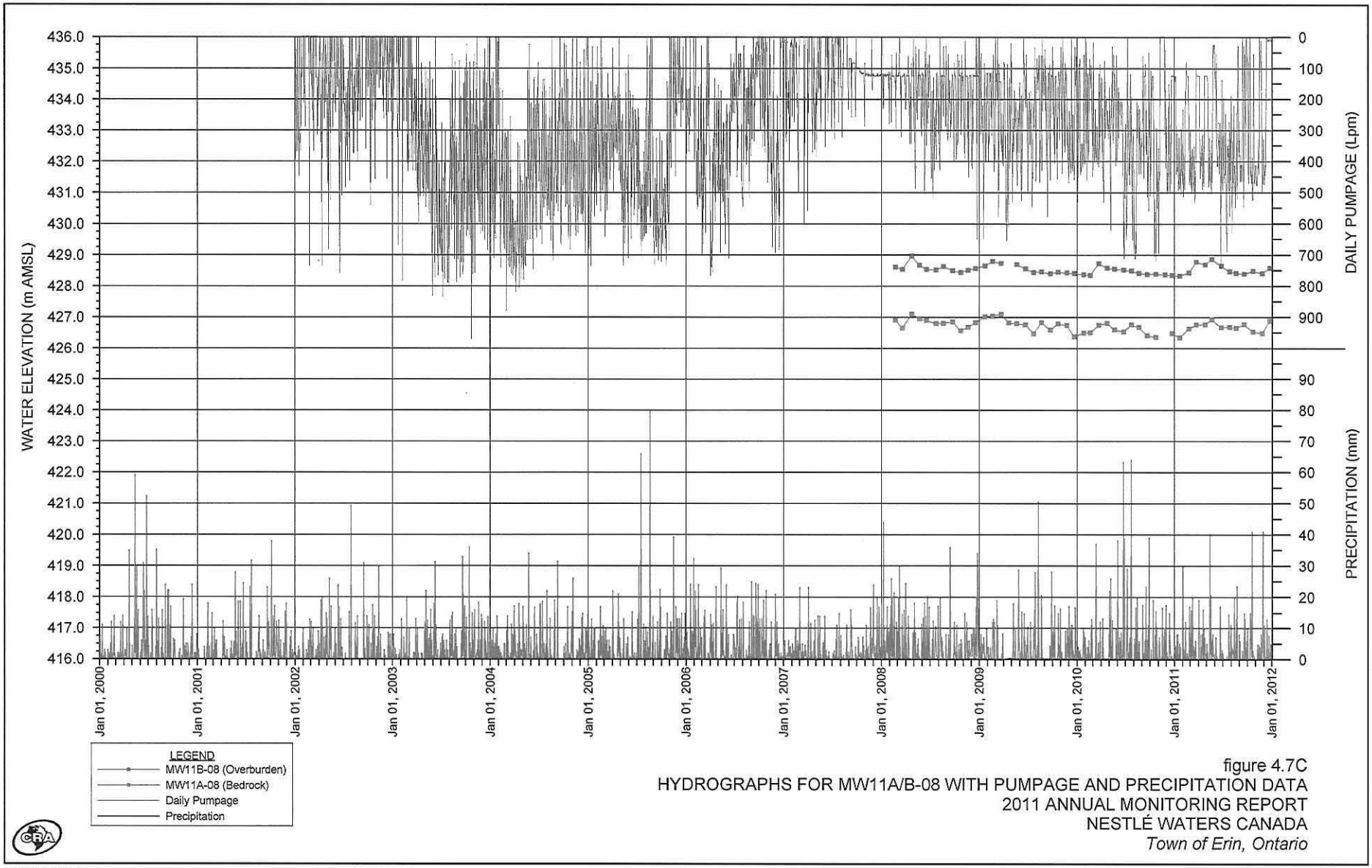


figure 4.7C
HYDROGRAPHS FOR MW11A/B-08 WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

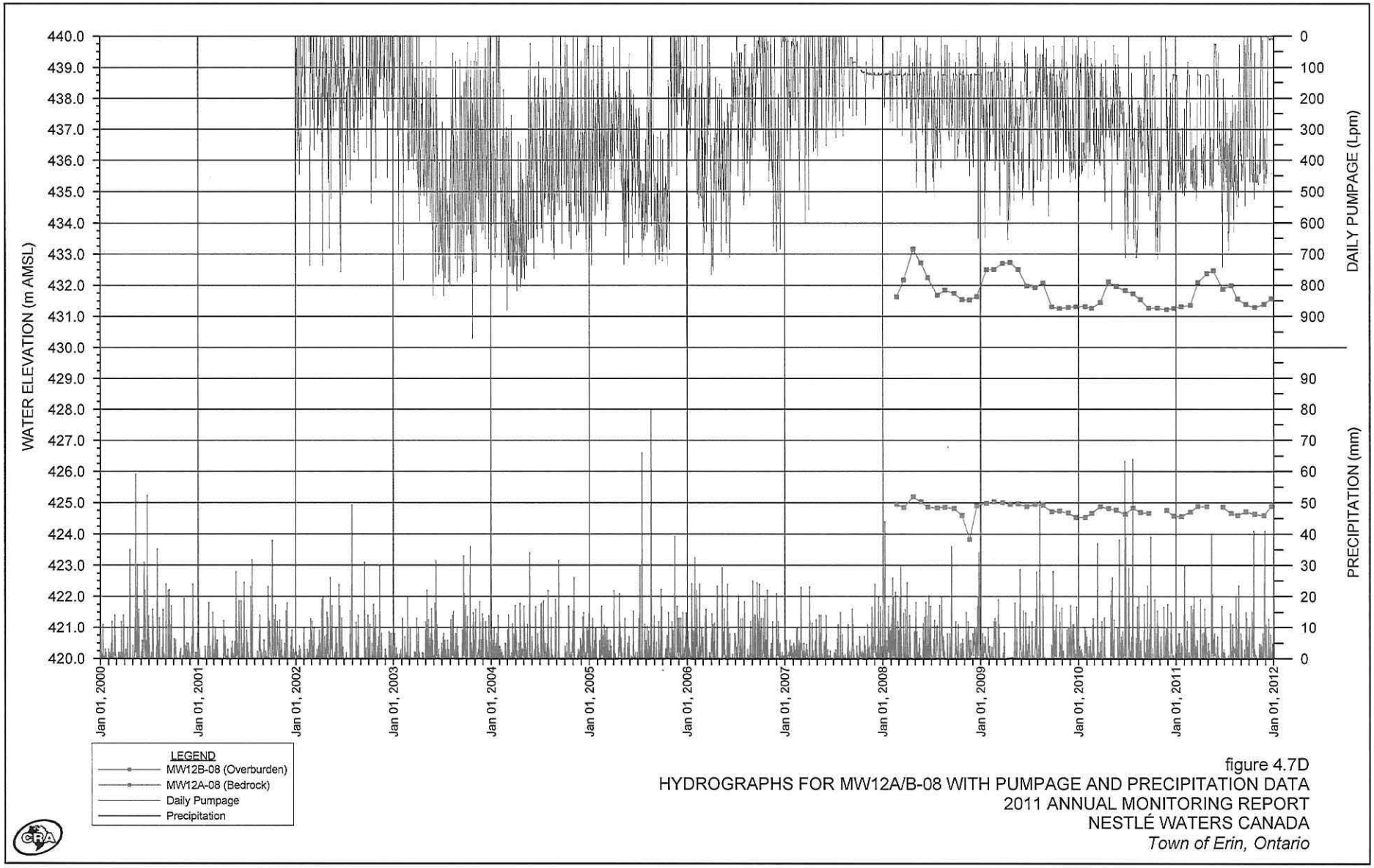


figure 4.7D
HYDROGRAPHS FOR MW12A/B-08 WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

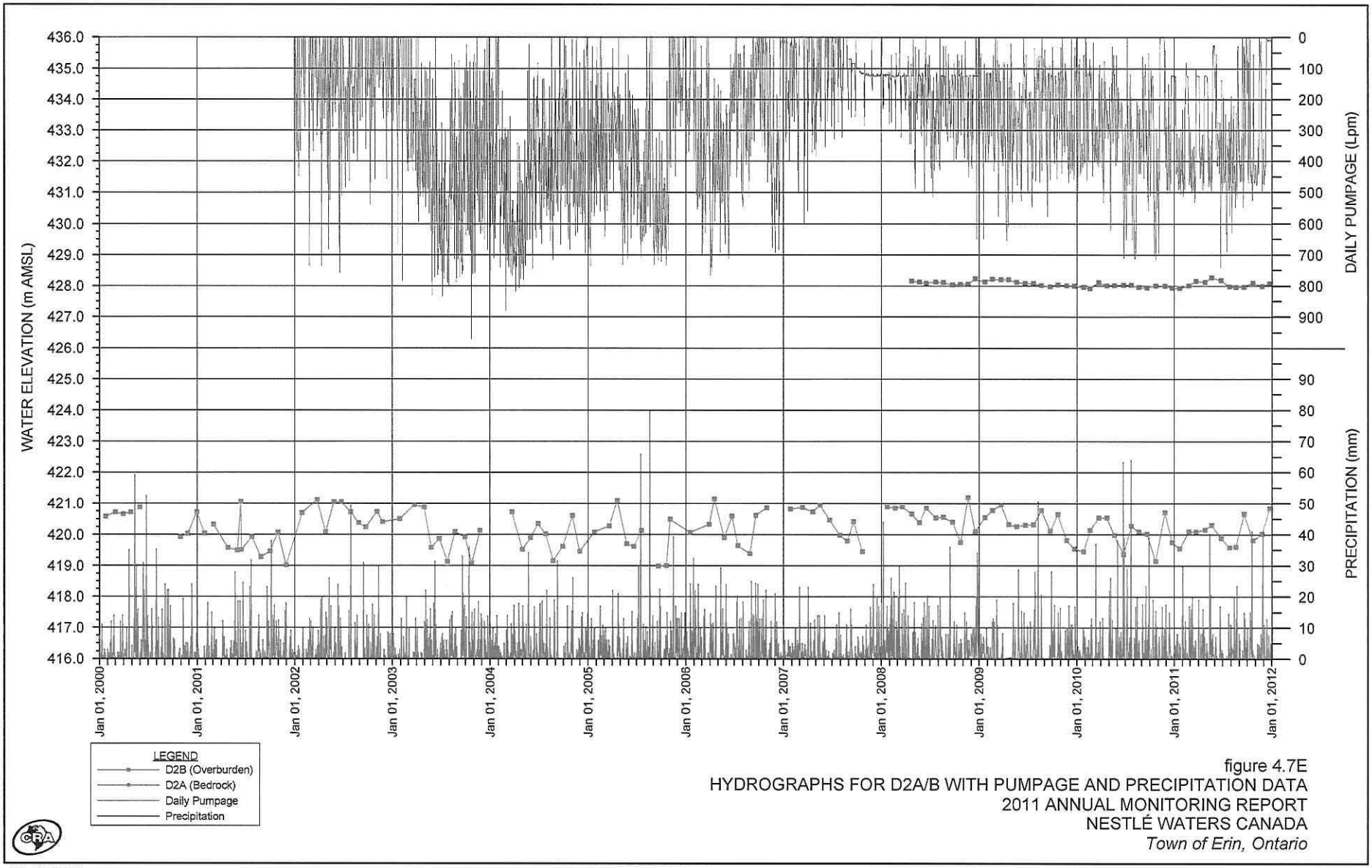


figure 4.7E
HYDROGRAPHS FOR D2A/B WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

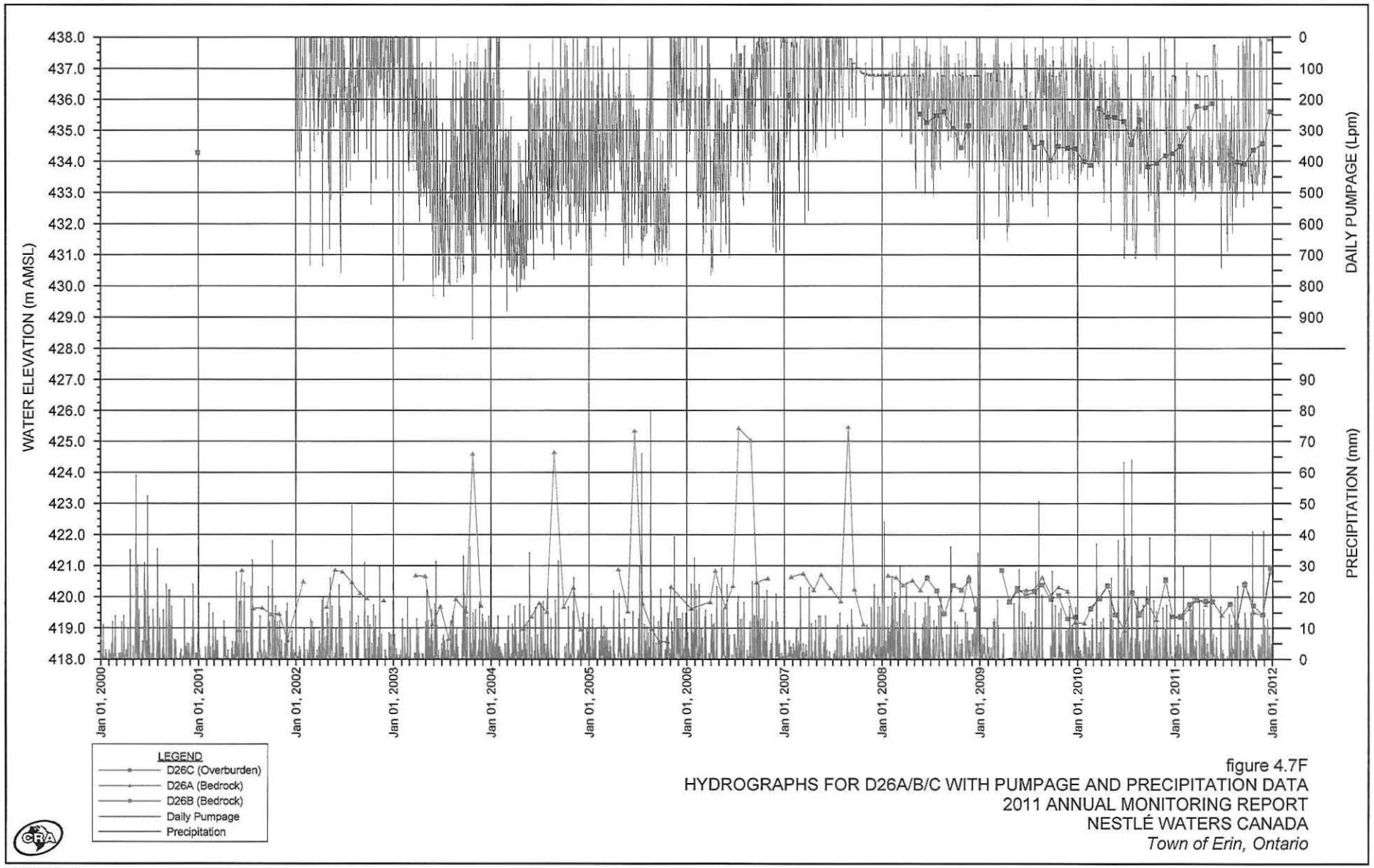


figure 4.7F
HYDROGRAPHS FOR D26A/B/C WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

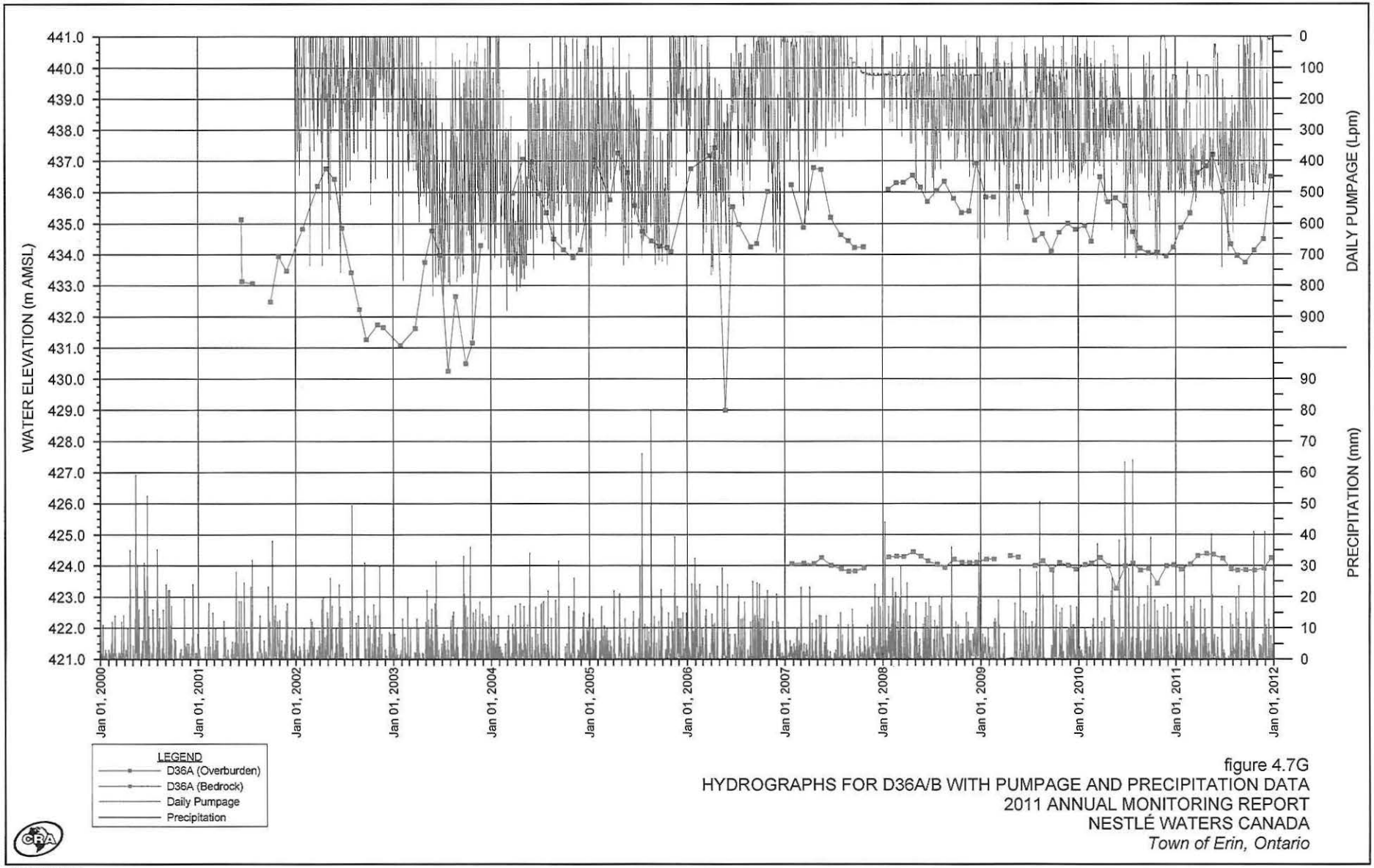


figure 4.7G
HYDROGRAPHS FOR D36A/B WITH PUMPAGE AND PRECIPITATION DATA
2011 ANNUAL MONITORING REPORT
NESTLÉ WATERS CANADA
Town of Erin, Ontario

CRA 013764(15)

This is Exhibit B referred to in the affidavit of ABDUL QUYUM sworn before me, this 29th day of APRIL 2013

A COMMISSIONER, ETC.
B. BYRNELL
BARRISTER & SOLICITOR

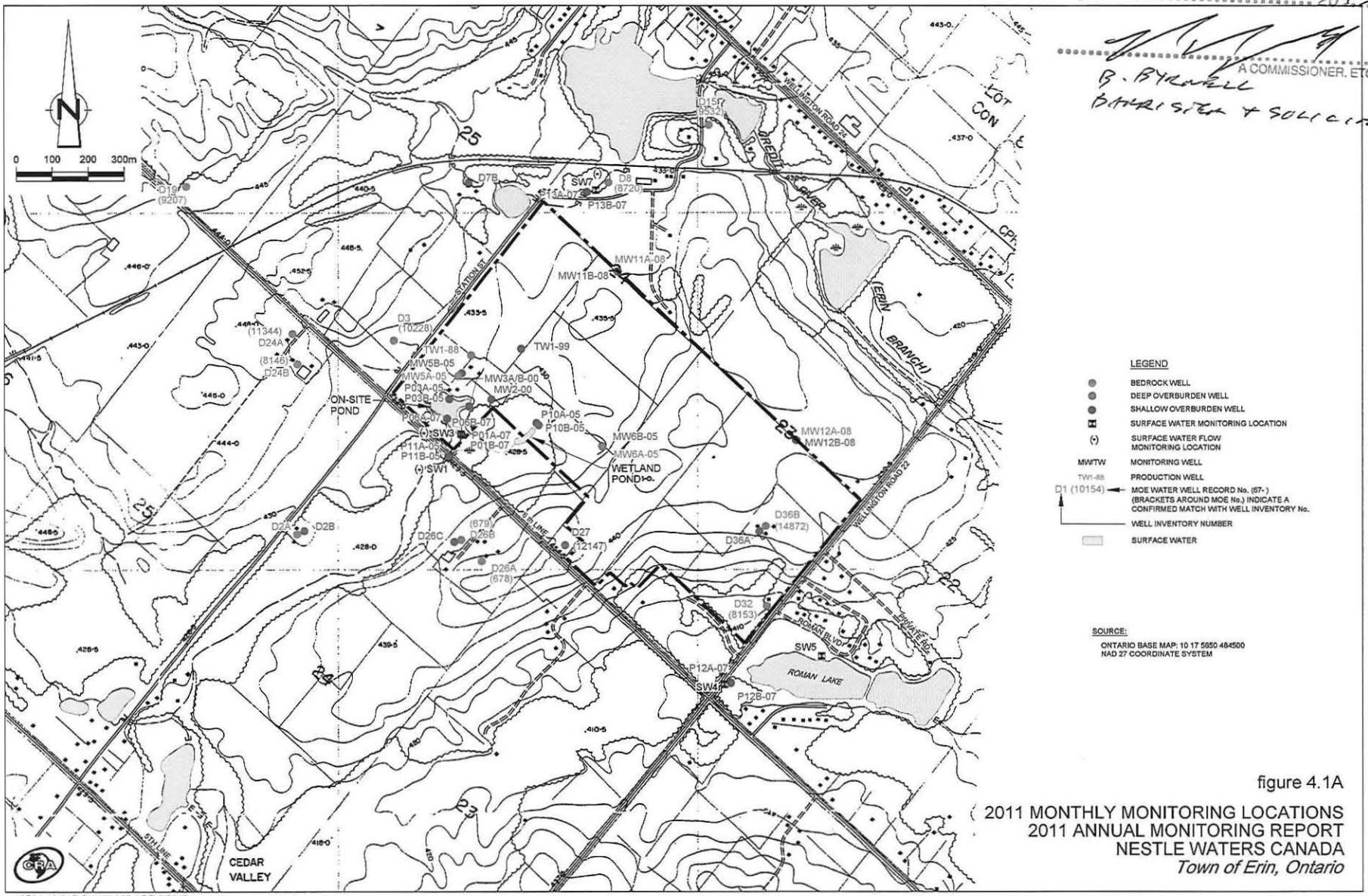


figure 4.1A

2011 MONTHLY MONITORING LOCATIONS
2011 ANNUAL MONITORING REPORT
NESTLE WATERS CANADA
Town of Erin, Ontario

13764-10(015)GN-WA008 APR 6/2012

ERT Case Nos. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

Nestlé Canada Inc. v. Director,
Ministry of the Environment

In the matter of a request for a Hearing by Nestlé Canada Inc. filed on October 11, 2012 pursuant to section 100 of the *Ontario Water Resources Act,* R.S.O. 1990, c. O.40, as amended with respect to Permit to Take Water (Ground Water) No. 3716-8UZMCU issued by the Director, Ministry of the Environment, on September 28, 2012 under section34 of the *Ontario Water Resources Act* permitting taking of ground water from one bedrock drilled well located at Lot 24, Concession 7, Geographic Township of Erin in the County of Wellington, Ontario; and

In support of a proposed withdrawal of an appeal as part of a settlement agreement.

REPLY AFFIDAVIT OF SARAH DAY
(Sworn April 29, 2013)

I, **SARAH DAY**, of the City of Hamilton, in the Province of Ontario, MAKE OATH AND SAY:

1. I have had the opportunity to review the affidavit of Ken Howard, sworn on April 16, 2013, the affidavit of Mike Nagy, sworn on April 21, 2013, and the affidavit of Mark Calzavara, sworn on April 22, 2013. I have also reviewed the submissions of Wellington Water Watchers and the Council of Canadians on the motion to approve the minutes of settlement. I provide the following comments:

Concerns Regarding the Impact of Water Taking on Surface Water Features

2. The review of the water level (Figures 4.8 to 4.10) and vertical hydraulic gradient data (Exhibit A) from multi-level piezometers at P11-05, P01-07, P06-07, P03-07, P10-05, P12-07 and P13-07 (Figure 4.1A), presented in the 2011 Annual Monitoring report, indicates that there is a hydraulic connection between surface water and the shallow overburden aquifer.

3. Water level and vertical hydraulic gradient data at the local surface water features do not appear to experience any changes as a result of pumping from TW1-88. These surface water features include those identified at paragraph 10 of the Respondents' submissions such as the onsite pond and wetland, the Erin Branch of the Credit River, Roman Lake, and the downstream tributary of the onsite pond.

4. Based on the absence of impact to surface water during pumping of TW1-88, it is my opinion that surface water features are not directly hydraulically connected with the bedrock aquifer which TW1-88 is pumping from. It is my opinion that any indirect connections to the bedrock aquifer, such as leakage through the aquitard, are likely to be small or insignificant such that no effect is seen on surface water.

Attached as Exhibit "A" to this affidavit is a true copy of the Vertical Hydraulic Gradient Figures

5. Monitoring of water level, vertical hydraulic gradient, and flow at the surface water locations was initiated in 2005. Water level, vertical hydraulic gradient, and flow data have remained consistent and have not experienced a decline as a result of water taking from TW1-88.

6. Based on the above, it is my opinion that TW1-88 is not having an impact on the local surface water features, including those identified by the Respondents.

7. As the local surface water features do not indicate there are any unacceptable impacts from the pumping of TW1-88, it is my opinion that it is not expected any impacts would be noted on surface water features further away.

Location of the Well and its Watersheds

8. Well TW1-88 is physically located within the headwaters of the Eramosa watershed. The Eramosa River flows into the Speed River; therefore, the Eramosa River is a part of the Speed River watershed, and the headwaters of the Speed River include the headwaters of the Eramosa River. Accordingly, both the GRCA and the Director's statements regarding the watershed location of the well are technically valid.

Adequacy of Nestle's Existing Monitoring Network

9. Figure 4.2 of the 2011 Annual Monitoring report presents the interpreted zone of influence in the bedrock aquifer as a result of pumping from TW1-88. Within this zone of influence, the Erin Branch of the Credit River to the north (SW7 and P13-07), Roman Lake to the southeast (SW4, SW5 and P12-07), the onsite pond and

Speed-Lutteral-Swan Creek wetland (P01-07, P06-07, P03-07, P10-05 and SW3) and the tributary to the southwest (SW1 and P11-07) are captured by the water monitoring program. Currently, these locations do not indicate there are any unacceptable impacts on the surrounding surface water features therefore it is not expected any impacts would be noted on surface water features further away.

Attached as Exhibit "B" to this affidavit is a true copy of Figure 4.2 of the 2011 Annual Monitoring Report

10. The existing surface water monitoring network is sized such that the local surface water features located within the zone of influence are captured. Surface water features located outside the zone of influence are not included in the existing monitoring network because impacts to them are unlikely, as no impact is being noted on the local surface water features. Therefore, it is my opinion that the surface water monitoring network is adequate

11. It is agreed that on a regional scale, surface and near-surface sources likely recharge the dolostone aquifer, as Ken Howard stated in paragraph 6 of his affidavit. However, on the local scale of the site of pumping, surface water does not appear to be contributing to the dolostone aquifer as the pumping of TW1-88 is not having an impact on the local surface water features.

Groundwater Indicators

12. In reply to paragraphs 26 to 28 of the Respondent's submissions, in general OLWR surface water indicators of low water conditions can act as a surrogate indicator for groundwater low water conditions. Drought is generally driven by a lack of precipitation and/or high temperatures which increase the evaporation process. Surface waters can act as the interface or boundary between the atmosphere and groundwater. Changes in atmospheric processes (i.e. precipitation and temperature) will be seen at the boundary (i.e. in surface water) first.

13. The use of surface water and precipitation indicators for low water conditions can be protective of groundwater. For example, when low water conditions are observed in surface water levels, low water conditions for groundwater may not yet be observed. Undertaking actions at that time would therefore proactively protect the groundwater resource, rather than waiting for low water conditions in groundwater to occur before taking action.

Evaluation of the Erin Spring Supplementary Monitoring Plan Results

14. The surface water review of the results of the Supplementary Erin Spring Monitoring Plan will rely in part upon an assessment of the following criteria:

- If there is a significant decrease in surface water levels as a result of the pumping;
- If there is a significant change in vertical hydraulic gradients or a reversal as a result of pumping; and
- If there is a greater than 10% reduction in surface water flow as a result of pumping

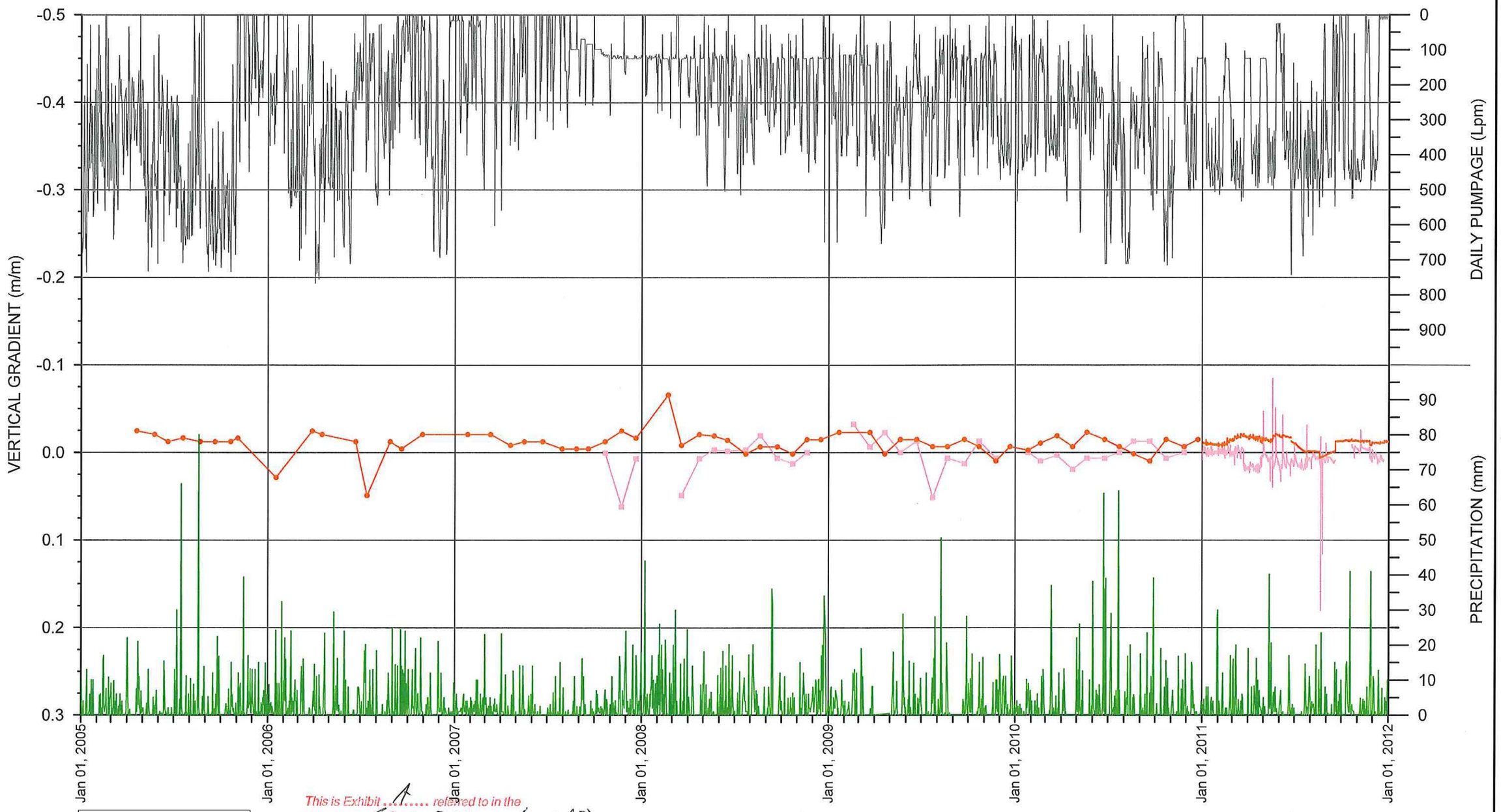
15. I make this affidavit in support of an order of the Environmental Review Tribunal approving the Minutes of Settlement, and for no other or improper purpose.

SWORN BEFORE ME)
at the City of Hamilton,)
in the Province of Ontario,)
this 29th day of April, 2013.)
)
)

B. ISARNELL BARRISTER & SOLICITOR
A Commissioner for Taking Oaths, etc.

SARAH DAY

DRAFT FOR REVIEW



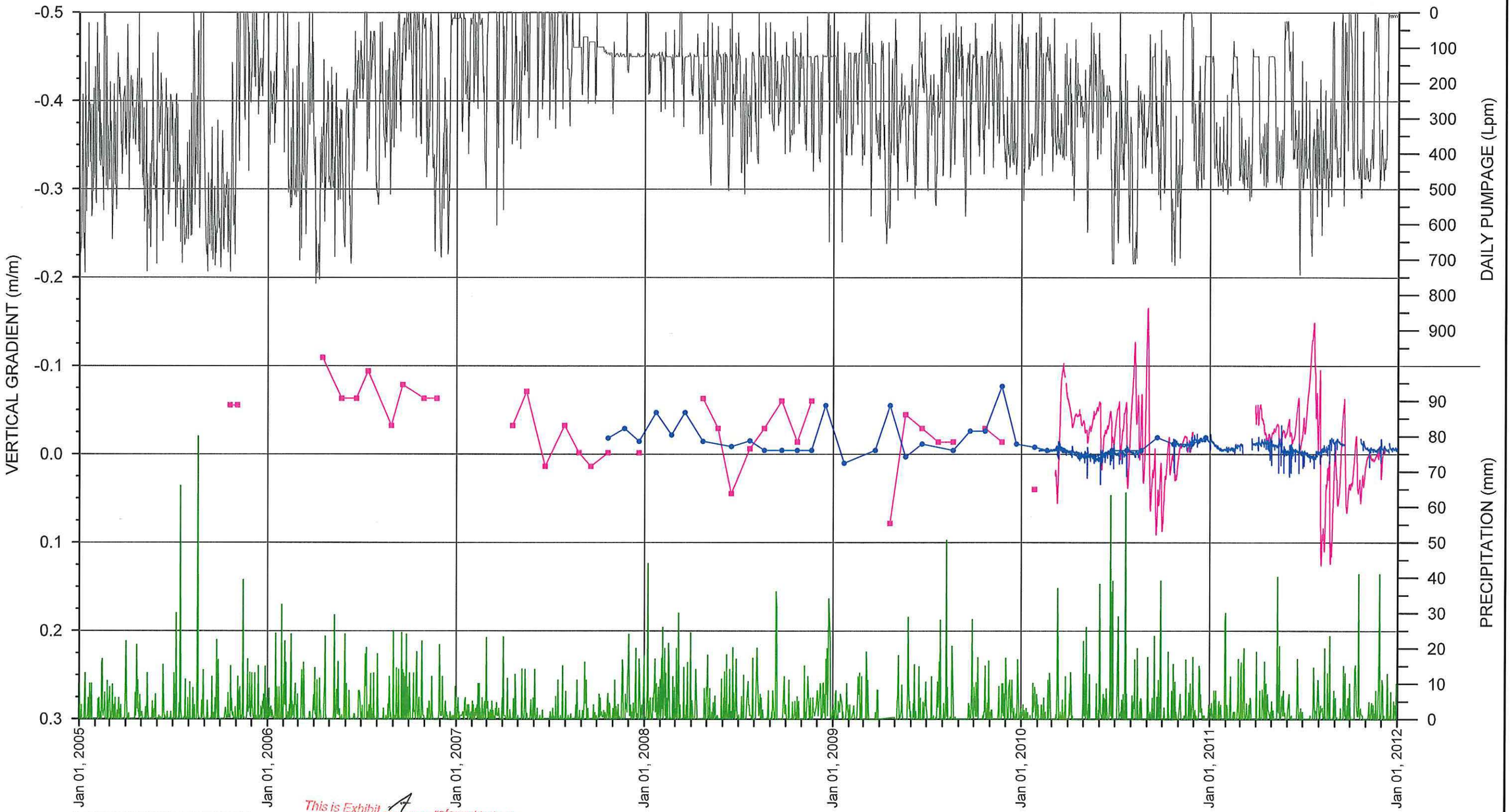
This is Exhibit A referred to in the affidavit of SARAH DAY (pg 1 of 3) sworn before me, this 29th day of APRIL 2013.

A COMMISSIONER, ETC.
B. BARRISTER & SOLICITOR

figure 1
VERTICAL GRADIENTS IN MINI-PIEZOMETER NESTS P03 and P06 (ON-SITE POND)
NESTLÉ WATERS CANADA
Town of Erin, Ontario

A negative vertical gradient indicates the potential for upward movement of groundwater

DRAFT FOR REVIEW



This is Exhibit A referred to in the affidavit of SARAH PAT. (pg. 2 of 3) sworn before me, this 29TH day of APRIL 20 13.

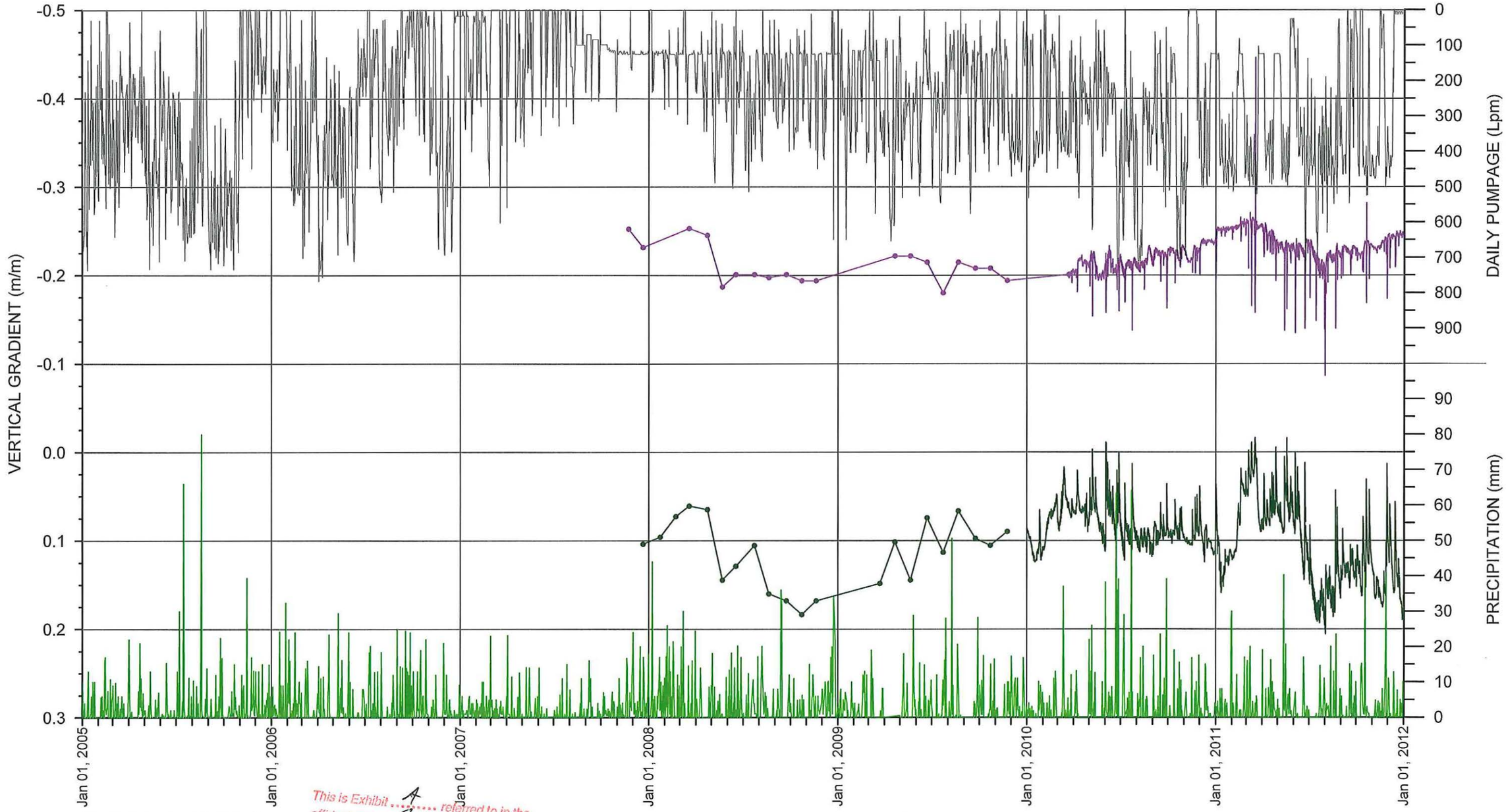
A COMMISSIONER, ETC.

B. BYRNELL BARRISTER & SOLICITOR

A negative vertical gradient indicates the potential for upward movement of groundwater

figure 2
VERTICAL GRADIENTS IN MINI-PIEZOMETER NESTS P01 and P10
NESTLÉ WATERS CANADA
Town of Erin, Ontario

DRAFT FOR REVIEW



A negative vertical gradient indicates the potential for upward movement of groundwater

This is Exhibit A referred to in the affidavit of STALK DAY (pg. 30 of 3) sworn before me, this 29TH day of MARCH 2013.

A COMMISSIONER, ETC.

B. BYRNELL BARRISTER & SOLICITOR

figure 3
VERTICAL GRADIENTS IN MINI-PIEZOMETER NESTS P12 and P13
NESTLÉ WATERS CANADA
Town of Erin, Ontario

This is Exhibit B referred to in the affidavit of SARAH DAY sworn before me, this 29TH day of APRIL 20 13

A COMMISSIONER, ETC.
B. BYRNALL BARRISTER + SOLICITOR

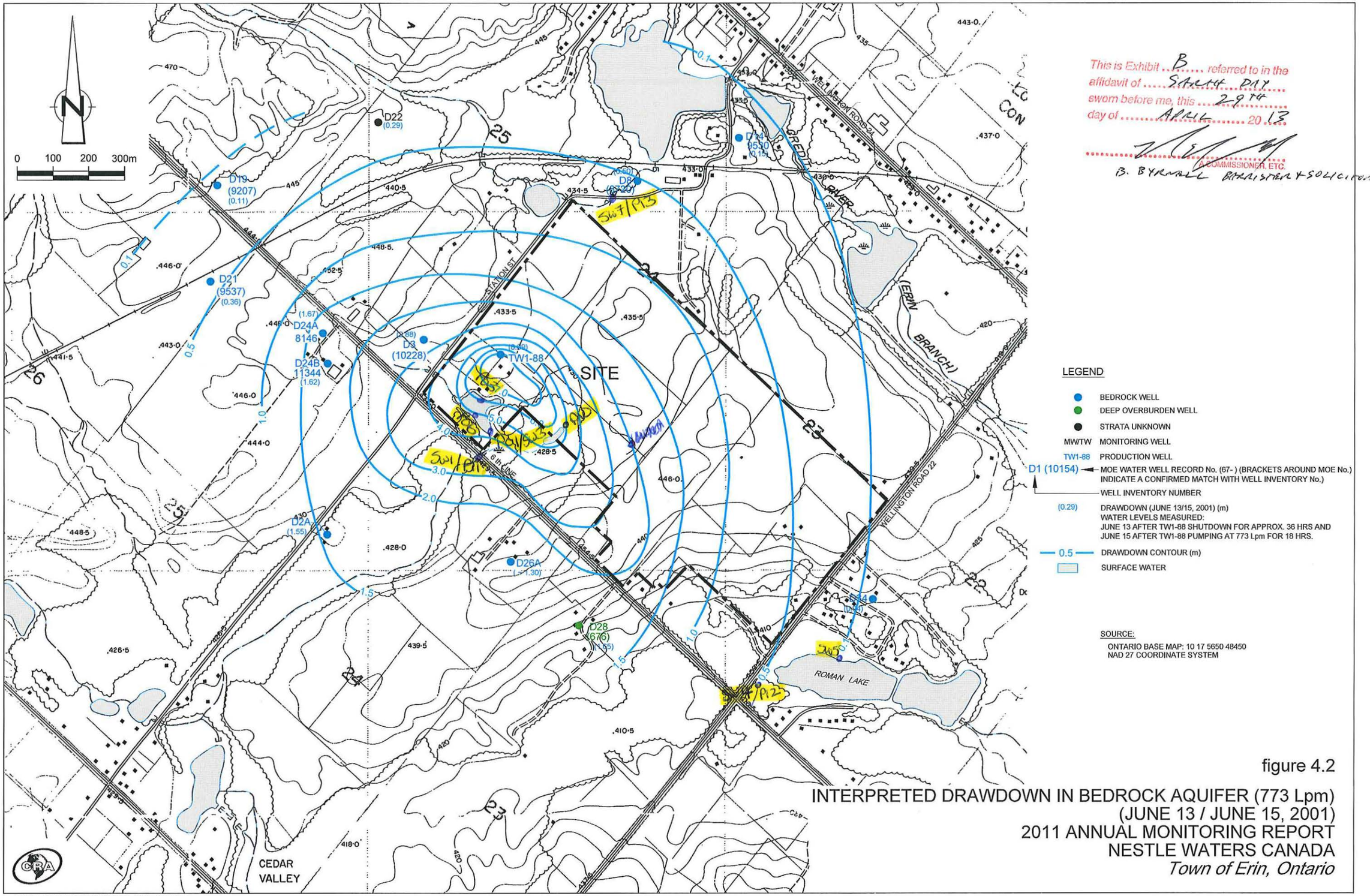


figure 4.2

INTERPRETED DRAWDOWN IN BEDROCK AQUIFER (773 Lpm)
(JUNE 13 / JUNE 15, 2001)
2011 ANNUAL MONITORING REPORT
NESTLE WATERS CANADA
Town of Erin, Ontario

13764-10(015)GN-WA012 APR 6/2012

ERT Case No. 12-131

ENVIRONMENTAL REVIEW TRIBUNAL

Nestlé Canada Inc. v. Director,
Ministry of the Environment

In the matter of a request for a Hearing by Nestlé Canada Inc. filed on October 11, 2012 pursuant to section 100 of the *Ontario Water Resources Act,* R.S.O. 1990, c. O.40, as amended with respect to Permit to Take Water (Ground Water) No. 3716-8UZMCU issued by the Director, Ministry of the Environment, on September 28, 2012 under section34 of the *Ontario Water Resources Act* permitting taking of ground water from one bedrock drilled well located at Lot 24, Concession 7, Geographic Township of Erin in the County of Wellington, Ontario; and

In support of a motion under Rule 200 to withdraw an appeal as part of a settlement agreement.

REPLY SUBMISSIONS OF THE DIRECTOR
SUPPLEMENTARY AUTHORITIES

Ontario Water Resources Act, R.S.O. 1990, CHAPTER O.40

Purpose

0.1 The purpose of this Act is to provide for the conservation, protection and management of Ontario's waters and for their efficient and sustainable use, in order to promote Ontario's long-term environmental, social and economic well-being. 2007, c. 12, s. 1 (1).

Ontario Regulation 387/04 - Water Taking

PERMITS

Matters to be considered by Director

4. (1) This section applies when a Director,

(a) is considering an application; or

(b) is otherwise considering under section 34 of the Act whether to cancel, amend or impose conditions on a permit to take water. O. Reg. 387/04, s. 4 (1).

(2) The Director shall consider the following matters, to the extent that information is available to the Director, and to the extent that the matters are relevant to the water taking or proposed taking in the particular case:

1. Issues relating to the need to protect the natural functions of the ecosystem, including,

i. the impact or potential impact of the water taking or proposed water taking on,

A. the natural variability of water flow or water levels,

B. minimum stream flow, and

C. habitat that depends on water flow or water levels, and

ii. ground water and surface water and their interrelationships that affect or are affected by, or may affect or be affected by, the water taking or proposed water taking, including its impact or potential impact on water quantity and quality.

2. Issues relating to water availability, including,

i. the impact or potential impact of the water taking or proposed water taking on,

A. water balance and sustainable aquifer yield, and

B. existing uses of water for large municipal residential systems and small municipal residential systems, both as defined in subsection 1 (1) of Drinking Water Systems, for sewage disposal, livestock and other agricultural purposes, for private domestic purposes, and for other purposes,

ii. low water conditions, if any,

iii. whether the water taking or proposed water taking is in a high use watershed or a medium use watershed,

A. as shown on the Average Annual Flow Map, or

B. as shown on the Summer Low Flow Map, and

iv. any planned municipal use of water that has been approved,

A. under a municipal official plan in accordance with Part III of the *Planning Act*, or

B. under the *Environmental Assessment Act*.

3. Issues relating to the use of water, including,

i. whether water conservation is being implemented or is proposed to be implemented in the use of the water, in accordance with best water management standards and practices for the relevant sector if these are available,

ii. the purpose for which the water is being used or is proposed to be used, and

iii. if the water is not currently being used, whether there is a reasonable prospect that the person will actually use the water in the near future.

4. Other issues, including,

i. the interests of other persons who have an interest in the water taking or proposed water taking, to the extent that the Director is made aware of those interests, and

ii. any other matters that the Director considers relevant. O. Reg. 387/04, s. 4 (2).

(3) If clause (1) (a) applies, the Director may, in order to be able to consider the matters set out in subsection (2), require the applicant to submit further information, including plans, specifications, reports and other materials and documents relating to the water taking or proposed water taking. O. Reg. 387/04, s. 4 (3).

High use watersheds

5. (1) Subsections (3) and (4) apply to applications that relate to water taking for a purpose described in subsection (5). O. Reg. 387/04, s. 5 (1).

(2) Subsections (3) and (4) do not apply,

(a) if the applicant is a municipality; or

(b) if the application relates to water taking from,

(i) Lake Ontario, Lake Erie, Lake Huron or Lake Superior or any of their connecting channels, namely the St. Mary's River, the St. Clair River, the Detroit River and the Niagara River,

(ii) the Welland Canal,

(iii) the St. Lawrence River, or

(iv) the Ottawa River. O. Reg. 387/04, s. 5 (2).

(3) If the proposed water taking is in a high use watershed as shown on the Average Annual Flow Map, the Director shall refuse the application unless,

(a) at the time of the application, the applicant or another person held an unexpired permit to take water; and

(b) the application is for a new permit to authorize the taking of the same or a lesser amount of water at the same location and for the same purpose as was authorized by the unexpired permit. O. Reg. 387/04, s. 5 (3).

(4) If the proposed water taking is in a high use watershed as shown on the Summer Low Flow Map, the Director shall refuse the application unless,

(a) the permit includes a condition prohibiting the person from taking water during the six-week period from August 1 to September 11, or during a specified longer period that includes the six-week period; or

(b) at the time of the application, the applicant or another person held an unexpired permit to take water, and the application is for a new permit to authorize the taking of the same or a lesser amount of water at the same location and for the same purpose as was authorized by the unexpired permit. O. Reg. 387/04, s. 5 (4).

(5) The purposes referred to in subsection (1) are:

1. Beverage manufacturing, including the manufacturing or production of bottled water or water in other containers.

2. Fruit or vegetable canning or pickling.

3. Ready-mix concrete manufacturing, not including concrete manufactured at a portable ready-mix concrete manufacturing facility.

4. Aggregate processing, if the aggregate and the water that is taken are incorporated into a product in the form of a slurry.

5. Product manufacturing or production, if, in the normal course of the manufacturing or production, more than a total of 50,000 litres of the water that is taken may be incorporated in a single day into the products being manufactured or produced. O. Reg. 387/04, s. 5 (5).

(6) Paragraph 2 of subsection (5) does not apply in respect of water that is taken only for washing in the course of the canning or pickling. O. Reg. 387/04, s. 5 (6).

(7) Paragraph 4 of subsection (5) does not apply in respect of the extraction of aggregates where the water taking is incidental. O. Reg. 387/04, s. 5 (7).

(8) Paragraph 5 of subsection (5) does not apply in respect of the manufacturing or production of,

(a) pulp and paper; or

(b) ethanol. O. Reg. 387/04, s. 5 (8).

(9) Subsection (5) does not apply in respect of water that is taken for agricultural purposes, including aquaculture, nurseries, tree farms and sod farms. O. Reg. 387/04, s. 5 (9).

Environmental Bill of Rights, 1993, S.O. 1993, CHAPTER 28

Right to seek leave to appeal a decision on an instrument

38. (1) Any person resident in Ontario may seek leave to appeal from a decision whether or not to implement a proposal for a Class I or II instrument of which notice is required to be given under section 22, if the following two conditions are met:

1. The person seeking leave to appeal has an interest in the decision.
2. Another person has a right under another Act to appeal from a decision whether or not to implement the proposal. 1993, c. 28, s. 38 (1).

Same

(2) For greater certainty, subsection (1) does not permit any person to seek leave to appeal from a decision about a proposal to which section 22 does not apply because of the application of section 29, 30, 32 or 33. 1993, c. 28, s. 38 (2).

Same

(3) For the purposes of subsection (1), the fact that a person has exercised a right given by this Act to comment on a proposal is evidence that the person has an interest in the decision on the proposal. 1993, c. 28, s. 38 (3).

Further rights of appeal

(4) Any person who, by virtue of this Part, is a party to an appeal about a proposal has rights of appeal from an appellate decision about the proposal equivalent to those of any other party to the appeal. 1993, c. 28, s. 38 (4).

Same

(5) For the purposes of subsection (4), an appellate decision about a proposal is not limited to a decision whether or not to implement the proposal but includes, for example, the following kinds of decisions:

1. An order to an earlier decision-maker to make a new decision about the proposal.
2. An order varying an earlier decision about the proposal.
3. An order to set aside an earlier decision about the proposal. 1993, c. 28, s. 38 (5).

Appellate body

39. (1) Subject to the regulations under this Act, the application for leave to appeal and the appeal shall be heard by the appellate body that would hear an appeal relating to the same proposal and of a similar nature brought by a person referred to in paragraph 2 of subsection 38 (1). 1993, c. 28, s. 39 (1).

Same

(2) For example, an appeal on a question of law from a decision to issue an instrument relates to the same proposal as and is of a similar nature to an appeal on a question of law from a decision not to issue the instrument. 1993, c. 28, s. 39 (2).

Time for appeal

40. An application for leave to appeal under subsection 38 (1) shall not be made later than the earlier of,

(a) fifteen days after the day on which the minister gives notice under section 36 of a decision on the proposal; and

(b) fifteen days after the day on which notice relating to the proposal is given under section 47. 1993, c. 28, s. 40.

Leave test

41. Leave to appeal a decision shall not be granted unless it appears to the appellate body that,

(a) there is good reason to believe that no reasonable person, having regard to the relevant law and to any government policies developed to guide decisions of that kind, could have made the decision; and

(b) the decision in respect of which an appeal is sought could result in significant harm to the environment. 1993, c. 28, s. 41.

PART VI
RIGHT TO SUE

HARM TO A PUBLIC RESOURCE

Definitions, Part VI

82. In this Part,

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"public land" means land that belongs to,

(a) the Crown in right of Ontario,

(b) a municipality, or

(c) a conservation authority,

but does not include land that is leased from a person referred to in clauses (a) to (c) and that is used for agricultural purposes; ("terre publique")

"public resource" means,

(a) air,

(b) water, not including water in a body of water the bed of which is privately owned and on which there is no public right of navigation,

(c) unimproved public land,

(d) any parcel of public land that is larger than five hectares and is used for,

(i) recreation,

(ii) conservation,

(iii) resource extraction,

(iv) resource management, or

(v) a purpose similar to one mentioned in subclauses (i) to (iv), and

(e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d). (“ressource publique”) 1993, c. 28, s. 82; 2001, c. 9, Sched. G, s. 4 (1); 2002, c. 17, Sched F, Table.

Application of ss. 84 to 102

83. Sections 84 to 102 apply only in respect of a contravention of an Act, regulation or instrument that occurs after the Act, regulation or instrument is prescribed for the purposes of Part V. 1993, c. 28, s. 83.

Right of action

84. (1) Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful. 1993, c. 28, s. 84 (1).

Case Name:

Burns Bog Conservation Society v. Canada (Attorney General)

Between
Burns Bog Conservation Society, Plaintiff, and
The Attorney General of Canada, the Minister of Transport and infrastructure, the Minister of Environment, the Minister of Fisheries and the Queen in right of Canada, Defendants

[2012] F.C.J. No. 1110

[2012] A.C.F. no 1110

2012 FC 1024

71 C.E.L.R. (3d) 118

221 A.C.W.S. (3d) 356

2012 CarswellNat 3188

Docket T-1963-10

Federal Court
Vancouver, British Columbia

Russell J.

Heard: July 12, 2012.
Judgment: August 29, 2012.

(130 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action or defence -- Disposition without trial -- Dismissal of action -- Action unfounded in law -- Judgments and orders -- Summary judgments -- Availability -- No triable issue -- To dismiss action -- Motion by defendants for summary judgment allowed -- Plaintiff was non-profit society dedicated to preserving peat bog -- Defendants were federal Ministers -- Plaintiff claimed that project would negatively impact ecological integrity of bog and that

defendants had legal duty to protect it -- There was no genuine issue for trial -- Documents did not impose obligation on Canada to protect bog -- There was no trust, fiduciary or statutory duty.

Environmental law -- Environmental liability -- Civil litigation -- Practice and procedure -- Motion by defendants for summary judgment allowed -- Plaintiff was non-profit society dedicated to preserving peat bog -- Defendants were federal Ministers -- Plaintiff claimed that project would negatively impact ecological integrity of bog and that defendants had legal duty to protect it -- There was no genuine issue for trial -- Documents did not impose obligation on Canada to protect bog -- There was no trust, fiduciary or statutory duty.

Government law -- Crown -- Ministries, departments and agencies -- Ministers -- Actions by and against Crown -- Practice and procedure -- Pleadings -- Motion by defendants for summary judgment allowed -- Plaintiff was non-profit society dedicated to preserving peat bog -- Defendants were federal Ministers -- Plaintiff claimed that project would negatively impact ecological integrity of bog and that defendants had legal duty to protect it -- There was no genuine issue for trial -- Documents did not impose obligation on Canada to protect bog -- There was no trust, fiduciary or statutory duty.

Motion by the defendants for summary judgment. The plaintiff was a non-profit society dedicated to preserving a peat bog and raising public awareness of its ecological significance. The defendants were federal Ministers associated with a program intended to improve Canada's maritime access to certain markets. Canada was granted a conservation covenant over the bog and was a party to a management agreement, and the development of a management plan, with respect to the bog. Canada and British Columbia entered into a funding agreement for an infrastructure project that would run adjacent to the bog. The plaintiff claimed that the project would negatively impact the ecological integrity of the bog and that the defendants had a legal duty to protect it. The defendants argued that there was no basis for the claim.

HELD: Motion allowed. There was no genuine issue for trial. The plaintiff simply asserted legal duties without showing how they could arise on these facts. None of the documents imposed any obligation on Canada to protect the bog's ecological integrity. There was no trust duty. Canada did not own the bog. The covenant did not create a trust relationship between Canada and the bog. A public trust duty could not be imposed on Canada concerning lands that it did not own. There was no fiduciary duty. Canada did not undertake to act in the best interests of the plaintiff. The Crown did not owe a fiduciary obligation to the public at large or to a geographical location. There was no statutory duty. Nothing in the Fisheries Act, Migratory Birds Convention Act, Canadian Environmental Protection Act or Species at Risk Act stated or implied that Canada had any legal relationship with the bog.

Statutes, Regulations and Rules Cited:

Canadian Environmental Assessment Act SC 1992 c 37,

Canadian Environmental Protection Act SC 1999 c 33,

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 91

Crown Liability and Proceedings Act RSC 1985 c C-50, s. 22

Federal Courts Act RSC 1985 c F-7, s. 18.1

Federal Courts Rules SOR/98-106, ss. 213-215, s. 215

Fisheries Act RSC 1985 c F-14,

Land Titles Act RSBC 1996 c 250, s. 219, s. 219(1), s. 219(9)

Migratory Birds Convention Act SC 1994 c 22,

Navigable Waters Protection Act RSC 1985 c N-22,

Society Act RSBC 1996, c 433,

Species at Risk Act SC 2002 c 29,

Counsel:

James L. Straith, **for the Plaintiff**.

Sheri Vigneau and Lindsay Morphy, **for the Defendants**.

REASONS FOR JUDGMENT AND JUDGMENT

RUSSELL J.:--

INTRODUCTION

1 This is a motion by the Defendants under section 215 of the *Federal Courts Rules* SOR/98-106 for summary judgment on the ground that there is no legal basis for the Plaintiff's claim.

BACKGROUND

2 Burns Bog, which is situated between the South Arm of the Fraser River and Boundary Bay, is one of the largest raised peat bogs in the world (Burns Bog or the Bog). The Burns Bog Conservation Society is a non-profit society registered in British Colombia under the *Society Act*

RSBC 1996, c 433 and dedicated to preserving the Bog and raising public awareness of its ecological significance.

3 The Defendants are ministers of the Federal Crown associated with the Pacific Gateway Strategy, an infrastructure program intended to improve Canada's maritime access to markets around the Pacific and Indian Oceans.

4 The Corporation of Delta (Delta), the Greater Vancouver Regional District (Vancouver), and the Province of British Columbia (together, Bog Owners) purchased six parcels of the Bog for conservation purposes in 2004. On 12 March 2004, the Federal Minister of the Environment agreed to contribute $28 million to the purchase (Contribution Agreement). However, the Federal Government did not take title to any part of the Bog. The Contribution Agreement required the Bog Owners to develop a management plan within two years so that at least 5000 acres of Burns Bog would be managed as protected conservation land.

5 In March 2004, the Bog Owners granted the Federal Crown a conservation covenant (Covenant) over the Bog under section 219 of the BC *Land Titles Act* RSBC 1996 c 250. The Covenant requires the Bog Owners to refrain from taking any action "that could reasonably be expected to destroy, impair, negatively affect, or alter" the Bog.

6 The Federal Government and the Bog Owners entered into the Burns Bog Management Agreement (Management Agreement) on 23 March 2004. The Management Agreement laid out the process by which the parties would develop a long-term management plan for the Bog in accordance with the Contribution Agreement. The Bog Owners collaborated with the Federal Government and, on 25 May 2007, they finalized the Burns Bog Ecological Conservancy Area Management Plan (Management Plan), which sets out policy direction and recommended actions to maintain the Bog's ecological integrity.

The South Fraser Perimeter Road

7 The South Fraser Perimeter Road (SFPR) is a component of the British Colombia Gateway Program, an effort by the government of British Colombia (Province) to improve bridge and road infrastructure throughout the Greater Vancouver area. Although no part of the SFPR will pass through Burns Bog itself, a stretch of it will run adjacent to the Bog.

8 On 3 September 2008, the Federal Government and the Province entered into an arrangement to fund the SFPR project. In total, the Federal government agreed to contribute $363 million to road construction. Notwithstanding its financial contribution, Canada did not assume any responsibility for construction or operation of the SFPR, which remains the Province's responsibility.

9 The Federal Government's monetary contribution, and the fact that the construction required permits under the *Fisheries Act* RSC 1985 c F-14 (Fisheries Act) and the *Navigable Waters Protection Act* RSC 1985 c N-22, triggered an environmental assessment under the *Canadian*

Environmental Assessment Act SC 1992 c 37. The environmental assessment began on 11 December 2006. Environment Canada provided expert advice to Transport Canada (TC) and the Department of Fisheries and Oceans (DFO), who were responsible for completing the assessment. On 28 July 2008, TC and the DFO concluded that the SFPR was not likely to cause significant adverse environmental effects if certain mitigation measures were followed. These mitigation measures included the creation of a hydrology work plan and air quality work plan.

Conservation Covenant

10 The Covenant restricts what the Bog Owners can do on the Bog, as follows:

> **4.1** Except as expressly permitted in section 6 of this agreement, the Province, Delta, and the GVRD shall not do anything, or allow anything to be done, that does or could reasonably be expected to destroy, impair, diminish, negatively affect, or alter the Bog or the Amenities from the condition thereof described in the Report.

11 The Covenant also provides that the obligations it creates are contractual only:

> **9.1** The parties agree that this Agreement creates only contractual obligations and obligations arising out of the nature of this Agreement as a Covenant under seal. Without limiting the generality of the foregoing, the parties agree that no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in this Agreement creates any duty of care or other duty on any of the parties to anyone else.

12 The Covenant also includes an "entire agreement" clause:

> **16**. None of the parties hereto have made any representation, Covenants, warranties, guarantees, promises or agreements (oral or otherwise) with any other party than those contained in this Agreement or in any other agreement that is reduced to writing and executed by all parties to it. This agreement may only be changed by a written instrument signed by all the parties.

Burns Bog Management Agreement

13 The Management Agreement provides for the development of a long-term Management Plan for the Bog and contains, *inter alia*, the following provisions:

> **2.01** Except as expressly permitted in section 6 of the Conservation Covenant, the Province, Delta, and the GVRD shall not do anything, or allow anything to be done, that does or could reasonably be expected to destroy, impair, diminish, negatively affect, or alter the Land, including all natural, scientific,

> environmental, wildlife or plant life values or attributes relating to it, from the condition thereof described in this Report.
>
> **2.04** Prior to completion of the Management Plan, GVRD will [...] manage the Land in accordance with the Conservation Covenant [...]
>
> **2.08** In the event of any conflict, the terms of the Conservation Covenant shall prevail over this Management Agreement, the Management Plan, the Provincial Land Operating Agreement and the Local Government Land Operating Agreement.

Statement of Claim

14 The Plaintiff filed a Statement of Claim on 24 November 2010 by which it sought to compel the Defendants to protect Burns Bog. The Plaintiff claims the construction of the SFPR will negatively impact the hydrology of Burns Bog and says the Defendants owe the Canadian public a trust, fiduciary, or other legal duty to protect the Bog. The Plaintiff also claims that the Defendants are bound to protect Burns Bog under the Fisheries Act, the *Migratory Birds Convention Act* SC 1994 c 22 (MBCA), the *Canadian Environmental Protection Act* SC 1999 c 33 (CEPA) and the *Species at Risk Act* SC 2002 c 29 (SARA).

15 The Plaintiff also says that the Burns Bog Agreements created a duty on the Defendants to protect Burns Bog and asks the Court for an injunction halting construction of the SFPR or an order to reconsider the SFPR to protect the Bog. The Plaintiff also asks for a declaration that the Defendants are bound by the Burns Bog Agreements and a declaration that Burns Bog is subject to a public trust.

Statement of Defence

16 The Defendants filed their statement of Defence on 21 June 2011. They say the claim should be struck because the Plaintiff has failed to plead the necessary facts to show it has standing to bring the claim. The Defendants also say they do not owe the Plaintiff any duty to protect Burns Bog and deny the existence of an environmental, public, or any other kind of trust or fiduciary obligation. If any of these obligations exists, none of the Defendants has breached any of them and all have met their obligations. The Defendants met any duty to protect Burns Bog by conducting the environmental assessment and by taking mitigation measures.

17 In the alternative, the Defendants say the essence of the Plaintiff's claim is a challenge to decisions by Transport Canada and the Department of Fisheries and Oceans to approve the environmental screening of the SFPR. The appropriate way to challenge those decisions was an application for judicial review under section 18.1 of the *Federal Courts Act* RSC 1985 c F-7. The

Plaintiff's claim is simply a collateral attack on those decisions.

18 The Defendants also note they do not own Burns Bog. They deny the existence of a general duty to protect the Bog. Further, there is no statutory duty to protect the Bog. The Covenant only creates contractual obligations between, Delta, Vancouver, and the Province. The Management Agreement is only enforceable between the parties and cannot create a duty to protect the Bog. The Management Plan does not place any obligations on the Defendants to protect the Bog.

19 The Plaintiff claims that the Defendants have breached the Burns Bog Agreements, but the SFPR is not located on Burns Bog, so the agreements have no application.

20 Section 22 of the *Crown Liability and Proceedings Act* RSC 1985 c C-50 prevents the Court from granting the Plaintiff injunctive relief.

ISSUES

21 The Defendants raise the following issues on this motion:

a. Whether the Statement of Claim discloses a genuine issue for trial;
b. Whether summary judgment is appropriate.

STATUTORY PROVISIONS

22 The following provisions of the Rules are applicable in this proceeding:

> **213**. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.
>
> [...]
>
> **215.** (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.
>
> * * *
>
> **213**. (1) Une partie peut présenter une requête en jugement sommaire ou en procès sommaire à l'égard de toutes ou d'une partie des questions que soulèvent les actes de procédure. Le cas échéant, elle la présente après le dépôt de la défense du défendeur et avant que les heure, date et lieu de l'instruction soient fixés.

[...]

215. (1) Si, par suite d'une requête enjugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

23 The following provision of the British Colombia *Land Titles Act* RSBC 1996 c 250 (BC Land Titles Act) is also applicable in this proceeding:

219 (1) a Covenant as described in subsection (2) in favour of the Crown [...] may be registered against the title to the land subject to the Covenant and is enforceable against the Covenantor and the successors in title of the Covenantor even if the Covenant is not annexed to land owned by the Covenantee.

(2) A Covenant registrable under subsection (1) may be of a negative or positive nature and may include one or more of the following provisions:

(a) provisions in respect of

(i) the use of land, or
(ii) the use of a building on or to be erected on land;

(b) that land

(i) is to be built on in accordance with the Covenant,
(ii) is not to be built on except in accordance with the Covenant, or
(iii) is not to be built on;

[...]

(9) A Covenant registrable under this section may be

(a) modified by the holder of the charge and the owner of the land charged, or
(b) discharged by the holder of the charge

> by an agreement or instrument in writing the execution of which is witnessed or proved in accordance with this Act.

ARGUMENT

The Defendants

24 The Defendants argue that the Plaintiff's claim is bound to fail because there is no legal or equitable basis for the duty the Plaintiff alleges.

Test for Summary Judgment

25 On a motion for summary judgment the Court must ask whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial. See *TPG Technology Consulting Ltd. v Canada* 2011 FC 1054 at paragraph 20. The Court is not to ask whether the Plaintiff could possibly succeed at trial.

Burden on Summary Judgment

26 The Plaintiff bears the evidentiary burden of establishing that there is a genuine issue for trial. The Defendant bears the legal burden of establishing the facts necessary to obtain summary judgment. See *TPG Technology*, above, at paragraph 21.

Summary Judgment Should be Granted

27 There are no contested facts which must be resolved in order to determine that the Plaintiff's claim has no chance of success. The Defendants owe no duty to the Plaintiff or to the general public to protect Burns Bog. The Statement of Claim identifies four possible sources of such a duty, but none of these actually create the duty the Plaintiff alleges.

Burns Bog Agreements

28 First, none of the agreements between the Federal Government and the Bog Owners require the Defendants to take any action to preserve the Bog's ecological integrity.

Conservation Covenant

29 The Covenant's restrictions apply to the Bog Owners, not to the Defendants. None of the Defendants committed to protect the Bog or to prevent activities that may damage it. The only obligation they assumed was to collaborate with the Bog Owners in the preparation of the Management Plan.

30 The Federal Crown is the beneficiary of the Covenant and has the power to enforce it against the Bog Owners. However, the Covenant does not require the Defendants to take steps to remedy breaches. The Covenant specifically permits Canada to waive breaches of the agreement.

31 The Covenant also applies only in respect of the lands it charges. The SFPR is to be situated entirely outside the Bog, so it follows that the Covenant cannot apply to the construction of the SFPR. Subsection 219(1) of the BC Land Titles Act provides that covenants are only enforceable against the original covenantor or a successor in title to lands in respect of which they are registered. It follows that the Covenant can only apply to the land against which it is registered. The Covenant runs with the title to the Bog and other land is not affected.

The Management Agreement

32 The Management Agreement provided for the management of the Bog while Canada and the Bog Owners worked toward a long-term Management Plan. There are no provisions in the Management Agreement which require the Defendants to take steps to protect the Bog.

Management Plan

33 The Management Plan sets out policy directions and actions necessary to maintain the Bog's ecological integrity. It does not oblige the Defendants to protect the Bog's ecological integrity. In any case, it is a policy document and not a contract.

Trust Obligations

34 Second, the Plaintiff relies on a public or environmental trust for the duty on the Defendants to protect the Bog. There is no trust with respect to Burns Bog, so this cannot ground a duty on the Defendants to protect it.

General Trust Principles

35 A trust is a fiduciary relationship which requires the legal owner of property to deal with it in a manner that gives effect to the equitable rights of another person. An express trust can only arise in the presence of the three certainties:

a. *Certainty of Intention*: the trustee must have a specific obligation to hold property to the benefit of anther person. A moral obligation is insufficient to give rise to a trust relationship;
b. *Certainty of Subject Matter*: the property subject to the trust obligation must, from the outset of the asserted trust, be clearly described or definitively ascertainable;
c. *Certainty of Objects*: there can be no uncertainty as to whether any given person is a beneficiary of the trust.

See *Scrimes v Nickle*, [1980] AJ No 514 (QL). None of the three certainties are present in this case, so there can be no trust.

36 A trust does not arise until trust property vests in the trustee. The Statement of Claim does not identify any specific trust property. The Plaintiff says only that the Defendants stand in a "trust and/or fiduciary and/or legal relationship with respect to the protection of the ecological balance of Burns Bog" However, the Defendants cannot be trustees of the Bog because they do not own it.

Public, Equitable, or Environmental Trust

37 The Plaintiff has said the Defendants are bound by a public or environmental trust which was created by the Burns Bog Agreements, by statute, or by the doctrine of environmental trust. None of these is a valid basis for any obligation on the Defendants to protect Burns Bog.

Burns Bog Agreements

The Covenant cannot create a trust because it gives neither title nor ownership of the Bog to the Defendants. It also expressly excludes any fiduciary obligations between the parties or to anyone else. *Zeitler v Zeitler Estate* 2008 BCSC 775, at paragraph 70, teaches that where there is a contractual relationship, the Court must not distort facts to impose a trust where none was intended. To interpret the Covenant as imposing a trust duty on the Defendants would be to inappropriately distort its terms.

38 Under section 219(9) of the *BC Land Titles Act*, the Defendants can unilaterally discharge their obligations under the Covenant. This is inconsistent with the existence of a trust relationship. Further, *Green v Ontario*, [1973] 2 OR 396 establishes that a trust obligation includes an obligation to hold trust property. See pages 407 and 408. The Defendants' right to unilaterally discharge the Covenant shows they do not have an obligation to hold the Covenant, which is the only property which could be subject to a trust obligation. The Defendants have no obligation to hold the purported trust property, so they cannot be subject to a trust obligation. Neither the Management Agreement nor the Management Plan eliminates the Defendants' right to unilaterally discharge the Covenant.

No Public Trust

39 The Defendants cannot be subject to obligations under a public trust because no such trust exists in Canadian law. The Plaintiff says this kind of trust is created by operation of Canadian environmental law, but no court in Canada has recognized a public trust which requires the Crown to protect the environment. The Supreme Court of Canada considered the possibility of a public trust in *British Colombia v Canadian Forest Products Ltd* 2004 SCC 38, [*Canfor*] but found it could not decide the issue because it was not addressed in the courts below.

40 The public trust doctrine exists in the United States of America (USA) and recognizes that

state lands may be held in trust for the public. In *Canfor*, above, British Colombia sought a valuation of tort damages for publicly owned resources. Here, the Defendants do not own Burns Bog, so they cannot owe a trust obligation even if a public trust can exist under Canadian law. There is no basis in law to impose a trust obligation on the Defendants with respect to property owned by the Bog Owners.

Fiduciary Duty

41 The third source the Plaintiff identifies for the Defendants' obligation to protect Burns Bog is a fiduciary duty owed to the Bog, the Canadian public and the Plaintiff. However, *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24 at paragraph 48 establishes that the Crown does not owe a fiduciary duty to the public at large. The Defendants cannot owe a fiduciary obligation to the Bog itself because a fiduciary duty can only be owed to persons or classes of persons. Further, the Plaintiff has not established that its relationship with the Defendants falls into any of the recognized categories of fiduciary relationship. *Elder Advocates* shows that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances." See paragraph 37.

42 To make out its claim based on fiduciary obligation, the Plaintiff must show that an *ad hoc* fiduciary relationship exists between it and the Defendants. Accordingly, it must show that:

a. The Defendants gave an undertaking of responsibility to act in the Plaintiff's best interests;
b. The Plaintiff is vulnerable to the Defendants, in the sense that the Defendants have discretionary power over the Plaintiff;
c. The Defendants' power may affect the Plaintiff's legal or substantial practical interests.

See *Elder Advocates*, above, at paragraph 30 to 34.

43 The Defendants have not undertaken to act in the Plaintiff's best interests. As the Supreme Court of Canada said in *Elder Advocates*, above, at paragraph 44:

> Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance: *Sagharian (Litigation Guardian of) v. Ontario (Minister of Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 47-49. The circumstances in which this will occur are few. The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group will be rare: see *Harris v. Canada*, 2001 FCT 1408, [2002] 2 F.C. 484, at para. 178.

44 The Covenant expressly says it creates no duty to outside parties, which precludes an undertaking to act in the Plaintiff's best interests. The Plaintiff's failure to show an undertaking is enough to defeat their claim of a fiduciary obligation on the Crown to protect the Bog.

45 The Plaintiff also fails to establish a fiduciary obligation on the second and third branches of the *Elder Advocates* test. The government may validly make distinctions between different groups of people. A fiduciary duty arises only where the purported fiduciary has deliberately given up interests of others in favour of the beneficiary. The Plaintiff's members are only distinguished by voluntary association with it and are otherwise indistinguishable from the rest of the Canadian public.

46 The Plaintiff also has no practical or legal interest in Burns Bog that is different from any other member of the public. *Elder Advocates* requires a specific private law interest to which the purported beneficiary has a distinct and complete legal interest. The interest the Plaintiff has in preserving Burns Bog is identical to that of all Canadians so there can be no fiduciary relationship between the Plaintiff and the Defendants.

Statutory Obligations

47 None of the *Fisheries Act*, the MBCA, the CEPA, or the SARA grounds a duty on the Defendants to protect Burns Bog. The Plaintiff has not pointed to any provision in these acts which establishes a fiduciary, trust, or legal relationship between the Defendants and the Plaintiff or Burns Bog. As the Supreme Court of Canada held in *Elder Advocates*, above, at paragraph 45,

> If the undertaking is alleged to flow from a statute, the language in the legislation must clearly support it: K.L.B. v. British Columbia, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 40; Authorson v. Canada (Attorney General) (2000), 53 O.R. (3d) 221 (S.C.J.), at para. 28, aff'd (2002), 58 O.R. (3d) 417 (C.A.), at para. 73, rev'd on other grounds, 2003 SCC 39, [2003] 2 S.C.R. 40. The mere grant to a public authority of discretionary power to affect a person's interest does not suffice.

Conclusion

48 The Plaintiff cannot prove any basis for fiduciary, trust, contractual, or other legal duty owed by the Defendants to protect Burns Bog, so its claim cannot succeed. There is no genuine issue for trial, so summary judgment should be granted against the Plaintiff with costs to the Defendants.

The Plaintiff

49 This case is not appropriate for summary disposition because the issues are complex and require a full hearing on the merits. To adjudicate the case, the Court will have to interpret several statutes and the Covenant. The issues raised touch on environmental and public policy and involve

consideration of the public good. Although the Defendants do not want the case to be given a full hearing, the public interest favours a full hearing in this case.

50 The Court should also allow this matter to proceed to trial to develop the law on environmental issues. Section 91 of the *Constitution Act, 1867* gives jurisdiction over the environment to the Federal Government. This is to ensure uniform regulation across Canada. The Federal Court is the appropriate court to consider the issues the Plaintiff has raised. Given the importance of the Federal Government in environmental protection, the Court should give guidance only after a full hearing in this case. The Court's jurisdiction over environmental law is analogous to its jurisdiction over maritime law, in that it is necessary to ensure uniformity across Canada. The existence of the doctrine of environmental trust in Canadian law requires a full hearing on the merits.

51 Protection of the environment is an important issue in Canada, so the Court should give the Plaintiff a full hearing. Although the Defendant has said there is no statutory basis for the trust the Plaintiff asserts that the law on this point is unsettled. The facts of this case are unique, so a full hearing is required.

52 The Defendants have given no authority for their argument that the only remedy available to the Plaintiffs was an application for judicial review. The Court should consider all remedies available.

Plaintiff has Standing

53 Recent cases from this Court and the Federal Court of Appeal dealing with the SARA show that the Plaintiff has standing to bring this application. The Plaintiff has a long-standing connection to Burns Bog and is an interested party.

Issues for Trial

Law is Unsettled

54 Summary judgment is appropriate where there is no genuine issue for trial. However, there is a genuine issue for trial in this case: whether the Court should extend the common-law to include an environmental trust. Such a trust could arise on the facts of this case, so a full oral hearing is required. Until the law in this area is fully developed, summary judgment is inappropriate.

55 In this case, the relevant facts are contested by the parties, so summary judgment is inappropriate. Further, full discovery is necessary to establish the history of the Covenant and ensure the SFPR was designed to protect Burns Bog. The Defendant has not led any evidence to show the hydrology of Burns Bog has been protected or what impact the SFPR will have on the Bog.

Duty to Protect the Bog

56 The Defendants have said they do not owe any duty to protect Burns Bog. However, there is no legal authority for this argument. The duty to protect Burns Bog can be supported by contractual, trust, fiduciary, and statutory obligations. Under the Covenant, Management Agreement, and Management Plan, the Defendants are under a duty to protect Burns Bog. The Defendants do not own the Bog, but their provision of funding to construct the SFPR imposes a public trust on them. The Defendants have also undertaken fiduciary obligations with respect to the Bog. The Fisheries Act, MBCA, CEPA, and SARA impose an obligation on the Defendants to protect Burns Bog. The Court will also have to consider how the Covenant imposes a duty on the Defendants to protect Burns Bog.

57 The Defendants are also under a duty to protect the environment which is broader than any proprietary interest and can be grounded in a number of sources. A full hearing is necessary to determine the scope of the duty the plaintiffs assert. A full hearing is necessary to consider whether the public interest grounds the duty to protect the environment.

58 The facts in this case are unique. Municipal, Provincial, and Federal authorities joined together to create a unique contract which creates park-like status for Burns Bog. However, government inaction has harmed the Bog by allowing it to be drained. The impact of this government inaction is an issue which must be addressed in a full hearing.

59 There is a valid cause of action in this case. The existence of a trust or stewardship relationship between the Defendant and Burns Bog is one which requires a full hearing on the merits.

Conclusion

60 The Defendants' motion should be dismissed and the case returned to the case management judge. With the assistance of experience counsel, the issues in this case can be resolved fully. The Plaintiff should also be awarded costs of this motion.

ANALYSIS

61 There is no dispute between the parties about the rules and principles applicable to summary judgment.

62 Sections 213 - 215 of the Rules govern motions for summary judgment. The Rules permit an application for summary judgment on all or some of the issues raised in the pleadings. If the Court is satisfied there is no genuine issue for trial, the Court must grant summary judgment accordingly.

63 The Supreme Court of Canada in *Canada (Attorney General) v Lameman* 2008 SCC 14, at paragraph 10, recently emphasized the importance of summary judgment for our justice system:

> The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

64 At paragraphs 20 and 21 of *TPG Technology,* above, Justice David Near confirmed the well-established principle that the question for the Court on an application for summary judgment is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at any future trial. On a motion for summary judgment, the responding party has the evidentiary burden of showing that there is a genuine issue for trial, but the moving party bears the legal onus of establishing the facts necessary to obtain summary judgment. Absent any issue of credibility, the Court is to consider and determine the facts necessary to decide questions of fact and law if that can be done on the whole of the evidence presented.

65 In my view, this matter is appropriate for summary judgment. There are no contested facts on the matter at issue which need to be resolved in order to determine that the Plaintiff's claim has no chance of success and that it should not be allowed to proceed to trial.

The Central Issue

66 As the Defendants correctly point out, the issue before me in this motion is not whether the construction of the SFPR by the Province may impact the ecology of Burns Bog. The issue is whether there is a genuine issue for trial over whether the Defendants owe to the Plaintiff any duty with respect to Burns Bog that compels any of the Defendants to intervene and ensure that the construction of the SFPR does not impact the ecological integrity of Burns Bog.

67 When it comes to arguing that there is a genuine issue for trial over whether Canada has such a duty or obligation, the Plaintiff relies heavily upon assertion but brings little to Court by way of evidence and authority.

68 It is well-established that, on a motion for summary judgment, both sides must file such evidence as is reasonably available to them and which could assist the court in determining if there is a genuine issue for trial. The responding party cannot rest on its pleadings and must prove specific facts to show there is a genuine issue. See *Kanematsu GmbH v Acadia Shipbrokers Ltd.*, [2000] FCJ No 978 (CA).

69 In the present case, the Plaintiff has produced and relies upon the affidavit from its president, Ms. Eliza Olson. Ms. Olson helpfully explains the history and purpose of the Plaintiff. She also explains the Plaintiff's concerns:

> The Plaintiff wishes to advise the court that it has been in operation for the last 20 years and it did not take filing this action lightly but given the importance of the issue and stewardship role that we have sought, we have commenced this action to protect Burns Bog for future generations. It is our belief that the project with respect to the construction of the South Fraser Perimeter Road (SFPR) will impact Burns Bog and affect its hydrology and that of the surrounding land and have an adverse long term effect as the hydrology will be impacted causing irreparable harm. These include but are not limited to the following:
>
> a. affecting the hydrology of the adjacent lands and impacting overall hydrology
> b. affecting the habitat of Sandhill cranes
> c. affecting the habitat of various fish species and
> d. affecting the habitat of small mammals and species at risk including the Red-backed vole.
>
> The Plaintiff at the outset wishes to say it does not wish to block the SFPR but wants to have the project reviewed and/or modified so that the Bog's raised area provides sufficient drainage, so that the Bog is not dried out leading to ecological harm and environmental damage.

70 While Ms. Olson assists the Court in understanding concerns about the future of Burns Bog that lie behind this lawsuit, she provides no evidence of relevance for the issue before me in this motion, which is whether the Defendants owe some contractual, trust, fiduciary or statutory obligation to maintain the ecological integrity of Burns Bog.

71 Mr. Straith, acting for the Plaintiff, was helpful in providing the Court with a better understanding of the general concern. In essence, he says that the Defendants have failed to safeguard the hydrology of the Bog in breach of its Covenant to do so and, in particular, by contributing to the financing of the SFPR and by allowing ministerial decisions to dilute the protections set out in the Covenant. He says that Canada has "changed the game plan" and reneged on its commitment and the duty to protect the Bog for all Canadians. Mr. Straith says that the situation is very complex and that the Plaintiff intends to call evidence at trial that will show how matters have changed since the Covenant was entered into and since the SFPR project was initiated.

72 The only evidence before me comes from Ms. Olson and she says the Plaintiff believes the SFPR will affect the hydrology of the Bog and will have an adverse long-term impact. However, there is no real evidence to support these beliefs and, in any event, such beliefs do not assist me in understanding what the Defendants' legal responsibility is for the Bog, or how the Defendants may have allowed the situation to deteriorate since entering into the Covenant.

73 It is well-established that a summary judgment motion must be supported by specific evidence and the parties cannot simply rely upon their pleadings. (See *White v Canada*, [1998] FCJ No 981 (TD). Assertions in a statement of claim which are not supported by evidence will not be treated as proven facts (see *Kirkbi AG v Ritvik Holdings Inc.*, [1998] FCJ No 912). A response to a motion for summary judgment cannot be based on conjecture as to what the evidence might be at a later stage in the proceedings. In fact, the Court is entitled to assume that the parties have put their best foot forward and that, if the case were to go to trial, no additional evidence would be presented. It is not sufficient for a responding party to say that more and better evidence will, or may, be available at trial. See *Rude Native Inc. v Tyrone T. Resto Lounge* 2010 FC 1278.

74 In the present case, there is no specific evidence before me on the background concerns and the Plaintiff's assertion that the Defendants have allowed a game change to occur, and have reneged on the Covenant. In addition, there is no evidence at all before me that the Defendants have assumed some kind of legal obligation to take steps to prevent the Province from constructing the SFPR in a manner that might compromise the Bog's ecological integrity. The Plaintiff has simply asserted legal duties in the abstract and has made no effort to show the Court how such duties could arise on the facts of this case. The Plaintiff says that the environment is an important issue for Canadians and that Burns Bog needs to be protected, but there is no factual underpinning to show what the dangers to the Bog are or how the Defendants, given the facts of this case, are fixed with the legal duties and obligations asserted.

75 There is an obvious reason for this lack of evidence. The issue of Canada's obligations is almost entirely legal. We have before us all of the relevant agreements and principles required to answer the question of whether there is a genuine case for trial on this matter. There are no credibility concerns and no facts in dispute. This is the kind of question that the Court is well able to address and answer by way of summary judgment.

76 Having reviewed the record before me, the relevant agreements, and the principles and authorities put forward by both sides, it is my view that the Defendants have made their case for summary judgment. Generally speaking, I accept the Defendants' reasoning and authority on each point and adopt them for purposes of these reasons.

The Covenant

77 Canada does not owe any duty to the Plaintiff, the Bog or the general public respecting the protection of the Bog's ecological integrity. This is because:

a. The Covenant, Management Agreement and Management Plan do not impose upon Canada any positive obligations respecting the protection of the Bog;
b. Canada does not owe any trust obligations respecting the Bog because Canada does not own the Bog. Moreover, there is no basis in law or equity for the imposition of a "public trust" duty in this case;

c. Canada has not undertaken any fiduciary obligations with respect to the Bog; and,
d. None of the statutes cited by the Plaintiff impose upon Canada any obligations with respect to the protection of the Bog.

78 In order to succeed in a claim based in contract, the Plaintiff must identify the specific obligation that Canada was required to perform and a breach of that obligation. I agree with the Defendants that a review of the terms of each of the Covenant, Management Agreement and Management Plan demonstrates that none of these documents impose upon Canada any obligations in relation to the protection of the Bog's ecological integrity.

79 Canada holds the benefit of the Covenant and may choose to enforce it in the event of a breach of the Covenant by one of the Bog Owners. However, the Covenant does not impose upon Canada any obligations respecting the Bog.

80 Further, the Covenant applies only to the Bog and does not limit the use of land outside of the Bog. Accordingly, the Covenant does not give rise to any obligations on Canada to ensure that the SFPR is constructed by the Province in a manner consistent with the preservation of the Bog.

81 The restrictions on land use in the Covenant do not apply to Canada. Canada is not one of the Bog Owners.

82 Moreover, Canada did not make any commitments under the Covenant to take steps to protect the Bog or to prevent activities that may damage the Bog.

83 Canada holds the benefit of the Covenant pursuant to section 219 of the *Land Titles Act*. Canada may choose to take steps to enforce the Covenant in the event of a breach by one of the Bog Owners. However, the Covenant does not require Canada to take steps to remedy a breach of the Covenant. Rather, the Covenant provides that Canada may waive any breach of the Agreement.

The Management Agreement

84 Similarly, I agree with the Defendants that the Management Agreement does not operate to impose upon Canada any duties respecting the protection of the Bog.

85 The Covenant contemplates that the parties will collaborate to develop a management plan governing the long-term management of the Bog. Pending the development of such a management plan, the parties entered into the Management Agreement.

86 The parties to the Management Agreement are Canada, Delta, Vancouver, and the Province. The Management Agreement acknowledged, *inter alia*, Canada's contribution to the purchase of the Bog and that the Bog Owners have agreed to enter into a Covenant that would restrict the use of the Local Government Land and the Provincial Land.

87 It is clear that the Management Agreement was intended to act as a bridge and to provide for the management of the Bog while the parties worked towards the development of the long-term Management Plan.

88 There are no provisions in the Management Agreement requiring Canada to take any steps to protect the Bog. Canada's only commitment in the Management Agreement is to participate in the collaborative planning team to prepare the Management Plan.

89 The Management Agreement does not support the Plaintiff's claim that Canada owes any kind of duty to protect the ecological integrity of the Bog.

The Management Plan

90 The Management Plan contemplated by the Covenant and the Management Agreement was completed in May of 2007. The Management Plan sets out the policy direction and actions that are designed to maintain the Bog's ecological integrity.

91 As the Defendants point out, the Management Plan is not a contract, but is a policy document produced by a team that included representatives from VANCOUVER, the Province, Delta and Canada.

92 The Management Plan identifies priorities and recommended actions respecting the management of the Bog in the areas on hydrology, lagg, wildlife, land interests, access to Bog lands, vegetation and wildlife, habitat and connectivity with adjacent lands and public education.

93 I agree with the Defendants that the Management Plan does not place any obligations on Canada respecting the protection of the Bog's ecological integrity. I also agree with the Defendants that the Management Plan does not support the Plaintiff's claim that Canada owes any duty to protect the ecological integrity of the Bog.

No Trust Duty

94 The Plaintiff suggests that Canada owes a variety of trust obligations with respect to the Bog but does little to suggest how such obligations have arisen on the facts of this case. In particular, the Plaintiff alleges that Canada is in an "environmental and/or fiduciary an [*sic*]/or legal trust relationship" and that a "public and/or equitable or environment trust" was "created by the operation of Canadian environmental law." The Defendants and the Court are left to surmise how these obligations may have come about in the present case. The Defendants have taken the Court back to basic principles and have, in my view, clearly demonstrated that there is nothing to support such obligations in this case.

95 To begin with, a trust is a category of fiduciary relationship in which the trustee holds the title to property and manages it for the benefit of another, who has exclusive enjoyment of the property.

As the Defendants point out, there are three essential characteristics of trusts, commonly referred to as the "three certainties":

> [...] first the language of the alleged settlor must be imperative; secondly, the subject matter or trust property must be certain; thirdly, the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring the property on trust in exchange for consideration, must employ language which clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must secondly be shown that the settlor has so clearly described the property which is to be subject to the trust that it can be definitively ascertained. Thirdly, the objects of the trust must be equally clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust falls to come into existence or, to put it differently, is void.

See *Scrimes*, above, at paragraph 16.

96 To establish a trust, it is also necessary to prove that the trust property is vested in the trustee. As established in *Scrimes*, above, at paragraph 17, there must be "an equitable interest based on a conscientious obligation which can be enforced against the legal owner" of the trust property, or no trust can exist.

97 This means that the Plaintiff must prove that Canada took ownership of specific trust property with the intention of holding that property in trust for the specified object.

98 The Plaintiff does not specifically identify the trust property in the Statement of Claim, but states that Canada is in a "trust relationship" with the Bog. The Plaintiff appears to allege that Canada holds the Bog subject to a trust.

99 However, Canada does not own the Bog. Ownership of the trust property by the trustee is an essential element of a trust. A trust is not perfected until the trust property is vested in the trustee. Accordingly, I agree with the Defendants that Canada is not a trustee of the Bog and does not owe to the Plaintiff, the Bog or the Canadian public any trust obligations respecting the Bog.

100 Despite the fact that Canada does not own the Bog, the Plaintiff alleges that a "public and/or equitable or environment trust" was created by agreement, statute and/or by an environmental trust doctrine. I agree with the Defendants that these allegations are bound to fail.

101 A review of the terms of the Covenant demonstrates that it does not create a trust relationship between Canada and the Bog.

102 The Covenant is a contract between Canada and the Bog Owners. The extent of Canada's interest in the Bog is defined by the Covenant. The Covenant does not give Canada title to the Bog. Further, it does not give Canada the ability to control the Bog.

103 Moreover, the Covenant expressly states that "no tort or fiduciary obligations or liabilities of any kind are created or exist between the parties in respect of this Agreement and nothing in the Agreement creates any duty of care or other duty on any of the parties to anyone else."

104 *Zeitler*, above, shows at paragraph 70 that

> In cases in which it is established that there is a contractual relationship between the parties, the interpretation of either facts or documents must not be distorted or given undue emphasis in order to impose the existence of a trust, where a reasonable and impartial interpretation would reveal that such a trust was neither intended nor created.

See also *Scrimes*, above, at paragraph 19.

105 Given the express disclaimer of any fiduciary obligations within the Covenant, I agree with the Defendants that it would be a "distortion" to find that it imposes any kind of trust duty on Canada. This aspect of the claim must fail.

No Public Trust

106 The Plaintiff also refers to a "public trust [...] created by operation of Canadian environmental law", and suggests that the Bog "is in a public trust and or equitable relationship with the Defendants." The Plaintiff suggests that the "public trust" requires Canada to take positive steps to protect land that is owned by other parties. This seems to me to be the Plaintiff's principal argument.

107 My review of the case law suggests that the Defendants are correct when they say that, to date, no Canadian courts have recognized a public trust duty requiring the Crown to take positive steps to protect the environment generally or a specific property.

108 In *Canfor*, above, Justice Binnie considered the possibility that there may be a place in Canadian law for a public trust doctrine, similar to the doctrine found in American law. After considering the American law, Justice Binnie concluded that it was not the proper case to embark upon a consideration of the issues involved because the issues were not fully addressed in the Court below.

109 In the US, the American Public Trust doctrine recognizes that a state's title to some lands may be held in trust for the public. The Public Trust Doctrine has been relied upon to permit the state to sue for damage to public resources and to restrain the state's own use of some public lands.

110 The key component of the American cases considered by Justice Binnie appears to be that they involved state obligations respecting public resources.

111 In *Canfor*, the province owned the land and sought a valuation of tort damages for the publicly owned resource. As the Defendants point out, this is a very different situation from the case at bar where the Bog is not owned by Canada. It is difficult to conceive of how a public trust duty could be imposed upon Canada concerning lands that it does not own. The Plaintiff is asserting some vague and undefined general concept that, in the end, amounts to saying that Canada has a general public trust duty to protect the environment in a way that the Plaintiff says it ought to be protected in this case. There is no legal support for such an assertion and, in my view, it is contrary to established principle and Canada's obligations to consider the best interests of all Canadians.

112 I think the Defendants are right to point out that the fact that Canada does not own the Bog presents a starkly different factual scenario than the one before the Supreme Court of Canada in *Canfor*. The Plaintiff is not suggesting that Canada must protect federally owned land. Rather, the Plaintiff seeks to impose upon Canada a trust duty to take steps to protect land that is owned by the Province, Vancouver and Delta. I agree that there is no basis in law or equity for the imposition of such a duty on Canada in this case. This aspect of the claim is bound to fail.

No Fiduciary Duty

113 The Plaintiff also asserts that Canada owed it, the Canadian public, and the Bog itself a fiduciary obligation.

114 I agree that such a claim is certain to fail. The Crown does not owe a fiduciary obligation to the public at large.

115 Additionally, the Plaintiff cannot succeed in its assertion that Canada owes a fiduciary obligation to the Bog itself. Fiduciary obligations can only be owed to persons or classes of persons, not geographical locations.

116 In order to succeed therefore the Plaintiff must establish that Canada owes a fiduciary obligation to the Plaintiff.

117 The Defendants are right when they point out that the relationship between the Crown and the Plaintiff does not fall into any established fiduciary relationship (trustee-*cestui qui trust*, executor-beneficiary, solicitor-client, agent-principal, director-corporation and guardian-ward or parent-child). Therefore, to succeed in the claim based on a fiduciary duty, the Plaintiff must demonstrate an *ad hoc* fiduciary relationship.

118 The Supreme Court of Canada in *Elder Advocates*, above, recently emphasized that "the special characteristics of governmental responsibilities and functions mean that governments will owe fiduciary duties only in limited and special circumstances."

119 In order to establish an *ad hoc* fiduciary duty:

a. The evidence must show that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of a beneficiary;
b. The duty must be owed to a defined person or class of persons who must be vulnerable to the fiduciary in the sense that the fiduciary has a discretionary power over them; and
c. The claimant must show that the alleged fiduciaries power may affect the legal or the substantial practical interests of the beneficiary.

120 I agree with the Defendants that, in the present case, the Plaintiff fails on each of these requirements.

121 First, there has been no undertaking made by Canada to act in the best interests of the Plaintiff. Such an undertaking will rarely be found to have been made by the Crown:

> "[c]ompelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance."

See *Elder Advocates,* above, at paragraph 44.

122 Though such undertakings can be either express or implied, a "general obligation to the public or sectors of the public cannot meet the requirement of an undertaking," and the "mere grant to a public authority of discretionary power to effect the person's interest does not suffice." See *Elder Advocates*, above, at paragraphs 45 and 48.

123 In this case, there has been no undertaking by Canada to put the interests of the Plaintiff before all others. Indeed, the Covenant expressly states that it creates no duties to any outside parties. The lack of an undertaking of undivided loyalty to the Plaintiff in itself is sufficient to dispose of the fiduciary obligation claim.

124 However, I agree that the Plaintiff also fails the second and third steps in the *Elder Advocates* test. The government is entitled to make distinctions between different groups. In order to establish a fiduciary duty, the Plaintiff "must point to a deliberate forsaking of the interests of all others in favour of himself or his class." See *Elder Advocates*, above, at paragraph 49. Nothing other than voluntary membership in an organization distinguishes the Plaintiff from any other member of the Canadian public. The Plaintiff group has an interest in preservation of the Bog, but the government of Canada is allowed to choose between competing interests.

125 Finally, the Plaintiff has no legal or substantial practical interest in the Bog. The Plaintiff

must show more than an impact on their "well-being, property or security." The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. See *Elder Advocates*, above, at paragraph 51. The Plaintiff has no legal entitlement to the Bog; it has the same interest in the preservation of British Columbia's environment shared by all.

No Statutory Duty

126 The Plaintiff alleges generally that the *Fisheries Act*, MBCA, CEPA, and SARA impose a "trust and/or fiduciary an[*sic*]/or legal relationship with respect to Burns Bog." I do not think any of these statutes imposes a duty on the Defendants to protect Burns Bog. The *Fisheries Act* is an Act respecting the federal regulations of fisheries in Canada. The MBCA implements a convention to protect migratory birds in Canada and the USA. The CEPA is all about pollution prevention and the protection of the environment and human health in order to contribute to sustainable development. The SARA is an Act to protect of wildlife at risk in Canada. Nothing in any of these Acts states or implies that Canada has any fiduciary, trust or legal relationship with the Bog.

127 If a statute does not clearly state that it creates a fiduciary duty, it does not do so:

> If the undertaking [creating a fiduciary obligation] is alleged to flow from the statute, the language in the legislation must clearly support it... The mere grant to a public authority of discretionary power to affect a person's interest does not suffice.

See *Elder Advocates*, above, at paragraph 45.

128 I once again agree with the Defendants that the allegation of a statutory duty is bound to fail because there is no basis for finding any obligation created by statute.

Conclusions

129 The Plaintiff has chosen to respond to and resist this motion, not by addressing the Defendants' factual and legal arguments, but by appealing to the importance of the environment and an assertion that Canada should assume stewardship of the Bog so that the Plaintiff's concerns about the SFPR can be dealt with. The only evidence I have about those concerns comes from Ms. Olson, who tells me that the Plaintiff does not wish to block the SFPR, but wants to have the project reviewed and/or modified so that the Bog's raised area provides sufficient drainage, and so that the Bog is not dried out, leading to ecological harm and environmental damage.

130 These may well be worthwhile objectives and I can well appreciate the Plaintiff's concerns over the future of the Bog and its frustrations in trying to find an appropriate legal context in which to raise those concerns. But I have nothing before me that substantiates those concerns and, more importantly, I have nothing before me to suggest that the Defendants have a legal obligation -- or

the legal right -- to step in and, on behalf of the Plaintiff, insist that the Province's SFPR project be reviewed and/or modified in ways that have not even been placed before me.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The Defendants' motion for summary judgment is granted and the Plaintiff's action is dismissed with costs to the Defendants.

RUSSELL J.

cp/e/qlecl/qljxr/qlecl/qlhcs