**ENVIRONMENTAL REVIEW TRIBUNAL**

**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) #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 (TW1-88) located at Lot 24, Concession 7, Geographic Township of Erin, County of Wellington, Ontario.

**NESTLÉ CANADA INC.**

**REPLY**

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The Issue Before the Board

1. The Nestle Appeal was and is confined to Conditions 3.4 and 3.5 of the Permit to Take Water (the “PTTW”).
2. The Wellington Water Watchers and Council of Canadians (“WWW & CoC”) acknowledged to the Tribunal that ”the issues they would raise in the proceedings would be restricted to the matters pertaining to those two conditions”.

**Reference: Tribunal Decision dated March 25, 2013, Paragraph 52**

1. Therefore:
   1. the levels of water taking permitted under Table A;
   2. the “daily spike rate” permission in Condition 3.2; and
   3. the extent of the monitoring network established for the Erin Well pursuant to Conditions 4.1 and 4.9

are not in issue.

1. The sole issue is whether the restrictions and requirements proposed in the Minutes of Settlement as replacements for the appealed Conditions 3.4 and 3.5 should be approved.
2. The positions taken by WWW & CoC at the Preliminary Hearing, as reflected in the Decision of the Tribunal, set up a clear choice between the original conditions and the replacement conditions 3.4 and 3.5 of the Minutes of Settlement:

“COC and WWW both state that they have a genuine public interest in seeing that the conditions reducing the maximum allowable water taking for the permit holder Nestle Canada Inc. (“Nestlé”) are affirmed. They assert that the conditions are an example of a precautionary regulation of consumptive water use which respects the needs of future generations. As such they maintain that the issues under appeal are at the core of their organizational objectives and the interests of their supporters.” (emphasis added)

**Reference: Decision, para. 20**

“…COC and WWW argue that they agree with the conditions under appeal”.

(emphasis added)

**Reference: Decision, para. 38**

“In their requests for status, COC and WWW clearly indicate that it is their position that these conditions should remain, unaltered, in the PTTW.”

(emphasis added)

**Reference: Decision, para. 50**

1. The framing of the issues to be addressed in this matter was further enunciated in the Decision:

“The Director and Nestlé submit that, if party status is granted, the Tribunal should impose a condition (as it is permitted to do under Rule 62) prohibiting COC and WWW from raising new issues. The Tribunal does not accept this submission. Nestle’s appeal is narrowly confined to Conditions 3.4 and 3.5 and the COC and WWW acknowledge that the issues they will raise in these proceedings are matters pertaining only to those two conditions”

1. No order was made because the COC and WWW had assured the Tribunal and the Director and Nestle that the issues were the choice between the original conditions 3.4 and 3.5 preferred by COC and WWW and the revised versions in the Minutes of Settlement.
2. As the “spike rate” itself is not in issue, the only area of discussion is the better appropriateness of the proposed revised conditions 3.4 and 3.5 to respond to one event, and one event only: a Low Water Declaration.

Low Water Declarations

1. Low Water Declarations are issued based on precipitation and surface water conditions.

**Affidavit of Carl Slater, para. 15**

**Affidavit of Greg Pucovsky, para. 10**

1. To the extent that the submissions of WWW & CoC reflect concerns about the nature of Ontario’s Low Water Response Plan, such concerns lie far outside the scope of the defined issues and far outside the ambit of the appealed conditions.

The Hydrogeological Consensus

1. Mr. Pucovsky has been involved with all aspects of the Erin Well since it was constructed, and during the last 12 years since it was acquired by Nestlé.

**Affidavit of Greg Pucovsky, para. 5**

Decision Making Context

1. Nowhere in the materials filed by the CoC and the WWW is there any suggestion that the use of the Erin well has ever caused a negative or adverse effect on either surface water conditions or nearby wells. The evidence of the Director and Mr. Pucovsky support this.

**Affidavit of Carl Slater, para. 17**

**Affidavit of Greg Pucovsky, para. 8**

1. The CoC and WWW submissions identify six droughts in the well’s region since 1998. These occurred in 1998, 1999, 2001, 2002, 2007 and 2012.

**CoC and WWW submissions, para. 18**

1. The Erin well has been operated continuously for approximately twenty years including (with voluntary restrictions by Nestlé) during all of the drought events referred to, including those considered most severe in 2007 and 2012.
2. During all of those years and all droughts, not a single instance of interference with wells nor any impact on surface water has been identified.

**Affidavit of Carl Slater, para. 17**

**Affidavit of Greg Pucovsky, para. 8**

1. Each of Abdul Quyum , Regional Hydrogeologist and ground water reviewer for the Ministry of the Environment, and Sarah Day, surface water reviewer, concur that there is no reason to believe the Erin well has or will affect municipal supplies, area wells, or surface water.

**Affidavit of Abdul Quyum, paras. 20-22**

**Affidavit of Sarah Day, paras. 13-16**

1. Mr. Pucovsky, a hydrogeologist with 20 years’ experience of the Erin Well, testifies that pumping at the daily “spike rate”

“should not have an adverse effect on the surficial overburden aquifer, nor surface waters within the zone of influence for [the Erin Well] which occurs within the Eramosa River Sub Watershed under Low Water Condition 1 or 2”.

**Affidavit of Greg Pucovsky, para. 10**

1. This consensus of Hydrogeologists is uncontroverted: the Erin well does not affect the surface water conditions governed by Low Water Declarations.
2. The monitoring network surrounding the Erin well is unusually extensive and fully sufficient to detect impacts, if any, from the Erin well. The comprehensiveness of the monitoring program was affirmed by Abdul Quyum and noted by Mr. Whiteley’s report on behalf of the WWW dated June 12, 2012 to Mr. Nagy.

**Affidavit of Abdul Quyum, para. 27**

**Affidavit of Greg Pucovsky, para. 4**

1. The “daily spike rate” provision in Condition 3.3 Permit To Take Water (Groundwater) Number 3716-8UZMCU (the “PTTW”) does not allow any more water to be taken in any month.
2. All the daily “spike rate” provision permits is a daily fluctuation in the permitted draw, provided a daily average draw for the month does not exceed the permit to draw set out in Table A to the PTTW. This is hydrogeologically negligible according to Mr. Pucovsky and will not cause unacceptable impacts on the bedrock aquifer or wells, according to Mr. Quyum.

**Affidavit of Abdul Quyum, para. 32**

**Affidavit of Greg Pucovsky, para. 13**

1. Mr. Howard, who provided the only hydrogeologically qualified evidence for the WWW & CoC
   1. does not assert any hydrogeological connection exists between the shallow and deep aquifers.
   2. Speculates about the possibility of affected receptors outside the current monitoring network, without any specific suggestions for additional monitoring points
   3. Opines that a 7 day pumping test is unlikely to produce effects on shallow wells and surface water bodies:

“will yield useful data not currently required under the Permit to Take Water (“PTTW”). Given the relatively high storage capacity of the shallow water table aquifer it is unlikely that a test of only 7 days duration will produce observable impacts on shallow wells and associated surface water bodies, even during drought conditions. However, the data collected should allow the hydraulic properties of the aquitard to be determined and provide for a better hydrogeological understanding of the relationship between the two aquifers at the well site.”

**Affidavit of Ken Howard, para. 11**

1. With regard to the duration of the pumping test:
   1. Mr. Howard does not recommend a longer test (nor any changes at all to the pump test); and
   2. The seven day test was specifically designed to exceed the effect of any likely use of the “spike rate” which would only involve elevated draws of short duration, with no increase in the monthly permitted draw.

**Affidavit of Greg Pucovsky, para. 10**

**Response to Law and Argument**

1. The entirety of the submissions of the WWW & CoC proceed from a premise which for which there is simply no hydrogeological evidence. Their submissions all stem from the undocumented, unsubstantiated premise that the pumping of water at the spike rate during low water conditions would cause some environmental harm.
2. All the evidence of the extensive monitoring of the Erin Well during conditions ranging from normal to severe drought demonstrates the opposite to be true. The deep aquifer can supply and has supplied water for more than 12 years without any impact on surface or near surface features. The operation of the Erin Well has been shown to be irrelevant to the surface water conditions and not to exacerbate drought conditions. The pumping test is designed further to test that observation under controlled conditions.
3. The approval of the Minutes of Settlement will not cause any of the three types of prejudice asserted to be relevant at paragraph 43 of the submissions of the WWW and CoC for the reasons set out in the following paragraphs.
4. The replacement of the appealed versions of Sections 3.4 and 3.5 results in a demonstrable strengthening and improvement of the permit’s ability to protect the environment while also operating in a more fair, transparent and science-based manner.

Comparison of Appealed and Proposed Conditions

1. The appealed conditions and the proposed conditions are compared as follows.
2. The original, appealed version of Condition 3.4 of the PTTW requires a ten per cent reduction in the maximum permitted daily water taking (in the case of a Level 1 Low Water Declaration) and a twenty per cent reduction of the maximum permitted daily taking (in the case of a Level 2 Low Water Declaration) and also precludes the use of the “spike rate”. This provision has the following characteristics:
   1. The required percentage reductions are drawn from generic standards contained in the “Ontario Low Water Response” for all of Ontario and are therefore not specific to the Erin well.

**Affidavit of Carl Slater, paras. 14-16**

* 1. The Low Water Condition Declarations are designed to be voluntary and often exclude groundwater takings.
  2. Low Water Declarations were not designed to serve as mandatory reductions and have not been removed even following a return to normal surface conditions.

**Affidavit of Greg Pucovsky, para. 6**

* 1. The CoC and WWW have not put forward any evidence to suggest any scientific connection between the ten and twenty per cent reductions and the performance of the Erin well within its zone of influence during drought conditions.
  2. There is no hydrogeological evidence that draws from the Erin well have any effect on surface water conditions and Sarah Day testifies that the elevated spike rate is unlikely to do so, and that the pumping test is sufficient to test this.

**Affidavit of Sarah Day, para. 13-17**

* 1. Equally, in the unexpected event that there was to be an impact, there is no indication that a ten or twenty per cent reduction would be the correct response for the Erin well.
  2. The original condition is not supported by the Grand River Conservation Authority. The Conservation Authority initially misunderstood the spiking provision and has emphasized to the Director the voluntary nature of the Low Water Declarations.

**Affidavit of Carl Slater, para. 30**

* 1. The original condition is not supported by the Director, nor by the team of experts who have advised the Director and provided evidence.
  2. The original condition was conceived from a misunderstanding candidly admitted by the Director.
  3. The original condition adds nothing to the scientific understanding of the performance of the Erin well in low water conditions.
  4. Condition 3.4 deprives the Permit Holder of a right to appeal an inappropriate or unfair restriction arising from a Low Water Declaration, or from the failure to repeal a Low Water Declaration.

1. The replacement conditions proposed in the Minutes of Settlement, by contrast:
   1. Completely preclude the use of the spike rate in low water conditions until a pumping test has confirmed the opinions of Mr. Pucovsky and the Ministry’s experts (and Mr. Howard) regarding the lack of effect on drought conditions from pumping at the “spike rate” for a 7 day period during actual drought conditions.
   2. Will ensure that the spike rate is not used under Low Water Conditions unless and until the Director is satisfied with the results of the test under actual drought conditions.
   3. Will provide the Director with information upon which he could base any required changes to the PTTW in order to respond to the pump test data.
   4. Is supported by the Director and the Ministry hydrogeologists who have given evidence.
   5. Is regarded by the Grand River Conservation Authority as a preferable condition.
   6. Is supported by the only person with hydrogeological qualifications to provide evidence in support of the CoC and WWW (Mr. Howard) who concedes:

“The 7 Day Pumping Test will yield useful data that are not currently required under the Permit To Take Water (“PTTW”). Given the relatively high storage properties of the shallow water table aquifer, it is unlikely that a test of only 7 days’ duration will produce observable impacts on shallow wells and associated surface water bodies, even during drought conditions. However, the data collected should allow the hydraulic properties of the aquitard to be determined and provide for a better hydrogeological understanding of the relationship between the two aquifers present at the well site.” (emphasis added)

* 1. Require the PTA report to be circulated to the CoC and WWW and provide an opportunity for the CoC and WWW to submit for any comments to the Director prior to the issuance of his report.
  2. Requires the PTA report to be made publically available through the Nestlé website.
  3. Nestlé has no doubt that the Director will explain the basis for his decision in response to the PTA report.

1. The proposed replacement for Section 3.4 is patently superior, both as an environmental protection and as an instrument of fairness.
2. With regard to Section 3.5, any implementation of a Level 3 condition will contain its own mandatory restrictions which will be suited to the exact nature of the low water condition. Section 3.5, as appealed, is redundant and, if anything, tends to limit the response required in the event of a Level 3 condition.
3. With regard to the second alleged ground of prejudice, there is no hydrogeological evidence anywhere in the Record to suggest that either:
   1. The original condition properly protects the environment in Low Drought Conditions by means of an arbitrary ten or twenty per cent reduction (and indeed the Director and the Conservation Authority no longer support it), nor
   2. That the proposed revised condition fails to protect the environment and indeed the hydrogeologist put forward by the CoC and WWW sees benefits in the pumping test.
4. The submissions of the WWW and CoC amount to hypothetical concerns without any empirical foundation. In any event, the pumping test embedded in the replacement condition is designed to answer fully and completely before any use of the “spike rate” under Low Water Conditions.
5. The third area of potential prejudice is completely absent. The Director’s discretion is unfettered under the proposed revised condition. In the first place, the Ontario Water Resources Act reserves to the Director, and the permit reflects, the Director’s ability to change the terms or limit the draws at any time by modification of the conditions. Conversely, the permit holder would have a right to appeal.

**Permit to Take Water, Exhibit A, Affidavit of Carl Slater, condition 6**

Public Trust Doctrine

1. There is no judicial support for the importation and application in Ontario of the Public Trust Doctrine found in some American jurisprudence.
2. The Supreme Court of Canada has declined to apply the Public Trust Doctrine.

***British Columbia v. Canadian Forest Products* [2004] 2 SCR 74,**

**WWW Book of Authorities, Tab 2**

1. However, even if the Public Trust Doctrine formed part of the common law of Ontario, which it does not, it would be inapplicable in this case.
2. The Public Trust Doctrine is a judicial construct which enables a governmental response when there is an environmental harm, generally in the nature of a public nuisance, which the statutory and regulatory provisions of the jurisdiction do not address.
3. In the instant case:
   1. There is simply no evidence of any environmental harm that has resulted or would result from the use of the Erin well pursuant to the proposed PTTW; and
   2. The *Ontario Water Resources Act* and the regulations thereunder provide a complete code for the protection of water and the allocation of water takings.
4. The WWW and CoC submissions invite the Tribunal to supplant the law of Ontario with arbitrary and unrecognized priorities that have no foundation in the law or policy of Ontario.
5. The failure of the WWW and CoC to base their arguments in the hydrogeologic evidence is exemplified in paragraph 56 of their submissions in which they seek:
   1. to have the Director “define groundwater drought indicators for the aquifer which trigger drought based reductions”; and
   2. to “recognize the uncertainty which clouds our understanding of the aquifer’s recharge and discharge flows by protecting all surface water features which may be dependent on its discharge.”
6. With regard to the submission in paragraph 56(i), the request that the conditions define groundwater drought indicators, firstly, contradicts the position of the WWW and CoC that they support and seek to preserve unaltered the appealed conditions. It is uncontroverted that the Low Water Conditions to which the appealed conditions refer have no relationship to groundwater conditions.
7. Further, the submission in paragraph 56(i) amounts to an admission of the superiority of the replacement condition 3.4 which will test the relationship of the deep aquifer to the shallow aquifer and surface water conditions at “spike rates” of pumping during Low Water Conditions.
8. The submission in paragraph 56(ii) is simply unfair to the evidence. It asserts, contrary to the hydrogeological evidence that there is some surface water feature which has not been accounted for in that very monitoring network which the WWW hydrogeologist described as comprehensive.
9. Even worse, the paragraph implies that the “uncertainty which clouds our understanding” precludes any draws from the aquifer. There is no evidence of a “cloud” on the understanding of the performance of the Erin well. The subparagraph denies the existence of a wealth of hydrogeologic evidence showing the sustainability of the deep aquifer and the Erin Mills well, including the 2011 Annual Report.
10. The submissions of the WWW and CoC are ultimately grounded, not in evidence or hydrogeology, but in an aversion to lawful water takings for bottling, as is apparent from the submissions that the Public Trust Doctrine should be imported to restrict water taking that has been demonstrated to be utterly sustainable under all weather conditions.
11. The approval of the Minutes of Settlement is in the public interest as it:
    1. imposes a science based, source specific test before allowing any use of the “spike rate” in Low Water Conditions;
    2. allows the Director to respond to the results of the test without any fetter on his discretion;
    3. is more fair and transparent to the permit holder, as it allows any further restrictions imposed by the Director to be appealed;
    4. eliminates the fundamental fallacy using a Low Water Declaration designed to be voluntary as a mandatory restriction on deep aquifer takings.
12. Nestle Canada Inc. respectfully submits that the Minutes of Settlement should be approved.