



State Water Resources Control Board

April 23, 2021

CERTIFIED MAIL

In Reply Refer to:
VV: INV 8217

Larry Lawrence
Natural Resources Manager
Nestlé Waters North America, Inc.
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Ontario, CA 91761

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Robert E. Donlan
Ellison Schneider Harris & Donlan LLP
2600 Capital Ave., Suite 400
Sacramento, CA 85816

CERTIFIED NO. 7004 2510 0003 9148 2264

Dear Mr. Lawrence and Mr. Donlan:

NOTICE OF REVISED REPORT OF INVESTIGATION AND DRAFT CEASE AND DESIST ORDER FOR NESTLÉ WATERS NORTH AMERICA, INC. FOR UNAUTHORIZED DIVERSION AND THREATENED UNAUTHORIZED DIVERSION FROM STRAWBERRY CREEK, SAN BERNARDINO COUNTY

Enclosed are: (1) a revised Report of Investigation and (2) a draft Cease and Desist Order (CDO). The draft CDO relates to alleged unauthorized diversions and threatened unauthorized diversions from Strawberry Creek in San Bernardino County by Nestlé Water North America, Inc. (Nestlé). This letter serves as notice of the intent of the State Water Resources Control Board (State Water Board), Division of Water Rights (Division) to proceed with formal enforcement against Nestlé.

NESTLÉ HAS 20 DAYS FROM RECEIPT OF THIS NOTICE TO ACT. THIS MATTER REQUIRES NESTLÉ'S IMMEDIATE ATTENTION.

The Report of Investigation, draft CDO, and other related documents referred to in this correspondence can be found on the State Water Board website at the following web address: https://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/nestle.html

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

1001 I Street, Sacramento, CA 95814 | Mailing Address: P.O. Box 100, Sacramento, CA 95812-0100 | www.waterboards.ca.gov

VIOLATIONS

The violations and threatened violations are described in the enclosed draft CDO and the Report of Investigation (ROI) attached to the pleading. The ROI contains revisions from a ROI issued December 20, 2017 (2017 ROI). The 2017 ROI notified the complainants and Nestlé that they could submit supporting evidence if they disagreed with the 2017 ROI's conclusions and recommendations. The complainants, Respondent, and other parties submitted significant new information that warranted certain revisions to portions of the 2017 ROI, and Division staff prepared a revised ROI (Revised ROI). The Revised ROI includes Division staff's analysis, conclusions, and recommendations as they pertain to Nestlé's diversion or use of water. The Division received other information and comments in response to the 2017 ROI that did not result in revisions to the ROI, and these are addressed by Division staff in the attached Responses to Comments document.

A summary of conclusions in the Revised ROI is as follows:

1. Nestlé's claim to a pre-1914 water right that originates from an 1865 possessory claim by David Noble Smith is not valid because the possessory claim only established a riparian right to water. Nestlé's claim to a pre-1914 water right, whether based on the David Noble Smith possessory claim or based on acquisition of land identified in the 1930 title company report, is not valid for Nestlé's current appropriative diversion and use of water from the San Bernardino National Forest. Water was bottled within the Arrowhead Hotel property, but this was a riparian use and not an appropriation.
2. Nestlé may claim an appropriation of up to 7.26 acre-feet annually (AFA) under a pre-1914 basis of right, based on a 1909 contact to appropriate up to 7.26 AFA for delivery to a company with bottling facilities in Los Angeles. This is the earliest Division staff could identify an appropriation or plan of development. The larger bottling plant that opened in downtown Los Angeles in 1917 could not expand the pre-1914 appropriation because it was not part of the originally contemplated plan of development.
3. Nestlé likely has an appropriative groundwater claim to an unknown amount of percolating groundwater from Boreholes 7, 7A, 7B, 7C, 10, 11, and 12 that would not have flowed in a natural surface channel elsewhere in the watershed. Division staff estimates that up to 52% of the water from Boreholes 7, 7A, 7B, and 7C and up to 100% of the water from Boreholes 10, 11, and 12 may be percolating groundwater. Division staff acknowledges that these percentages are based on the limited available information at the time of the investigation and may be revised if new information becomes available.

4. Nestlé's diversions and use of water greater than 7.26 AFA during a calendar year consisting of the combined diversions from Spring Tunnels 2, 3, and 7 and Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C that are within the permitting authority of the State Water Board are unauthorized diversions. At this time, Division enforcement staff does not have information on any mitigation measures implemented by Nestlé to prevent unauthorized diversions.
5. While Nestlé may be able to claim a valid basis of right to some water in Strawberry Canyon, a significant portion of the water currently diverted by Nestlé appears to be diverted without a valid basis of right.
6. Nestlé cited the stipulated judgment in *Del Rosa Mutual Water Company v. D.J. Carpenter, et al.*, No. 31798, San Bernardino County Superior Court, October 31, 1931 (*Del Rosa Judgment*), as a basis of right. While the parties to the *Del Rosa Judgment* agreed not to restrict Nestlé's predecessor in interest from taking and exporting water from the East Twin Creek watershed, they did not recognize that Nestlé's predecessor in interest held any water rights either. The diversion and use of water recognized in the *Del Rosa Judgment* would have required a permit insofar as it was based on an appropriation initiated after 1914 and within the State Water Board's permitting authority. Furthermore, the Board was not a party to the *Del Rosa Judgment*, and while judgments warrant consideration, they only bind those who were parties.
7. Nestlé is not precluded from applying for a water right permit for water under the right recognized in the *Del Rosa Judgment*. Because the Santa Ana River Watershed was declared fully-appropriated in 1964, the actual determination of water availability and whether Nestlé could now obtain an appropriative water right would occur during the water right permitting process.
8. The US Forest Service issued a new SUP to Nestlé on June 27, 2018 for the extraction and transmission of water using existing facilities within the San Bernardino National Forest. The SUP requires studies, monitoring, and adaptive management measures that will characterize and mitigate the impact of Nestlé's diversions on public trust resources in Strawberry Canyon. The SUP has a five-year term, with an initial permit term of three years and discretionary annual permits for two additional years. The Adaptive Management Plan (AMP) studies conducted by Nestlé under the SUP are ongoing for a period of three years, and data and information from these studies may provide a better understanding of the hydrogeology of the Strawberry Canyon watershed sources.
9. There is insufficient information to determine if Nestlé's authorized diversions cause injuries to public trust resources that outweigh the beneficial use.

CEASE AND DESIST ORDER

The State Water Board may order any person or entity to cease and desist from any actual or threatened unauthorized diversion or use of water subject to the water right permitting and licensing authority of the State Water Board.¹ The draft CDO alleges that Nestlé is subject to a CDO for the unauthorized diversion or use of water or threatened unauthorized diversion or use of water from Spring Tunnels 2, 3, and 7, Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C. The draft CDO would order Nestlé to take the following actions:

1. Immediately cease all unauthorized diversions of water within the State Water Board's permitting authority until demonstrating, to the satisfaction of the Deputy Director, a valid basis of right. Unauthorized diversions occur if, during a calendar year, the total quantity of water that the Diverter diverts and uses from Spring Tunnels 2, 3, and 7 and Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C is greater than 7.26 acre-feet of water that is subject to Division 2 of the Water Code, although this criteria may be revised based on findings of the Deputy Director in Directives 6 and 7 of this Order.
2. No less than 30 days after issuance of this Order:
 - a. Update ownership of Groundwater Recordations.
 - b. File a Statement of Water Diversion and Use, pursuant to Water Code section 5101, for any diversion requiring a statement.
3. No less than 180 days after issuance of this Order, submit a report with evidence acceptable to the Deputy Director demonstrating implementation of Directive 1 of this Order. The report must include a description of the methods used to determine that no more than 7.26 acre-feet of water within the State Water Board's permitting authority has been diverted annually from Spring Tunnels 2, 3, and 7 and Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C each calendar year.
4. By June 30 of each year, submit a monitoring report for the previous calendar year to report the daily, monthly, and annual diversions of water within the permitting authority of the State Water Board from Spring Tunnels 2, 3, and 7 and Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C. This report is not required to the extent the information is duplicative of information in the report submitted in compliance with Directive 3 of this Order.
5. When a report for each study conducted for the US Forest Service SUP is provided to the US Forest Service, provide a copy to the Division.

¹ Water Code § 1831, subd. (d)(1)

6. Within 180 days of completing studies conducted for Objectives 1 and 2 of the US Forest Service SUP AMP, submit a report more precisely determining the amount of flow at Spring Tunnels 2, 3, and 7 and Boreholes 1, 1A, 8, 7, 7A, 7B, and 7C that is subject to the permitting authority of the State Water Board, based on information and analysis from the studies. If this determination is infeasible, the Diverter must explain the infeasibility. The Deputy Director may, based on a review of that report, refine the conclusions of the revised ROI regarding how much water diverted at each POD is subject to the permitting authority of the State Water Board.

In addition, pursuant to Water Code section 1051, the draft CDO would order Nestlé to take the following action:

7. Within 180 days of completing studies conducted for Objectives 1 and 2 of the US Forest Service SUP AMP, submit a report more precisely determining the amount of flow at Boreholes 10, 11, and 12 that is spring water that if not diverted would have otherwise surfaced naturally. If this determination is infeasible, the Diverter must explain the infeasibility. The Deputy Director may, based on a review of that report, refine the conclusions of the revised ROI regarding how much water diverted at each POD is subject to the permitting authority of the State Water Board.

If Nestlé chooses to accept the draft CDO directives, please provide written confirmation of its intent to comply with the draft CDO. If the CDO is adopted and Nestlé fails to comply, the State Water Board may consider additional enforcement of the CDO without further notice. Such enforcement may include the imposition of administrative civil liability of up to \$10,000 for each day of noncompliance during a period when the Governor has issued a proclamation of a state of drought emergency, \$1,000 for each day of noncompliance at all other times, or referral to the Attorney General for further action.

RIGHT TO A HEARING

If Nestlé chooses to request a hearing, **Nestlé must submit a written request for hearing within 20 days of receiving this notice.** A hearing request may be made via e-mail by submitting the request to EXEC-AdminHrgOffice@Waterboards.ca.gov. Nestlé may also request a hearing by mailing the request to the following address:

Attn: Administrative Hearings Office
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

If Nestlé requests a hearing, a hearing will be scheduled with the Administrative Hearings Office, or a designated State Water Board hearing officer. Nestlé will be notified of the hearing date and the

submittal deadlines as soon as they are scheduled. Prior to the hearing, Nestlé will be required to submit any written testimony and other evidence it would like the Board to consider. If Nestlé fails to come into compliance or request a hearing within 20 days of the date it receives this notice, the State Water Board will adopt the CDO.

If Nestlé has any questions regarding this notice or draft CDO, please contact Victor Vasquez, Senior Water Resource Control Engineer, at (916) 323-9407 or via e-mail at victor.vasquez@waterboards.ca.gov.

Sincerely,



Julé Rizzardo, Assistant Deputy Director
Division of Water Rights

Enclosures: 1) Revised Report of Investigation
2) Response to Comments
3) Draft Cease and Desist Order

cc: (without enclosures, continued on separate page)

ec: (without enclosures, continued on separate page)

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