

An Open Response to Testimony at Congressional Gov Oversight and Domestic Policy Subcommittee Hearing, Chaired by Congressman Kucinich, Dec. 12, 2007.

Community and Environmental Risks of Bottled or Containerized Water

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Following is a summary of key points and comment on testimony before Subcommittee on Domestic Policy and Governmental Oversight, Dec. 12, 2007:

1. Increased federal role in existing federal water programs, such as the Clean Water Act regarding water quality and wetlands, funding for US Geological data, mapping, and monitoring, and oversight of state and local regulations and decisions. If this is done, which it should be according to all panelists, the federal government must impose minimum standards that (1) protect flows and levels, now and in the future, including uncertain effects of global warming or climate change, from diminishment where water is extracted and/or diverted for sale somewhere else; (2) impose a no draining or adverse impact on wetlands or navigable waters protected by the Clean Water Act, including the jurisdiction asserted by Congress under the Constitution; (3) demand watershed planning, consideration of sufficient data gathered by USGS and the states, through such increased funding, and minimum standards, before any permit or approval or allowed use or sale is made of water in a community.

2. IBWA and Nestlé support the 21st Century Water Commission Act, presumably to push issues there, place them under study, and then control the larger questions, leaving to states to regulate with their own standards that would be based on science and the principle of sustainability. It is unclear what "sustainability" means -- economic sustainability, other uses, aquatic organisms, or public uses of the water -- but largely IBWA and Nestlé would support the idea of "multiple uses" a principle used by USDA in it's the management of national forests. This means, as noted by IBWA, the idea of equal access or "all groundwater users should be treated equally."

The trouble with this, is that it erases priorities and preferences, inherent in water law, that protect water as a public commons and prefer its use stay in watersheds where it flows and supports life. It also blurs the distinction between water "use" and water "sale." The law would treat all uses the same and as correlative to another use common in a watershed. But the idea of "sale" of water as a product triggers two differences:

One, it sets a precedent that the "sale" of water somewhere else is the same, i.e. "equal" to all other uses; that said, the common law idea that use is connected to land, not severed such as a sale, would be lost, and states, the nation, and local governments would have less ability to regulate in the future, and trade laws or agreements may also make it more difficult for governments, property owners, and businesses, and citizens to compete against the increased continental or global demand for water and water diversions and exports.

Two, groundwater and surface water are one, and surface waters are protected under state law by the public trust doctrine, which limits diversion and sale of water out of watersheds for private purposes, as opposed to primarily public purposes; again, the idea that the "sale" of water, as a product, as opposed to use of water in a product like Coca Cola or Pepsi, blurs the risk of erasing legal principles by inadvertent, or perhaps in this case intentional, legal framework. The preferences and priorities in the use of water with land or in a community inherent in owning property or being a member of a community should not be leveled or made no more than equal to the sale of water under any circumstances. The nation, states, and local governments will send the wrong message to the thirsty world in the midst of water crises local, regional, and global.

3. IBWA and Nestle's push for "sustainable use" standards is not stewardship, it makes water a product and relaxes standards to the lowest common denominator among competing users, including water in place, which is the unpolluted or preexisting condition or status quo of a yet to

be harmed environment. It appears they want the loose relaxed rule, and at state level to avoid federal minimum standards, and they likely will push for that before Congress.

4. "Spring water" as defined by the FDA should be expanded, so that for the sake of marketing "spring water" on a label, headwaters, wetlands, and streams are not seriously affected or harmed.

This was one of the major problems causing the harm in Michigan Citizens for Water Conservation v Nestlé Waters North America, 709 NW2d 174 (MI Ct of App., 2005). Nestle's representative testifying at the hearing, Ms. Heidi Paul, stated that the condition of the "mudflat" in the Dead Stream was not caused by Nestle.

However, a trial court and two appellate courts in the MCWC v Nestlé case found harm, including at the mudflats where prior to pumping there was water in the stream, even during natural low flows and levels. As Dr. Hyndman correctly testified, thus impeaching Ms. Paul, the mudflat and exposed bottomland was due to the natural low flows AND Nestle's continued pumping under such conditions.

Ms. Paul implied that Nestlé would halt pumping if the company violated "sustainable use" principles. First, given sound science, arduously considered and argued over during 19 days of trial in that case, Nestle's pumping reduced stream flow by over 27% for a large stream segment, dropped levels by 2 to 4 inches, and dropped the levels of two lakes by 4 to 6 inches, which during natural seasonal or cyclical lows, makes the difference between public use, fishing, and the integrity of the stream or harm or loss of aquatic organisms. The stream has narrowed and wetland edges and bottomlands have been invaded by plant species. Second, if, looking at the photographs, the condition of a stream show exposed bottomlands, and Nestlé has not or did not halt pumping, then what good or what stewardship is done under "sustainable use" principles?

5. The Great Lakes Compact, testified to at the hearing, exemption of bottled water under 5.7 gallons from the ban on diversions sets a legal precedent, acknowledging water as a product, and it could set into motion a domino-effect, where water exporters will claim the 5.7 gallon limit is arbitrary, since water extraction and impact are the only issues, which is what Nestlé and IBWA argue for the justification of treating all water users as equal. The point is they are not equal. The bottled water exemption or sale out of watersheds is different, because it establishes a precedent under the law when viewed by others; there is no Coca Cola law, but there are water and public trust law principles. Too, contrary to Professor Hall's testimony, the compromised standards at the state level to regulate impacts are fairly weak, despite the intentions of the Compact negotiators, and they do not address the common law, public trust, or water as a commons, or the legal percent problem in expanding the privatization (right to withdraw for sale) of water.

6. Public participation seemed to be acknowledged, or at least there was no objection by the panelists. The problem is this. There needs to be data and characterization of aquifers and watersheds, water use data, and monitoring for two years minimum, before any use or export of water like bottled water should be approved. Moreover, the standards have to protect existing water flows, levels, environment, and existing uses, such as agriculture and businesses, tourism, recreation in the community. There should be a citizen suit law that grants rights to affected persons and communities to enforce minimum standards to protect flows, levels, and the public trust in water. And, the burden of proof should be on the water extractor or marketer, not the citizens or community. Those who seek to profit must bear the costs, all costs, even if it means the internalization of all costs results in no approval.

7. Not enough testimony addressed public ownership and control issues, and how bottled water moves away from this. This is fundamental and inseparable to impact issues. Further, there are very good reasons in the common law of most states, Texas and Maine aside, that as a matter of property or public trust limit the legal right to divert or sell water in the first place. Why relax or ignore these limitations, when these are fundamental in the property rights of all. This means, that if there is no right to divert or sell, or it is limited by common law, then when a state or

local government regulates, they won't be trounced by takings, commerce clause, or trade law or agreement arguments, as noted in paragraph 2 above.

8. Federal oversight could also assure that states do not weaken the public trust doctrine by allowing private sale of water under improper circumstances. States when admitted to the US received all waters, subject to a public trust in favor of citizens, in addition to common law property rights or limitations. Thus, while Congress cannot for this reason take back title to the water or invade the public trust of citizens or states, it can make sure that states do not relax or violate the underlying principles under which states receive sovereign ownership and control of these waters. Most all, including IBWA and Nestles, seemed to recognize that these matters are for the states to decide. But this doesn't give the states the right to destroy the public trust, as states are bound by it as a condition of statehood.

Thank you.

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