



State Water Resources Control Board

DEC 20 2017

CERTIFIED MAIL

In Reply Refer to:
VV: INV 8217

Larry Lawrence
Natural Resources Manager
Nestlé Waters North America, Inc.
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Rita Maguire, Esq.
Maguire, Pearce & Storey, PLLC
2999 North 44th Street, Suite 650
Phoenix, AZ 85018

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Dear Mr. Lawrence and Ms. Maguire:

REPORT OF INVESTIGATION AND STAFF FINDINGS OF UNAUTHORIZED DIVERSION REGARDING COMPLAINT AGAINST NESTLÉ WATERS NORTH AMERICA, STRAWBERRY CREEK, SAN BERNARDINO COUNTY

The State Water Resources Control Board (State Water Board), Division of Water Rights (Division) received several water rights complaints against Nestlé Waters North America (Nestlé or NWNNA), starting on April 20, 2015. The complaint allegations included diversion of water without a valid basis of right, unreasonable use of water, injury to public trust resources, and incorrect or missing reporting, all regarding Nestlé's diversion of water from springs at the headwaters of Strawberry Creek in the San Bernardino National Forest (SBNF) for bottling under the Arrowhead label. Many of the complainants emphasized their concerns about the impacts of Nestlé's diversions during California's recent historic drought. Nestlé reports diversions under 11 groundwater records under the State Water Board's Groundwater Recordation Program. Over the period from 1947 to 2015, Nestlé's reported extractions from the springs in the SBNF have averaged 192 acre-feet, or 62.6 million gallons, per year. Nestlé claims several bases of right for the diversion and use of water from the Strawberry Creek Watershed.

Division staff completed their investigation into the allegations. The attached Report of Investigation (ROI) includes Division staff's analysis, conclusions, and recommendations as they pertain to Nestlé's diversion and use of water. Conclusions and recommendations from the ROI are summarized below.

FELICIA MARCUS, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

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The ROI can additionally be found at the following web address:

https://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/nestle.html.

Based on the Report of Investigation and as described in more detail below, Nwana's current operations do not appear to be supported by rights to the diversion or use of water exceeding 26 acre-feet per annum (AFA) and, accordingly, any diversions in excess of that amount may be unauthorized. Nwana must limit its appropriative diversion and use of water to 26 AFA unless it has evidence of valid water rights to water within the permitting authority of the State Water Board and/or evidence documenting the extent of additional water claimed to be percolating groundwater, as any diversion or use without a valid basis of right is a trespass subject to enforcement actions in accordance with the Water Code.

Based on review of available information, Division staff has concluded the following:

- Nestlé's claim to a pre-1914 water right that originates from an 1865 possessory claim by David Noble Smith is limited to riparian uses and is not valid for Nestlé's current appropriative diversion and use of water from the San Bernardino National Forest;
- Nestlé could claim up to 26 AFA for appropriative diversions from Indian Springs, including developed water, under a pre-1914 basis of right identified by Division staff based on 1912 plans to bottle water in Los Angeles;
- Nestlé likely has an appropriative groundwater claim to an unknown amount of developed percolating groundwater that would not have contributed to surface flow in a natural channel elsewhere in the watershed;
- 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;
- The Del Rosa Judgment recognized that Nestlé's predecessors had a right to the diversion and use of water from Strawberry Canyon as against a prior water right claimant;
 - The diversion and use of water under the right recognized in the Del Rosa Judgment would have required a permit insofar as it was not based on an appropriation initiated before 1914 or diverted under a claim for groundwater that is not within the State Water Board's permitting authority;
 - Nestlé may be able to seek an exemption from the Declaration of Fully Appropriated Streams (see, e.g., Orders WR 2000-12 and WRO-2002-0006);
- At this time, there is insufficient information to determine if Nestlé's diversion injures public trust resources in such a way that it outweighs the beneficial use.

RECOMMENDATIONS

Division staff recommends that Nestlé immediately cease any unauthorized diversions.

Additionally, Division staff recommends Nestlé take the following actions:

- Within 30 days, for any diversion not subject to a notice filed under Part 5 of the Water Code, submit to the Division an initial Statement pursuant to Water Code § 5101 for:
 - (1) unauthorized diversions; and
 - (2) diversions under any valid pre-1914 claim of right
- A Supplemental Statement must be filed annually for any diversion not subject to a notice filed under Part 5 of Division 2 of the Water Code (i.e., the Groundwater Recordation Program);
- Update ownership of Groundwater Recordations. If annual diversions of groundwater not within the permitting authority of the State Water Board from Strawberry Canyon fall below 25 AFA, reporting under the Groundwater Recordation Program for diversions of groundwater is no longer required.
- Within 60 days, submit an interim compliance plan for Division review and approval to ensure that diversions do not exceed those allowable under any valid bases of right;
- Within 90 days, submit an investigation and monitoring plan for Division review and approval. The investigation and monitoring plan should include:
 - (1) Investigation and monitoring to determine the portion of developed water, if any, that is not tributary to flow in any natural channel and can therefore be diverted without authorization from the State Water Board; and
 - (2) Monitoring of diurnal, seasonal, and other flow variations using industry standard equipment and methods for measuring flow;
- Within 18 months, submit a final report and compliance plan for Division review and approval. The final report should:
 - (1) Determine the amount of water to be diverted that will not be within the permitting authority of the State Water Board;
 - (2) Include a detailed explanation of methods;
 - (3) Include a model for determining how diversions impact or do not impact surface flows, and provide a sufficiently detailed description of the model to allow Division staff to evaluate the model; and
 - (4) Include a final compliance plan.

- For its current operations in the SBNF, if Nestlé wishes to divert water subject to the permitting authority of the State Water Board, i.e., in excess of the 26 AFA for which it likely has a valid pre-1914 claim, it must apply for and receive a water right permit before diverting or using water. While the Santa Ana River is a fully appropriated stream system, Nestlé may seek an exception and choose to apply for a post-1914 water right permit. The application will not be accepted unless Nestlé can demonstrate that there is water available for appropriation.

Other Division staff recommendations:

- Take no further action on the allegations of unreasonable use and injury to public trust resources at this time. If future hydrologic and riparian studies indicate that Nestlé's diversion of water injures public trust resources in a way that cannot be mitigated by implementation of the adaptive management plan in development as part of the US Forest Service Special Use Permit process, the Division should revisit this issue.

Please note that the State Water Board has the authority to initiate enforcement action at its discretion for alleged unauthorized diversion or use of water or alleged waste or unreasonable use of water. Therefore, you should take all necessary actions to ensure that your diversion is authorized, up to and including ceasing unauthorized diversions and/or use.

If any of the parties disagree with the conclusions and recommendations contained in the report, **please submit written supporting evidence within 30 days from the date of receipt of this letter.** Unless compelling evidence is provided to counter the information contained in the enclosed report, Division staff will forward its recommendation to the Assistant Deputy Director for appropriate action.

Thank you for your cooperation and prompt response to the complaint. If you have any questions, please contact me at (916) 323-9407 or via email at Victor.Vasquez@Waterboards.ca.gov. Written correspondence should be addressed as follows: State Water Resources Control Board, Division of Water Rights, Attn: Victor Vasquez, P.O. Box 2000, Sacramento, CA 95812-2000. A copy of this letter will be provided to the complainants and involved parties.

Sincerely,
ORIGINAL SIGNED BY:

Victor Vasquez, Senior WRCE
Sacramento Valley Enforcement Unit
Division of Water Rights

Enclosure: Report of Investigation

cc: (continued on next page)

cc: (w/out enclosures)

League of Women Voters
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San Bernardino County
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Management Division
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