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— PLLC —

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March 12, 2018

**VIA: ELECTRONIC MAIL and OVERNIGHT COURIER**

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*Re: NWNA's Second Response to the State Water Resources Control Board's Report of Investigation*

Dear Mr. Vasquez and Mr. Petruzzelli:

Nestlé Waters North America Inc. ("NWNA") is pleased to provide the State Water Resources Control Board ("SWRCB" or "Board") with its second response to the SWRCB's Report of Investigation ("ROI") issued on December 21, 2017. Pursuant to the Board's request, NWNA submitted a Preliminary Response to the SWRCB's ROI on February 9, 2018 ("Preliminary Response"), which described the legal bases for its diversions in Strawberry Canyon. Historical records, a superior court adjudication, and other substantiated information, document appropriate water rights from the tributaries of East Twin Creek prior to 1914 by NWNA's predecessors-in-interest.

The SWRCB also requested that NWNA submit an "interim compliance plan" 60 days after the issuance of its ROI<sup>1</sup> for its review and approval to ensure that NWNA's diversions do not

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<sup>1</sup> The SWRCB agreed to extend the initial deadline for responses to its ROI to February 9, 2018. In a subsequent communication, SWRCB agreed to NWNA's proposal to submit its second response on March 12, 2018.

exceed the amounts allowable under any valid basis of right. As indicated in our Preliminary Response, Nwana believes it has clearly demonstrated sufficient legal grounds to divert at least 271 acre-feet per year ("AFY") of surface water from Strawberry Creek and groundwater within Strawberry Canyon. Based upon Nwana's reported diversions in accordance with state law since 1947, the average annual spring water collections through the Nwana pipeline is 192 AFY, well below the 271 AFY we believe we are legally entitled to capture. Thus, we do not believe it is necessary, at this time, to file an interim compliance plan.

While Nwana awaits feedback from the SWRCB regarding the findings and conclusions concerning our water rights as set forth in its Preliminary Response, Nwana would like to provide the Board with information about Nwana's study of stream flows, and riparian habitat associated with those flows, in Strawberry Canyon. This information is provided below.

### ***Measurement and Report of Diversions from Strawberry Creek***

#### **1. Classification of Water Reported under State Groundwater Recordation Act**

Since the adoption of the Groundwater Recordation Act in 1955, Nwana has consistently reported its annual diversions from Strawberry Canyon to the appropriate reporting authority. The water has also been consistently classified as "groundwater" as defined in the California Water Code § 5000(a), because all of the water collected by Nwana is collected from beneath the surface of the earth.<sup>2</sup> Nevertheless, based upon the SWRCB's legal analysis in its ROI, the SWRCB acknowledges that some of this water is surface water, not groundwater. Or, alternatively, the SWRCB states that the water may be classified as "developed water" that may, or may not, contain both surface water and percolating groundwater. The uncertainty surrounding the SWRCB's classification of spring water makes reporting the precise nature of the water collected extremely difficult, if not impossible. Nwana, therefore, suggests that the Nwana and SWRCB work cooperatively to establish reporting protocols that will report the total volume of water collected, but leave classification to a later time when the classification issues have been resolved.

#### **2. Future Measurement and Flow Control**

In 2017, Nwana installed improved electronic meters at each of five spring locations and a data communication system that allows for monitoring of flows at each of Nwana's catchments. All flow meters are calibrated annually.

The spring water is collected from ten horizontal boreholes and two engineered tunnels, constructed and maintained by Nwana. Because the spring water collection system collects water that naturally flows to the surface without pumping, collections are directly impacted by the variation of flows at each spring site throughout the year. For example, surface water collections

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<sup>2</sup> No pumps or any other means of external force are used to capture the water that is collected from Nwana's spring sites in the Canyon. The spring water is then conveyed by gravity through its pipeline to storage tanks located on private property.

can increase dramatically due to a local storm event. With the installation of the meters at each spring site and the ability to “shut-in” the boreholes, NWNNA will be able to adjust its collection of water from the boreholes to ensure that it does not exceed its legally recognized water rights under California law.

NWNNA is prepared to work with the SWRCB to establish a protocol to manage flows at the various collection points to ensure that they do not exceed a total aggregate flow of 271 AFY. A similar regimen is not currently possible at the two tunnels that serve as collection points for springs 2 and 3 and any construction activity in the SBNF will require its approval.

As acknowledged in the SWRCB’s ROI, the nature of spring water collections and the legal definitions of surface water and groundwater under California law, make it difficult to distinguish between the two types of water collected at NWNNA’s spring sites. In addition, no data presently exist to reasonably determine the fraction of developed water at each tunnel and borehole that is surface water and the fraction that is groundwater. NWNNA is currently preparing an investigation and monitoring plan that will include a methodology to determine the relative proportions of developed water, which will include a combination of standard hydrogeological methods to accurately characterize flow from each of the spring sites. Testing will include a combination of shut-in tests, flow tests, diurnal monitoring, and creek flow measurements. Depending on the data generated during testing, analysis of the results may be performed using analytical methods or numerical models. This methodology will provide data and information about springs 1, 1A, 2, 3 and 8 --and if deemed useful by the SWRCB, may also generate additional data at spring sites 10, 11, 12 and the 7’s.

### ***The Adaptive Management Plan***

As the Board is aware, NWNNA’s collection of water occurs in the San Bernardino National Forest (“SBNF”) through a series of boreholes and engineered tunnels that ultimately deliver the water to a 4-inch diameter pipeline for transportation to the bottom of Strawberry Canyon. Because the pipeline crosses federal public land, NWNNA is required to obtain a Special Use Permit (“SUP”) authorizing a five-foot right-of-way (“ROW”) for the pipeline approximately 23,020 feet in length. According to the SBNF, the first SUP for the pipeline was issued in 1929.<sup>3</sup>

As part of the permit renewal process for SUP #7285, NWNNA voluntarily prepared an Adaptive Management Plan (“AMP”), which is intended to provide objective data that may be used to manage water collection and to gather information in the Strawberry Canyon environment. The data collection anticipated to be derived from the AMP will also yield important information about streamflow and riparian conditions in Strawberry Canyon. NWNNA prepared the AMP based on information and data gained from 31 separate biological and hydrological studies and reports

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<sup>3</sup> The last SUP was issued to NWNNA’s predecessor-in-interest by the Forest Service in 1978. Over the decades, the actual right-of-way for the pipeline never changed. NWNNA’s predecessor-in-interest timely applied to the Forest Service to renew its 1978 Permit by letter dated May 12, 1987. All fees have been paid and NWNNA remains in full compliance with its Permit while it awaits its renewal by the Forest Service.

conducted in the Project Area<sup>4</sup> during 2016 and 2017. NWNA submitted its Final Draft AMP to the SBNF on December 20, 2017 and is awaiting comments.<sup>5</sup> A general description of the AMP is provided below.

The AMP framework includes both interim efforts to address local or regional climatic conditions, as well as the research necessary for the development of a long-term AMP that implements science-based triggers and actions. It provides for monitoring and data collection to be conducted which will establish scientifically valid baseline conditions and characterize the relationship between NWNA's collection of spring water and current streamflow and riparian conditions in Strawberry Canyon. Like many of the canyons in the front country of the San Bernardino Mountains, streamflow is intermittent and varies widely in response to seasonal and regional climatic changes. Specific monitoring protocols must be established to understand the natural conditions in the Canyon as well as the impacts, if any, of diversions from Arrowhead Springs.<sup>6</sup> Over a two-year period, NWNA conducted 31 studies and reports and undertook an intensive data collection program to characterize current conditions in Strawberry Canyon and identify key indicators of stream and riparian health, and the best locations to monitor those conditions.<sup>7</sup>

NWNA's AMP is intended to be modified to incorporate site-specific observations and to revise triggers, actions, and monitoring to further protect existing riparian resources as additional site-specific data become available. The AMP is subject to review and comment by the USFS, which have not been received to date. The term of the NWNA-proposed AMP is designed to be coterminous with the SUP's term. NWNA is prepared to provide the information it develops through its AMP to the SWRCB and to supplement that information with additional reports and operating criteria for its spring sites as described above.

NWNA has been actively working with the Forest Service since February 2015 to assess the potential impact of its activities in Strawberry Canyon on water resources and the flora and fauna dependent upon it. We recognize that many of the written comments submitted to the Board in response to the ROI concern this relationship and a desire to develop a better understanding of it particularly during drought conditions. NWNA is working with the Forest Service to address these concerns as part of the SUP renewal process, which includes the development of an AMP to achieve these goals. NWNA's draft AMP may be viewed at <https://www.nestle-watersna.com/content/documents/pdfs/adaptive-management-plan.pdf>.

NWNA looks forward to responding to any requests from the SWRCB for additional information and data that arise from review of this submission and we look forward to receiving feedback from the SWRCB staff on our Preliminary Response.

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<sup>4</sup>See USFS Map of the Project Area at:

[https://www.fs.usda.gov/nfs/11558/www/nepa/103330\\_FSPLT3\\_3032538.pdf](https://www.fs.usda.gov/nfs/11558/www/nepa/103330_FSPLT3_3032538.pdf)

<sup>5</sup> NWNA provided a copy of the AMP to the SWRCB on December 21, 2017.

<sup>6</sup> "Arrowhead Springs" refers to the springs located in Strawberry Canyon from which NWNA collects spring water.

<sup>7</sup> A list of the studies conducted by NWNA in 2016 and 2017 may be found in its AMP, pp. 16-17.

Sincerely,



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