

Mr. Norm Labbe
Superintendent
Kennebunk, Kennebunkport and Wells Water District
PO Box 88
Kennebunk, ME 04043

Re: Proposed Sale of Water to Nestlé Waters North America

To Mr. Labbe,

We understand that there is a hearing and vote on June 23, 2008, regarding the proposal of the Kennebunk, Kennebunkport and Wells Water District (KKW) to sell 432,000 gallons per day of water to Nestlé Waters North America (Nestle). The undersigned organizations have significant concerns with the proposed sale, as detailed below.

Our primary issue with the proposed sale is its potential effect on the future health of Branch Brook and its streamflow levels and native fish populations. As you know, the stretch of Branch Brook below the KKW reservoir routinely dries up during the late summer and early autumn months, and, generally experiences unnaturally low or altered flows throughout the year. Our respective organizations believe that the current state of the law in Maine requires that if KKW carries out this transaction with Nestle, it will be then required to release ecologically protective streamflows below the reservoir. We explain further below.

After several years of work by the Department of Environmental Protection (DEP) and interested stakeholders, and following several statewide droughts, the legislature passed a bill in 2002 that resulted in Section 470-H (In-stream flow and water level requirements; rules) of the Maine Revised Statutes. Among other things, this statute required that “[t]he board shall adopt rules that establish water use requirements for maintaining in-stream flows and lake or pond water levels that are protective of aquatic life and other uses.” As part of a negotiated agreement with stakeholders, new language was added in 2007 to this section that created an “out” of sorts for water suppliers that could not meet the proposed standards. At the time of negotiation, it was expected that KKW would be one of these users, due primarily to its claim that it did not have enough water to release downstream of the reservoir into Branch Brook to meet the proposed standards. This new language stated that “[t]he board shall incorporate into the rules a mechanism to reconcile, to the extent feasible, the objective of protecting aquatic life and other uses as provided for in this section and the objective of allowing community water systems to use their existing water supplies to provide water service.”

Following five years of continuous work by various state agencies, numerous interested legislators and a large contingent of stakeholders, LD 774, which authorized the implementation of the streamflow standards (Ch. 587. In-stream Flows and Lake and Pond Water Levels), was signed by Governor Baldacci into law in 2007.

Under Chapter 587, there are several manners in which a water supplier can comply with the streamflow standards. For instance, it can meet the default standards set forth in Sections 4-6, it can carry out a site-specific flow study as set forth in Section 7, or it can satisfactorily meet the standards if it is already complying with another regulatory permit or water level order, as set forth in Section 8. It is only after a water supplier demonstrates that it cannot meet any of the different streamflow standards proposed, that it could be eligible for a “Community Water System Withdrawal Certificate” (CWSWC). It is not clear how KKW could do be a candidate for a CWSWC if it could clearly meet the default standards by releasing 432,000 gallons a day below its reservoir.

We negotiated the elements of a CWSWC with KKW, in particular at a meeting at the KKW offices in late April, 2006. As part of the negotiation, we questioned the KKW representative as to the steps the company could potentially take to meet ecologically protective streamflow standards in Branch Brook. We were told in no uncertain terms that there was no additional groundwater available, that there was no additional reservoir water available, that conservation measures and demand management were fully implemented, and that leak detection, limits on outdoor watering and other measures had been fully exhausted. In short, the message we received was that KKW had no additional water to spare to release downstream into the dewatered section of Branch Brook. If this situation has changed with the purchase of the Wells Barren land, then KKW has an obligation under law to meet streamflow standards in Branch Brook. The sale to Nestle cannot interfere with this legal obligation.

The elements of a CWSWC are detailed in Section 1(D) of Chapter 587, which states, in part, that “[e]xcept as provided herein, Community Water Systems must comply with the applicable flow and water level requirements established in sections 4, 5, 6, 7 or 8 of this chapter. Notwithstanding this, and for the purpose of any enforcement action under this chapter, these requirements will not apply to an existing Community Water System operating within its system design capacity providing that (1) the Community Water System, so operating, **cannot attain the applicable requirements,** and (2) the Community Water System has received, and is operating in accordance with, or is otherwise satisfying the requirements of, a Community Water System Withdrawal Certificate issued by the Department. A Community Water System Withdrawal Certificate will be issued by the Department to any existing Community Water System that demonstrates that it cannot operate at its system design capacity and attain the applicable flow or water level requirements of this chapter.”

Section 1(D) ends with the statement that “[t]he intent of the certificate process shall be to accommodate needs of Community Water Systems while striving to move towards achievement of water quality standards.” It is not the stated or implied intent of the CWSWC process to accommodate the needs of water suppliers to sell water commercially out of watershed. The two principal factors in the CWSWC process are reliable drinking water supplies for residents and healthier streamflow levels. Once those interests are taken care of, then a sale such as that proposed could be considered, but never before.

In conclusion, if KKW does indeed now possess a surplus of water, such that it could sell some to Nestle, it must also meet downstream flow requirements on Branch Brook. Not doing so would be contrary to law, and fly in the face of nearly a decade of work by the legislature, the DEP, and dozens of stakeholders. Before you finalize this sale with Nestle, we recommend that you consult with your hydrologists to determine if water is available to do both. If not, under Chapter 587, the health of the watershed and protective streamflows always supersede bottled water sales.

Please feel free to contact us with any questions.

Sincerely,

Kirt Mayland, Esq.
Director of the Eastern Water Project
Trout Unlimited

John Burrows
Maine Coordinator
Atlantic Salmon Federation

Bill Townsend
President
Maine Rivers

Cc: Senator John Martin
Representative Theodore Kaufman
Representative Christopher Babbidge

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