



# MCWC

Michigan Citizens for  
Water Conservation

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## ***Nestle Wants Court Do-Over***

The legal battle of *Michigan Citizens for Water Conservation v Nestlé* has taken another turn. Nestlé has filed legal arguments to retry a water law case it lost in the trial court and Court of Appeals based on fact and judgment against Nestlé for violation of groundwater law. A three-month trial in 2003 determined that proposed Nestlé withdrawals would unreasonably drop stream and wetland water levels. (See "*Background of the MCWC Organization*" on page 2.)

In 2005 and 2007, during low flow periods, Nestlé kept pumping even though bottomlands were exposed, and little water flowed in the stream. MCWC and its plaintiffs have asked Circuit Court Judge Susan Grant to adjust the order to reduce pumping to protect streams, as required by the Court of Appeals ruling. In response, Nestlé recently filed legal briefs arguing that it has a right to the water under any conditions, and should be allowed to pump even if there is not adequate water in the stream for various water uses. Nestlé has been given one favor after another to exploit and export water from Michigan at substantial harm in the Mecosta case.

In the fall of 2008, Nestlé conducted a pumping "experiment" during high water level conditions that masked effects or impacts and ignored basic hydrological variables. Nestlé now wants to use this report to undo the scientific findings based on data and investigations that went on for over two years.

The so-called "new scientific report" would ask the Court to reopen and overturn the victory of MCWC's astounding citizen grass roots efforts to beat a giant like Nestlé in trial and appellate courts.

The so-called "experiment" ignores basic variables like the amount of water and back-ups from temporal beaver dams, and understates effects and impacts. Nestlé wants to ignore the connection and standing to protect Osprey Lake. In short, Nestlé refuses to admit defeat, continues to attack with new tests and arguments, and has turned its back on Michigan's lakes, streams, wetlands and the environment.

**A hearing on Nestlé's request and MCWC's motion to reduce pumping to maintain adequate water in summer dry periods is scheduled for 9:00 a.m. on March 23-27, 2009 in the Mecosta County Circuit Court, 400 Elm St., Big Rapids, MI.**

MCWC continues to fight this seven-year battle in and out of the courtrooms. People have the right to use our water, but no one should have the right to own or sell water.

The Supreme Court ruled 4-3 that even though MCWC and plaintiffs had standing to address downstream interests under the Michigan Environmental Protection Act, we did not have standing to prevent harm to three wetlands and a lake impoundment on Nestlé's property. Former Governors William Milliken and James Blanchard, many leaders and citizens, and newspapers decried the ruling. The ruling did not affect MCWC's monumental victory in 2003; however, it crippled the rights of citizens to file suits to protect the state's environment in the future. The 2008 election defeat of Supreme Court Justice Clifford Taylor, who opposed citizen rights to sue to protect air and water, may lead to better results on the issue in the future.

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## **Background of the MCWC Organization**

It has been almost eight years since 100 of us met in the gym of the Mecosta Elementary School and formed Michigan Citizens for Water Conservation (MCWC). MCWC now has over 2,000 members.

Since December 2000, we have been fighting Nestlé Waters North America/Ice Mountain (Perrier Group of North America/Great Spring Waters of America - Yes, Ice Mountain water in Michigan has gone through four name changes since 2000).

### **Victories in 2001-2007**

- MCWC's first victory pressured Nestlé to release its complete hydrogeological assessment regarding its water extraction in Mecosta County to the public. The extraction at 400 gallons per minute would reduce flows, levels, and harm lakes, streams, and wetland dependent on this water.
- MCWC organized a public hearing with the Michigan Department of Environmental Quality (MDEQ), in which citizens overwhelmingly opposed the Nestlé operation. With the help of environmental experts, MCWC submitted evidence that showed that Nestlé's assessment and modeling were flawed and the proposal should not be permitted.
- MCWC organized a countywide petition drive and vote that opposed the project by a 2:1 margin.
- MCWC successfully convinced Governor Granholm, then Attorney General, that the Nestlé water extraction for export of bottled water from the Great Lakes Basin would violate a ban on diversions or exports under the Federal Water Resources Development Act (WRDA).

### **Mecosta County Circuit Court**

In 2002, MCWC filed a lawsuit in Mecosta County Circuit Court. The issues in the case were:

- Who owns and controls Michigan's water?
- What right does Nestlé have to divert or export water for sale out of a watershed where it robs other riparians, the public, and groundwater users of their common property and water rights?
- What is the standing of citizens under the public trust doctrine and the Michigan Environmental Protection Act (MEPA) to protect the flow, level and quality of water resources from impairment or harm?

In 2003, after 19 days of trial spanning three months, Judge Lawrence Root issued a landmark ruling. In his 60-page opinion, Judge Root found:

- Nestlé's assessment and model were not reliable.
- Nestlé's extraction of water *at any rate* was unreasonable use of groundwater.
- Removal of groundwater would divert and diminish the flow of the stream by at least 27%.
- The level of the stream and two lakes would be lowered by 4 to 6 inches.
- The effects of pumping would impair the stream, lakes, and wetlands located on Nestlé's well field property or downstream on some of the plaintiffs' property.

**As a result of this opinion, Judge Root ordered Nestlé's operations to cease completely.**

### **Michigan Court of Appeals**

Nestlé appealed to the Michigan Court of Appeals. With the help of the MDEQ and other state agencies, Nestlé was granted a partial stay of Judge Root's order. Nestlé was allowed to continue pumping up to 250 gpm during the appeal.

In November 2005, the Court of Appeals affirmed the trial court's findings on scientific facts, diminishment of the flow of the stream by 25 percent, impairment, and unreasonable use. The Court adopted a new "balancing test." This rule opened the door for the diversion or export of water from a watershed or community.

(Continued on page 3.)

## Michigan Court of Appeals (continued)

However, the Court affirmed the trial court's ruling that extraction at 400 gpm for export did not outweigh the harm and was unreasonable. The appeals court reduced the maximum pumping limit to 200 gallons per minute and remanded the case back to the trial court to: (1) establish what level Nestlé could pump under its new "balancing test" and (2) set forth the basis for finding an impairment in violation of the MEPA. MCWC and Nestlé met and set a schedule of pumping limits of 218 gallons per minute (average) based on the flows and levels monitored in the stream.

## Michigan Supreme Court

In early 2006, MCWC appealed to the Supreme Court because the Court of Appeals' "balancing test" would open the door for any person or entity outside the Great Lakes Basin to divert and export water as long as the benefit of exporting surplus water outweighs the harm.

Nestlé cross-appealed asking the Supreme Court to reverse the Court of Appeals decision under the MEPA. Nestlé argued that MCWC or citizens do not have standing to protect wetlands and a lake on the property where Nestlé's high capacity wells are located.

In 2007, the Supreme Court chose not to hear the water law and public trust issues, but to hear oral arguments only on the question of standing of citizens to bring a suit to protect water resources or wetlands under the MEPA.

On July 25, 2007, the Supreme Court ruled 4:3 (the make up of the Court became more balanced in the recent 2008 elections) that MCWC and plaintiffs had standing to address downstream interests under the MEPA, but did not have standing to prevent harm to three wetlands and a lake on Nestlé's property.

On September 28, 2007, the Supreme Court denied the motion for rehearing in another 4:3 order. While the ruling did not affect MCWC's monumental victory under Michigan water law and the MEPA, the ruling crippled the rights of citizens to file suits in the future to protect the state's environment.

## Michigan Legislature

In February 2006, Michigan passed a weak water law that regulates withdrawals under limited impact standards, applies only to withdrawals of 2 million gallons a day or more, and exempts water packaged in containers smaller than 5.7 gallons.

*MCWC has been able to remain closely involved with all of the above actions over the last seven years with the help of the Traverse City law firm Olson, Bzdok & Howard and, in particular, Jim Olson of that firm.*

## Summary of Proposed Michigan Legislation or Constitutional Amendment

- All waters of the State, including lakes, streams, and groundwater, are a public commons held by the State as sovereign subject to a public trust on behalf of its citizens.
- No waters shall be diverted, exported, or transferred out of any watershed of the state for commercial sale except in accordance with the Amendment.

*The prohibition does not apply to:*

- Delivery of water by a municipality or other public water service.
- Commercial sale of water authorized by a two-thirds vote of the Senate and House and Department of Natural Resources or other agency as provided by law, based on recorded findings, that (1) constitutes a primarily public purpose; (2) will not impair water, natural resources, or public trust; (3) assures fair compensation to the State consistent with the public trust.
- Products, other than water are itself, produced as a product or incorporated into agricultural, manufacturing, commercial processes or products.

*This Amendment does not interfere with any property rights of reasonable use of water, other than commercial sale of water except authorized and licensed pursuant to this Amendment.*

## ***A History of the Breach in the Great Lakes Compact***

- 1986 Federal Water Resources Development Act prohibits diversion of water out of Great Lakes Basin unless consented to by all 8 governors of the Great Lakes states.
- 2000 Federal Water Resources Development Act amended to prohibit both diversions and exports without governor's consent.
- 2001 Great Lakes Annex. 8 governors sign intent to enact a Great Lakes Compact to limit diversions and withdrawals in or outside of the Basin where it would cause significant environmental impacts or ignore conservation measures.
- 2003-2005 Proposed Great Lakes Compact draws opposition from leaders in some states and Ontario and 10,000 letters from citizens for authorizing diversions and exports except where significant impact.
- When MCWC attorneys and other organizations reviewed the Compact, they discovered that language for water exports, including bottled water, had been inserted in the Compact that would exempt exports of water as product from the diversion ban.
- MCWC and others filed testimony and appeared at hearings in Congress and the Michigan legislature to bring attention to the product or export exception.
- After all 8 Great Lakes states accepted the compromise and passed the Compact, it then went to Congress. Congress passed the Compact in a few short days.

*MCWC and its supporting organizations and individuals do not oppose the Compact's diversion ban and conservation standards, but seek to correct the Compact and the failure to protect the public trust in waters of the Great Lakes Basin.*

## ***FLOW: THE PREMIER!***

*- Rhonda Huff, Vice-President, MCWC*

November 16, 2008 was a blustery Sunday afternoon at the State Theater in Traverse City. People were bundled against the wind waiting to get into the theater to watch the award winning water documentary, *FLOW*. The fundraiser by MCWC and *FLOW: For Love of the Great Lakes* featured the film followed by a reception at the Historical Traverse City Opera House. The theater was filled over and above capacity and many moviegoers were turned away.

The film was introduced by Traverse City Environmental Attorney Jim Olson who welcomed notable attendees Governor and Mrs. William Milliken and others. *FLOW* is a worldwide water crisis documentary. It traverses the water crisis issues in Africa, India, China, and Michigan. The film sheds light on the World Bank's involvement in water privatization and water for profit. The film received a resounding applause with an even greater applause following the introduction of *FLOW* director Irena Salina.

Following the film, the audience made its way down Front Street to the Historical Traverse City Opera House Reception where drinks and locally donated appetizers were enjoyed. The reception was also overflowing. and featured a Question and Answer panel comprised of director Irena Salina, attorney Jim Olson and Terry Swier, president of MCWC. The evening's entertainment included a collection of readings by Michigan water poet Michael Delp and music by Chris Campbell and Jimmy Olson.

The outpouring of interested people that attended was greatly appreciated and a much needed boost to MCWC's morale. MCWC has been inundated with request to see, show, or find out more about the film, *FLOW*. MCWC has the DVD available for purchase—see the order form on page 5. Proceeds benefit MCWC. There are several other forums that are being planned to view *FLOW*; dates will be available on [www.saveMIwater.org](http://www.saveMIwater.org).

## FLOW: FOR THE LOVE OF THE GREAT LAKES

In November 2008, MCWC and a coalition of citizen organizations sponsored the showing of the award-winning film *FLOW*. The coalition **FLOW: For the Love of the Great Lakes** grew out of the film, reception and Q & A. MCWC and other supporting organizations such as Food and Water Watch, West Michigan Environmental Council, Northern Michigan Action Council and individuals are part of the coalition.

The purpose of the coalition is to continue to correct the defect in the Compact through nonpartisan citizens efforts and to protect the public trust of citizens in the waters of the Basin and Michigan's streams, lakes, adjacent wetlands, and tributary groundwater.

Those interested in learning more or joining this coalition and campaign may contact Terry Swier, President of MCWC at [tswier@centurytel.net](mailto:tswier@centurytel.net) or visit the coalition website at [www.FlowforWater.org](http://www.FlowforWater.org).

## TO CONTINUE THE FIGHT

MCWC has found that doing the right thing is less stressful than not doing the right thing and we're all in this together. How this all plays out is on everyone's shoulders.

MCWC is fighting for you. At this time, MCWC has no paid staff, no office, and no money. Please join the fight; it is everyone's water. Consider a donation to MCWC to continue the fight to *win* this battle. It is estimated the fight will cost from \$80,000 to \$100,000 to fight the battle beginning in March. The battle has begun!

**Help MCWC with on-going expenses by renewing your 2009 membership early.** Make a generous donation to MCWC to continue the fight and leave a legacy for our future generations. Donations and memberships can be made on-line at: [www.saveMIwater.org](http://www.saveMIwater.org), or mail your check to:

**MCWC**  
**P. O. Box 1**  
**Mecosta, MI 49332**

**Yes!** Please send one or more copies of the DVD "*FLOW: For the Love of Water.*" Cost is \$20.00 each plus \$5.00 for shipping and handling or e-mail [tswier@centurytel.net](mailto:tswier@centurytel.net).

Name \_\_\_\_\_

Address \_\_\_\_\_

State/Zip Code \_\_\_\_\_

\_\_\_\_\_ # of DVD's x \$25.00 = \_\_\_\_\_

Please make check payable to MCWC and mail your check to:

MCWC  
 P.O. Box 1

Name \_\_\_\_\_

Address \_\_\_\_\_  
 State/  
 Zip \_\_\_\_\_

Email \_\_\_\_\_

Individual \_\_\_\_\_ \$25

Family \_\_\_\_\_ \$40

Student/retired \_\_\_\_\_ \$10

Lifetime Individual \_\_\_\_\_ \$250

Lifetime Family \_\_\_\_\_ \$500

Other \_\_\_\_\_

**Upcoming Events & Fund-Raisers for MCWC:**

The MCWC Board of Directors meets the second Saturday of every month at Northern Shores Supper Club on Highway M-20, Mecosta, MI.

February, 2009: "Flow: For the Love of Water" will be shown at Ferris State University.  
Check [www.saveMIwater.org](http://www.saveMIwater.org) for time and location.

March 23-27, 2009 9:00 AM Hearing in Mecosta County Circuit Court, 400 Elm St., Big Rapids, MI.

May, 2009 Garage and Bake Sale. Save your unused items!

To sign a "Pledge to Protect the Waters of the Great Lakes Basin" log on to MCWC's web site [www.saveMIwater.org](http://www.saveMIwater.org) or [www.FlowforWater.org](http://www.FlowforWater.org). The signed pledges are being sent to Congress and to our State legislators, encouraging additional legislation to correct weaknesses in the Great Lakes Compact.

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MCWC is a non-profit group organized in December 2000. Our goal is to conserve, preserve and protect the public's natural resources. Our efforts have concentrated on research and education so that informed decisions are made regarding protection of the quality and quantity of Michigan's groundwater, wetlands, lakes, streams, ponds and wildlife.

Fickes Lee & June  
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*Help preserve natural resources - recycle this newsletter by sharing it with a friend!*