

STAFF SUMMARY FOR FEBRUARY 6, 2019

22. NON-REGULATORY REQUESTS**Today's Item****Information** ☐**Action** ☒

This is a standing agenda item for FGC to act on non-regulatory requests from the public. For this meeting:

- (A) Action on non-regulatory requests received at the Dec 2018 meeting.
- (B) Update on pending non-regulatory requests referred to FGC staff or DFW for review.

Summary of Previous/Future Actions

(A)

- FGC receipt of requests Dec 12-13, 2018; Oceanside
- **Today's action on requests Feb 6, 2019; Sacramento**

(B)

N/A

Background

FGC provides direction regarding requests from the public received by mail and email and during public forum at the previous FGC meeting. Public requests for non-regulatory action follow a two-meeting cycle to ensure proper review and consideration.

- (A) **Non-regulatory requests.** Non-regulatory requests scheduled for consideration today were received at the Dec 2018 meeting in one of three ways: (1) submitted by the comment deadline and published as tables in the meeting binder, (2) submitted by the late comment deadline and delivered at the meeting, or (3) received during public comment.

Today, six non-regulatory requests received at the Dec 2018 meeting are scheduled for action. Exhibit A1 summarizes and contains staff recommendations for each request; individual written requests are provided as exhibits A2-A6.

- (B) **Pending non-regulatory requests.** This item is an opportunity for staff to provide a recommendation on non-regulatory requests that were scheduled for action at a previous meeting and referred by FGC to staff or DFW for further review.

No items are scheduled for action today.

Significant Public Comments (N/A)**Recommendation**

- (A) **FGC staff:** Adopt staff recommendations for Dec 2018 non-regulatory requests (Exhibit A1).

STAFF SUMMARY FOR FEBRUARY 6, 2019

Exhibits

- A1. [List of non-regulatory requests and staff recommendations for requests received through Dec 13, 2018](#)
- A2. [Letter from Blake Alexandre regarding private lands management practices for Roosevelt elk, received Oct 10, 2018](#)
- A3. [Email from Anita Youabian requesting an end to driftnet fishing, received Nov 8, 2018](#)
- A4. [Letter from Rachel Doughty requesting an investigation of Nestlé Waters North America, received Nov 26, 2018](#)
- A5. [Letter from Robert Larkins regarding the use of airguns to take game, received Dec 4, 2018](#)
- A6. [Letter from Dennis Fox requesting discussion of potential changes to muzzleloader regulations, received Dec 4, 2018](#)

Motion/Direction

- (A) Moved by _____ and seconded by _____ that the Commission adopts the staff recommendation for actions on December 2018 non-regulatory requests.

OR

Moved by _____ and seconded by _____ that the Commission adopts the staff recommendations for actions on December 2018 non-regulatory requests, except for item(s) _____ for which the action is _____.

CALIFORNIA FISH AND GAME COMMISSION
Requests for Non-regulatory Action 2018, received through December 13, 2018
Revised 1-30-2019

FGC - California Fish and Game Commission **DFW** - California Department of Fish and Wildlife **WRC** - Wildlife Resources Committee **MRC** - Marine Resources Committee

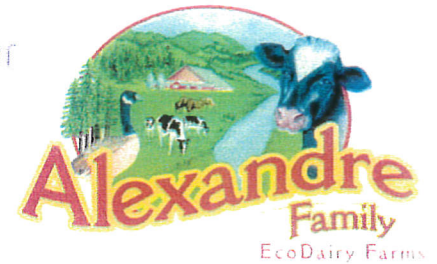
Date Received	Name of Petitioner	Request category (Marine or Wildlife)	Subject of Request	Short Description	FGC Decision	Staff / DFW Recommendations
10/10/2018	Blake Alexandre Alexandre EcoDairy Farms	Wildlife	Private lands management (PLM) and Roosevelt elk	Requests a change in PLM practices concerning Roosevelt elk.	Receipt: 12/12-13/2018 Action scheduled: 2/6/2019	DFW is working with the stakeholder; no further action recommended.
11/8/2018	Anita Youabian	Marine	Driftnet fishery	Requests an end to the driftnet fishery in California.	Receipt: 12/12-13/2018 Action scheduled: 2/6/2019	No action recommended. Legislation passed in 2018 prescribes a process for phasing out this fishing gear.
11/26/2018	Rachel Doughty Greenfire Law	Wildlife	Investigation of Nestlé Waters North America, Inc.	Requests an investigation of and enforcement against Nestlé Waters North America, Inc. for potential violations of California Fish and Game Code Section 1602.	Receipt: 12/12-13/2018 Action scheduled: 2/6/2019	FGC does not enforce Fish and Game Code violations; however, the request was forwarded to DFW. No further action recommended.
12/4/2018	Robert Larkins	Wildlife	Use of airguns to take game	Request to amend regulations to allow expanded use of airguns as a legal weapon for taking game.	Receipt: 12/4/2018 Action scheduled: 2/5/2019	This is a regulatory request; requester was asked to fill out petition form FGC 1. No further action at this time.
12/4/2018	Dennis Fox	Wildlife	Muzzleloading guns	Request for discussion about potential changes to regulations concerning muzzleloading guns.	Receipt: 12/4/2018 Action scheduled: 2/6/2019	This is a regulatory request; requester was asked to fill out petition form FGC 1. No further action at this time.
12/12/2018	Josh Fisher Mike Conroy	Marine	Lobster trap theft	(a) Proposal to change regulations to clarify abandoned trap retrieval provision; it is being abused. (b) Request referral of topic to MRC.	Receipt: 12/12-13/2018 Action scheduled: 2/6/2019	Refer to MRC as a broader discussion of the effectiveness of FMP implementing regulations and any possible revisions that may be warranted. However, do not schedule until DFW's Law Enforcement Division has completed its investigation into the specific abandoned trap retrieval case of reference (currently underway).

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October 4, 2018

2018 OCT 10 AM 10:07

Brad Burkholder
Environmental Program Manager
California Department of Fish and Wildlife
1812 9th Street
Sacramento California



Dear Mr. Burkholder,

We are writing to you today three years into a Private Lands Management (PLM) plan for Roosevelt elk on Alexandre Dairy located in Crescent City California which we implemented to help reduce elk population numbers. Our dairy farm has participated in the PLM program since 2016 with the plan's adoption by the California Fish and Game Commission. We write to you today to plead for the States assistance in helping to properly manage Roosevelt Elk populations on Alexandre Dairy lands and lands adjacent to the dairy by increasing the level of harvest under the Dairy's PLM.

The Dairy supports approximately 2,700 milking and dry cows plus an additional 1,100 other dairy heifers which utilize pasture approximately 10-12 months out of the year depending on weather and livestock age classes. The Dairy also supports a pastured poultry program that feeds approximately 60,000 organic laying hens, producing approximately 160,000 eggs a week for export out of Del Norte County. Our goal has always been to work with nature and not against it, however it has become increasingly obvious that our efforts to help alleviate the continuous pressure by Roosevelt Elk on Dairy lands has not been effective at reducing numbers even with our participation in the PLM, SHARE Program and Northwestern Hunt.

We are pasture based organic dairy farmers who rely on our pastures to support silage and grazing programs all year around. Roosevelt elk have increased so dramatically since their first appearance on the Dairy in 2010, that they are now having a significant impact on our forages.

Year	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008
Population	262	254	195	147	136	97	65	53	43	0	0

The reproductive success rate of Roosevelt elk on Dairy lands is high. The Dairy believes with the high forage quality it produces, lack of predation, and low herd mortality that future growth of the herd cannot be checked soon enough. Overwinter survival appears increasing based on observations by Department biologists. Overall body condition of the elk is very healthy. Cows are weighing in over 1,000 pounds and mature bulls harvested are

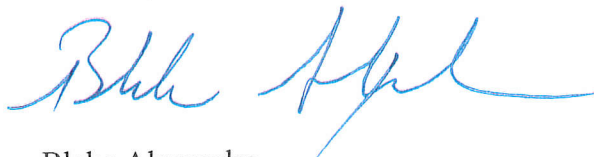
Alexandre EcoDairy Farms
8371 Lower Lake Road
Crescent City, California 9551

commonly however 1,400 pounds. Organic grasses within the pasture are likely the reason for the overall herd health as it appears to be of preference year around in the herd's diet. Indications of heavy browse and other undue range damage by elk has been a factor as the population of the herd has increased rapidly since 2010. There has been a significant decrease in high quantity forage available for the Dairy's milk cows during the winter months, as both the Dairy's livestock and elk compete for forage on the same pastures. It is estimated that the average cow elk is consuming approximately 25 pounds of dry matter a day, and the mature bulls approximately 35 pounds of dry matter per day.

The loss of forage is not the only issue the Dairy is faced with. Tree mortality has been very high. Large pines, Sitka spruce and other coniferous species have been killed during the rut when bulls sharp their horns. Fencing we utilize to control dairy cow grazing is constantly being fixed. Our lead herdsman is repairing 4-5 sections per week throughout the year. This is a significant issue for a pasture based dairy like Alexandre who's entire grazing program is based on a Pasture Promise to our customers and effects 10 grazing groups of cows.

We have worked cooperatively with State Biologist Carrington Hillson to help record what we are seeing and allow State biologist access to our lands 24/7. However, data has not currently helped to elevate our growing problem. We do know that 50% of the Del Norte groups reside on Alexandre Dairy. We feel our local biologists are dedicated to assisting before we are overrun. We strongly believe without a change in the Departments management practices in the near future that the Dairy will not experience any relief from the expanding number of Roosevelt elk.

Sincerely,



Blake Alexandre
Alexandre EcoDairy Farms
707-487-1000

Cc: Senator Mike McGuire
President Eric Sklar, California Fish and Game Commission
Deputy Director Stafford Lehr
Chairman Chris Howard, Del Norte County

Alexandre EcoDairy Farms
8371 Lower Lake Road
Crescent City, California 9551

From: Anita Youabian
Sent: Thursday, November 8, 2018 9:19 PM
To: FGC
Subject: Please Don't Miss Opportunity to End Driftnet Fishery & Protect Ocean Wildlife

California Fish and Game Commission

RE: Please Don't Miss Opportunity to End Driftnet Fishery & Protect Ocean Wildlife

Dear ,

Dear CA Department of Fish & Wildlife, and CA Fish & Game Commission,

I am writing to express my support for California to take all possible actions to end the driftnet fishery happening off our state's coast. For too long, this fishery has been allowed indiscriminately kill ocean wildlife, including endangered species.

Improvements to the fishery have not made the fishery acceptable. Driftnets are still curtains of death. With the advancement of deep-set buoy gear, regulators have a golden opportunity to end the driftnet fishery. I encourage California to do everything it can to stop the slaughter from driftnets.

Like many people, I was disappointed when federal regulators withdrew protections for some of the species most affected by driftnets. I want California to protect the environment, not abuse it. California has a chance now to continue its role of being an environmental leader. Please take action to end the driftnet fishery - California needs to live up to its reputation as a good environmental steward.

Thank you.

Sincerely,
Miss. Anita Youabian



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LAW, PC

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2018 NOV 26 PM 1:00

RACHEL S. DOUGHTY
2550 Ninth Street, Suite 204B
BERKELEY, CA 94710
PHONE: 510.900-9502
EMAIL: rdoughty@greenfirelaw.com
WWW.GREENFIRELAW.COM

November 20, 2018

Ms. Melissa Miller-Henson, Acting Executive Director
California Fish & Game Commission
1416 Ninth Street, Room 1320
P.O. Box 944209
Sacramento, CA. 94244-2090
fgc@fgc.ca.gov

Ms. Leslie MacNair, Regional Manager
California Department of Fish and Wildlife
Region 6, Inland Deserts Region
3602 Inland Empire Blvd, Suite C-220
Ontario, CA 91764
AskRegion6@wildlife.ca.gov

**RE: Petition to the California Fish & Game Commission and California
Department of Fish and Wildlife for investigation of and enforcement against
Nestlé Waters North America, Inc. regarding potential violations of
California Fish & Game Code § 1602**

Dear Director Miller-Henson and Regional Manager MacNair,

This law firm represents the interests of the Story of Stuff Project, a global non-profit organization headquartered in Berkeley, California. On behalf of the Story of Stuff Project, we formally request an investigation into Nestlé Waters North America, Inc. ("Nestlé") for potential violations of California Fish & Game Code section 1602 ("Section 1602") resulting from its extraction of water from the Strawberry Creek Watershed within the San Bernardino National Forest.

1. About the Story of Stuff Project

The Story of Stuff Project has been actively involved in environmental sustainability and resource conservation efforts since its founding in 2008. The Project has more than 30,000 members in California, 800 of whom live in San Bernardino County near the San Bernardino National Forest, which is managed by the U.S. Forest Service. The Project is deeply troubled by Nestlé's continuing diversion and extraction of water from the Strawberry Creek Watershed



within the San Bernardino National Forest to support its for-profit water bottling operation.

2. Section 1602: Lake and Streambed Alteration Agreements

As you know, Section 1602 requires Nestlé to obtain a Lake and Streambed Alteration Agreement (“LSA”) if its ongoing diversion of water resources from the Strawberry Creek Watershed does any of the following:

- Substantially diverts or obstructs the natural flow of any river, stream, or lake;
- Substantially changes the bed, channel, or bank of any river, stream, or lake;
- Uses material from any river, stream, or lake; or
- Deposits or disposes of debris, waste, or other materials containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake.

(See Cal. Fish & Game Code, § 1602.) In order to assess whether an LSA is required in any instance, Section 1602 requires an entity, like Nestlé, to notify the California Department of Fish & Wildlife (“CDFW”) prior to commencing any activity that may cause the impacts identified above. The notification requirement applies to *any* river, stream, or lake, including those that are dry for periods of time (ephemeral/episodic) as well as those that flow year-round (perennial). This includes ephemeral streams, desert washes, and watercourses with a subsurface flow. It may also apply to work undertaken within the flood plain of a water body. Therefore, if Nestlé’s diversion of water from the Strawberry Creek Watershed causes alterations to any river, stream, or lake, then CDFW has authority to impose conditions on the project to conserve existing fish and wildlife resources. (*Id.*)

3. Nestlé’s Operations in the Strawberry Creek Watershed

Nestlé’s expansive operation consists of water collection tunnels, horizontal wells, water transmission pipelines, and associated infrastructure within the Strawberry Creek Watershed within the San Bernardino National Forest. Nestlé’s infrastructure was most recently authorized by a special use permit, which expired in the 1980s. On June 27, 2018, the Forest Service authorized Nestlé’s continued occupancy and use of improved water development facilities by approving Nestlé’s application for a new special use permit. I am attaching a copy of the Forest Service’s Decision Memo regarding the Special Use Permit (SUP) for your reference.

In order to approve Nestlé’s SUP, the Forest Service assessed its obligations under the National Environmental Policy Act (NEPA) which requires consultation with CDFW in those areas which are germane to its statutory responsibilities. For your convenience, I am attaching a copy of CDFW’s May 2, 2016, consultation letter to the Forest Service (CDFW Comment). The CDFW comment encouraged Nestlé to “contact CDFW as soon as possible to determine if an LSA may be required for this project” because “the project includes facilities and appurtenances that have been constructed within the bed, bank, or channel of a stream.” (See CDFW Comment, p. 6.) The comment pointed out that Forest Service issuance of a special use permit would not preclude CDFW’s exercise of jurisdiction under Fish & Game Code section 1600, *et seq.*, “should the project anticipate impacts to any streams.” (*Id.*)

Among other concerns about potential impacts, the CDFW comment expressed concern “with the lack of analysis of impacts to biological resources in the proposal and the deferral of analysis to a later date.” (CDFW Comment, p. 2.) Noting that the project implicates several of CDFW’s statutory responsibilities, including review of areas within its jurisdiction under the California Environmental Quality Act (CEQA), the CDFW comment recommended concurrent analysis under NEPA and CEQA (*Id.*, p. 4.) However, the Forest Service conducted no detailed environmental review and based its project decision on a categorical exclusion from NEPA.

In addition to CDFW’s observations and concerns, former Forest Service biologist Steve Loe submitted a public comment during the scoping process that identifies several potential impacts to the Strawberry Creek Watershed’s fish and wildlife resources. Mr. Loe is a representative of the Southern California Native Freshwater Fauna Working Group. In addition to his public comment, on May 2, 2016, Mr. Loe submitted a declaration under oath in federal court in which he identified several measures Nestlé could take to mitigate impacts to fish and wildlife resources in the San Bernardino Forest. Mr. Loe has also charged that Nestlé’s actions result in substantial reduction in flow of Strawberry Creek. I attached Mr. Loe’s comment letter and declaration for your reference.

Despite the evidence of need, as of July 2018, CDFW staff confirmed that Nestlé has neither responded to CDFW’s request to contact it to determine whether an LSA was required for its work in the Strawberry Creek Watershed, nor submitted notification of its intention to alter a lake or streambed as required by Section 1602. This inaction is despite the fact that between 1947 and 2015, Nestlé reported extractions from the springs in the San Bernardino National Forest averaging 192 acre-feet per year. Nestlé’s failure to engage CDFW regarding the necessity of an LSA was no doubt intentional, but investigation is needed to confirm whether, as the Forest Service indicates “water extraction is reducing surface flow in Strawberry Creek.” (FS Decision Memo, p. 8.)

4. Impact to Trust Resources

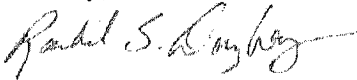
Notably, as the Forest Service worked through its decision-making process regarding the SUP, the California State Water Resources Control Board staff issued its “Report of Investigation and Staff Findings of Unauthorized Diversion Regarding Complaint Against Nestlé Waters North America, Strawberry Creek, San Bernardino County” (ROI) on December 20, 2017. I am attaching a copy of the ROI for your convenience. The ROI concedes that Nestlé’s use of water from the Strawberry Creek Watershed “could be unreasonable if it injures public trust resources, such as instream habitat for certain species, in such a way that it outweighs the beneficial use.” (ROI, 31.) Yet in a glaring omission, the ROI declines to provide substantive analysis addressing Nestlé’s injury to public trust resources. (ROI, 31.)

The public trust doctrine requires more than acknowledgment and deferred analysis. It is “an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.” (*Environmental Law Foundation v. State Water Resources Control Board* (2018) 26 Cal.App.5th 844, 857 (quoting *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 441).) Notwithstanding

complementary public trust duties relating to areas within the State Board's responsibilities, CDFW is the state agency best positioned to determine whether Nestlé's operations will have a substantial impact on wildlife trust resources in the Strawberry Creek Watershed and must investigate Nestlé's operation to determine whether Nestlé is operating without an LSA in violation of Section 1602.

The Project is ready to assist CDFW in its pursuit of an investigation into Nestlé's violation of Section 1602, as well as the related issues noted above. If you have any questions, please do not hesitate to contact me. We look forward to working with you.

Sincerely,



Rachel S. Doughty
Greenfire Law, PC

Enclosures:

1. San Bernardino National Forest Decision Memo, dated June 27, 2018
2. CDFW Consultation Letter, dated May 2, 2016
3. California State Water Resources Control Board, Report of Investigation, dated December 20, 2017
4. Declaration of Steve Loe, dated May 4, 2016
5. Southern California Native Freshwater Fauna Working Group Comment Letter, dated May 1, 2016
6. The Story of Stuff Project Comment Letter, dated May 1, 2016



DECISION MEMO
NESTLÉ WATERS NORTH AMERICA INC.
SPECIAL USE PERMIT
U.S. FOREST SERVICE
STRAWBERRY CREEK
FRONT COUNTRY RANGER DISTRICT
SAN BERNARDINO NATIONAL FOREST
SAN BERNARDINO COUNTY, CALIFORNIA

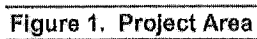
BACKGROUND

Nestlé Waters North America (Nestlé) owns and operates water collection tunnels, horizontal wells, water transmission pipelines and associated improvements on the San Bernardino National Forest. These developments, commonly referred to as the Arrowhead Springs Permit, have been authorized since 1929, with the latest permit issued in 1978. Nestlé has been operating and maintaining the improvements under the terms and conditions of the 1978 permit. These developments are located within the Strawberry Creek watershed, which is tributary to East Twin Creek, which is tributary to the Santa Ana River. The permit area is shown in Figure 1.

PURPOSE AND NEED FOR ACTION

There is a need to respond to a request to authorize the continued occupancy and use of the existing water development facilities, water transmission pipelines, electronic telemetry equipment, helicopter landing areas, and access trails on National Forest System (NFS) lands. The Forest Service purpose is to authorize the existing facilities under a current Forest Service permit that is consistent with state and federal law, regulations, and the San Bernardino National Forest Land Management Plan (LMP).

Nestlé's project purpose is to continue to operate and maintain the existing system to supply bottled drinking water for retail sale. Nestlé is responsible for the safe and reliable operation of their water system under a variety of federal and state laws, and would operate the system on NFS lands according to the terms of the permit.



DECISION

As District Ranger I have the delegated authority to approve special uses for terms that do not exceed 5 years. I have reviewed the project record (including public comments, specialist reports, and consultation with other agencies) and I have decided to approve the continued occupancy and use of NFS lands for the extraction and transmission of water using existing improvements, subject to resource mitigation measures designed to ensure compliance with the LMP. The initial permit term will be three (3) years, with discretionary annual permits for an additional two (2) years. The analysis summarized in this Decision Memo is based on a maximum permit term of five (5) years. In addition to approving the continued use of the existing improvements, Nestlé will conduct hydrologic and riparian area studies and modify operations under an Adaptive Management Plan (AMP) as necessary. The AMP would identify whether incremental changes to the mitigation measures are necessary to reduce effects on National Forest resources.

My decision to approve the continued use and occupancy of existing facilities with conditions is based on the agency objective to authorize and manage special uses of NFS lands in a manner which mitigates natural resources and public health and safety concerns, consistent with the LMP and all other relevant law. The resource mitigation measures, are designed to ensure that the impact to natural resources will be minimal, may improve resource conditions when compared to the existing condition. These resource mitigation measures protect and do not infringe upon water rights for developed spring water held by Nestlé under California state water law, as described by a recent report from the California Water Resources Control Board staff. The AMP provides the permittee with operational flexibility in how those resource measures will be addressed. A complete discussion of water rights associated with this authorization is found on pages 21 to 22 of this decision memo. As described further in this decision, including the analysis of the potential for extraordinary circumstances as supported by the specialist reports, the impacts from the authorized activities, including any adjustments (resource mitigation measures) that may be necessary, will not result in extraordinary circumstances. While the AMP provides operational flexibility for meeting resource mitigation measures, implementing the AMP will not result in increased impacts from approved activities or cause extraordinary circumstances to occur. My decision is consistent with the LMP and meets the present and future needs of the American people.

Based on comments from the public I have made changes and clarifications to the proposed action and the changes are incorporated in the description below and displayed in italics to differentiate information added since scoping.

The right-of-way occupies approximately 4.5 acres of NFS land. This use of National Forest System land is authorized under the authority granted to the Secretary of Agriculture by several laws, including the Federal Land Policy and Management Act of 1976 and the Organic Act of 1897. The authorized activities are further described in the following sections.

The following existing improvements will be authorized:

- 2 water collection tunnels
- 10 horizontal wells located within 4 concrete vaults
- 5 electronic monitoring telemetry sites and associated equipment
- 4 helicopter landing areas

- 5.7 miles of access trails (4.5 miles of trail are along the water transmission lines)
- 4.5 miles of 4" steel water transmission pipe and associated valves
 - 2.75 miles of above ground pipeline
 - 1.75 miles of buried pipeline (along Forest road 1N24)
- 20 pipeline support bridges

The permit would also continue to authorize administrative use and maintenance of Forest Road 1N24 on a shared basis.

The working area is the area needed for temporary use when routine maintenance work is conducted on the existing improvements. This working area is calculated based on set distances from approved facilities, and is used to identify the area that may be used if work is needed during the term of the permit. Those working areas are described in Table 1.

Table 1. Working Areas.

Improvement	Working Area
Vault Structures	5' around structure
Above ground pipeline	2.5' each side
Buried pipeline and road 1N24	10' each side
Trails	3' each side
Helicopter landing areas	30' radius circle

Operation of the system – This decision approves the continued operation of the current system subject to the terms and conditions of the new permit, including the adaptive management plan requirements. *No expansion of the well system is authorized.* The system is operated to collect water on a year-round basis. Water infiltrates under the influence of gravity into the collection tunnels or horizontal wells and is transported through pipes to storage tanks on private land. Pipeline pressure is regulated through a series of valves located along the pipeline. There is no storage of water on National Forest System lands.

Electronic devices are used to monitor conditions at the vaults. The information is sent via radio signals to a company owned facility on private lands. The power for the devices is provided by solar panels with battery backup.

Maintenance of the system – This decision approves the continued maintenance of the existing system subject to the terms and conditions of the new permit. *Maintenance does not include expansion or change to the water system components, but does include replacement or repair of facilities "in kind."* The system is maintained based on periodic inspections by Nestlé. Every piece of equipment is inspected at least annually. The maintenance work includes:

Well and pipeline sanitizing – collection facilities are sanitized annually or more frequently as indicated by weekly tests. Collection areas are treated with a 200 parts-per-million solution of chlorine. Treated water is dechlorinated with Sodium thiosulfate and discharged through the pipeline system on private property. The pipeline system as a whole is sanitized by adding chlorine at the collection points and running that chlorinated water through the pipeline system to a release point on private land. All water released in conjunction with routine maintenance is regulated under National Pollution Discharge Elimination System permit CA #G998001, issued by the Santa Ana Regional Water Quality Control Board.

Horizontal well cleaning – the horizontal wells are cleaned by brushing and water jetting the full length of each boring screen. The wells are typically cleaned once every 10 years.

Equipment maintenance/replacement – all equipment including valves, sensors, and telemetry equipment is inspected monthly for proper operation, and maintained as needed. Maintenance could include cleaning and exercising valves, replacing parts within valves, and replacing defective components as needed. Isopropyl alcohol is used to disinfect any serviced components that are part of the water system.

Pipeline repair – Any sections of pipeline that are damaged or broken by falling rocks, trees or other debris are repaired as soon as possible, typically as emergency work. For the above ground pipeline, the damaged section of pipeline is cut out and a new section is welded in place, with pipe supports replaced as needed. For the buried pipeline located along 1N24, a backhoe will be used to expose the broken section of pipe. Materials will be flown to remote repair sites using helicopters. Equipment powered by generators or gas motors could be used to perform the work, along with common hand tools.

Vegetation management – vegetation is cleared 5 feet around vaults and 2.5 feet around the pipeline using motorized equipment and hand tools on an as-needed basis. Slash is lopped and scattered to minimize fuel loading or concentrations. Under the new permit work would be prohibited during the Limited Operating Periods described in the Resource Mitigation Measures. *No use of herbicides is permitted as part of this authorization.*

Monitoring Stations – *The new permit will require monitoring of resource conditions in locations downstream from the authorized facilities. Some monitoring sites will include some instrumentation such as streamflow stage recorders but all sites will include simple markers for established plots and cross sections.*

The Hydrologic and Riparian studies described below will require clearing of helispots in the East Twin Creek drainage to provide access for monitoring. Up to three helispots (TC 1 through 3) within Section 36, Township 2 North Range 4 West (refer to the June 14, 2017 map in the project records) may be developed. Helispots would be cleared of brush in a 20' by 20' area, however no trees would be removed. Brush would be cleared along foot trail access routes from the helispots to East Twin Creek monitoring locations. Up to 12 additional helicopter flights may be needed to support monitoring.

Access – This decision approves the continued use and maintenance of designated access trails (with a tread width of 50" or less), designated helicopter landing areas, and use of Forest road 1N24. Maintenance crews will access work sites by using one of the authorized access points and then traveling cross-country or along the pipeline to reach the work site. Helicopter access is the most common access method used to reach the improvements, and typically 32 helicopter flights to the existing helicopter landing areas are required on an annual basis for routine inspections and maintenance. Helicopter flights for pipeline repair and emergency work would be on an as-needed basis.

Trails are not regularly maintained, allowing vegetation to encroach on the trail. When the trail is needed for access, motorized equipment and hand tools are used to maintain foot access. Helicopter landing areas are maintained as needed to prevent vegetation encroachment using motorized equipment and hand tools.

A minor amount of brushing will be required to access monitoring stations and established plots along Strawberry Creek and in East Twin Creek. Access is typically gained by foot from Forest Road 1N24, or from established helicopter landing areas.

Emergency Work – Work on the system may be required on an emergency basis and emergency repair to pipelines and structures are conditionally authorized under this new permit. The permit holder will be required to notify and request approval from the Forest Service of any emergency work as soon as possible. The holder will be required to utilize previously approved temporary work areas to the extent such use is possible.

Resource Mitigation – Permit Sections V and VIII contain standard and supplemental provisions for resource mitigation that cover compliance with environmental laws, and protection of water quality, esthetics, and threatened, endangered and sensitive species habitat. These sections of the permit also include requirements that Nestlé will follow if there is an unanticipated discovery of archeological or paleontological resources, or human remains, funerary objects, sacred objects, or objects of cultural patrimony. Supplemental standard clauses are also included to require a Fire Control Plan and an Invasive Plant Species Prevention and Control Plan. The Operating Plan required by permit section III C will include implementation details of how Nestlé will comply with the permit terms and the required resource mitigation measures. *Nestlé will submit the Operating Plan within 60 days of permit issuance and implement the Operating Plan within 30 days of Forest Service approval.* Resource mitigation measures developed by the Forest Service in accordance with the Federal Land Planning and Management Act (FLPMA) and the LMP during the development of the proposed action and in response to scoping and environmental review include:

- The appropriate site-specific National Best Management Practices (BMPs) for the protection of water quality (USDA USFS, FS-990a, April 2012) will be applied to the operation and maintenance of the pipeline, helispots, trails, roads, etc. such as those BMPs in the Facilities and Nonrecreation Special Uses Management Activities, Operations in Aquatic Ecosystems, Water diversions and conveyances, and Road Management Activities categories.
- Maintain a Limited Operating Period (LOP) for the protection of least Bell's vireo (March 15 through September 15) and southwestern willow flycatcher (May 1 to August 31), both federally listed species, during the breeding season for any disturbance related activities within ¼ mile of suitable habitat.
- Maintain a limited operating period (LOP) prohibiting activities within approximately .25 miles of a California spotted owl nest site (US Forest Service sensitive species), or activity center where nest site is unknown, during the breeding season (February 1 through August 15), unless surveys confirm that the owls are not nesting.
- *Nestlé will install suitable shut-off valves or other flow control devices to ensure that water will not be extracted in excess of the holders ability to store or transport water without waste or spillage from local storage. This requirement will be implemented within 30 days of Forest Service approval of the Operating Plans.*
- *Maintain minimum flows in two locations as described in the Adaptive Management Plan as follows:*
 - *Lower spring complex (10, 11, 12) - 20 gallons per minute (gpm) in the drainage area A tributary of Strawberry Creek immediately above the confluence of*

drainage area A and B as defined in URS 2002. Drainage area A is the watershed influenced by the water extraction.

- Borehole complex 1, 1A, and 8 – 6.25 gpm as measured at water right A6108.
- Install, supply water to, and maintain two wildlife “drinkers”, one in the vicinity of tunnels 2 and 3, and the other near the well 7 complex. Plans for these features will be submitted to the authorized officer for approval prior to installation.
- Continue the addition of water (irrigation) to support success of native special status vegetation and provide for wildlife habitat linkages if determined that less than 70% of expected aquatic life forms and communities are present based on riparian studies.
- Implement actions identified in the AMP, such as maintaining surface water flow to support macroinvertebrate populations and riparian vegetation, and determining if benthic macroinvertebrate (providing base of food chain to riparian dependent wildlife resources) diversity and abundance supported by base flows measured in East Twin Creek control watershed are not maintained at the 70% level by the 6.25 gpm and 20 gpm initial minimum flows in the diversion subwatershed
- Implement actions identified in the AMP, such as the direction to conduct a paired watershed study to assess the riparian health of East Twin Creek compared to the subwatershed of Strawberry Creek where the extraction points are located. Multiple paired study locations may be used to look at different parts of the watershed. Define current riparian/stream health in each watershed at all comparison study reaches to determine if native vegetation is vigorous, healthy and diverse in age, structure, cover and composition on <75% of the riparian/wetland areas in the diversion subwatershed where extraction is taking place compared to the East Twin Creek control area.
- Trash shall be removed daily during all on-site activities for the protection of wildlife.
- Provide an annual Project Aviation Safety Plan to the SBNF Unit Aviation Officer (UAO) as part of the Annual Operating Plan for approval. The Plan should include: i) Aircraft company/pilot contact information, ii) Radio Frequencies, iii) Schedule of proposed flights, iv) Base of operations and proposed flight routes in/out of watersheds, v) Emergency protocol for mishap.
 - Provide Notification to Permit Administrator and UAO two weeks prior to any flight in order to: i) Determine if Limited Operating Period (LOP) is needed for nesting/ breeding bird season for flycatcher/vireo if determined to be present during the permit period, ii) Avoid any concerns with other flights in area – de-conflict airspace if needed, ii) Provide FICC/dispatch with information to track flight if needed during fire season.
 - Communicate with FICC/dispatch the day of any flight to ensure positive radio communication with dispatch over assigned frequency at beginning of day/flights into area and to close out last flight/exit from area at end of day.
- The authorized officer will approve final locations for any helispots and access routes developed for monitoring in East Twin Creek. Pre-work resource surveys will be conducted if required by the authorized officer.
- Special status plants and wildlife species:
 - If occurrences of FS Sensitive or Federally listed plant or wildlife species are found at any time within the project area, they will be reported to the Forest Service immediately. New protection measures may be developed with input from

appropriate specialists, and USFWS (if federally listed species are found). Protection measures will be implemented by the project proponent for all activities that may affect the identified occurrences.

- Invasive Plant Species Management
 - All off-road equipment will be cleaned **prior to entering NFS land**. The cleaning measures must be practical, verifiable, and not cause other unacceptable environmental problems. Depending on the nature of the debris, the equipment may be cleaned using water or mechanical methods (brushing, scraping, prying), compressed air, high-pressure water, or steam. This includes wheels, tires, buckets, stabilizers, undercarriages and bumpers.
 - All gravel, fill, erosion control or other materials are required to be weed-free and subject to review and approval by the Forest Service line officer with input from appropriate resource specialists.
 - Use only weed-free equipment, mulches, and seed sources. Salvage topsoil from project area for use in onsite revegetation, unless contaminated with weeds. All activities that require seeding or planting must utilize locally collected native seed sources when possible. Plant and seed material should be collected from or near the project area, from within the same watershed, and at a similar elevation when possible. This requirement is consistent with the USFS Region 5 policy that directs the use of native plant material for revegetation and restoration for maintaining “the overall national goal of conserving the biodiversity, health, productivity, and sustainable use of forest, rangeland, and aquatic ecosystems.” Seed mixes must be approved by a Forest Service botanist.
 - Minimize the amount of ground and vegetation disturbance during construction and maintenance.
 - A weed management plan will be prepared in cooperation with the Forest Service for survey, prevention, reporting, controlling and monitoring weed populations in the project area. The plan will be included in the Adaptive Management Plan.
 - *Take action as described in the weed management plan if the cover, quantity or extent of current infestations are increasing, or new invasive species are identified.*

Hydrologic and Riparian Studies – Under the new permit, Nestlé will conduct hydrologic and riparian studies to better understand the relationship between water withdrawals, surface flows, and riparian habitat in order to ensure that water withdrawals under state law are also consistent with the LMP standards. The initial studies provided by the permittee suggest that water extraction is reducing surface flow in Strawberry Creek. The effect of this flow reduction has not been thoroughly studied. The permittee will study comparison sites in adjacent unmanaged drainages to determine what conditions would exist in Strawberry Creek without water extraction in the upper watershed. This approach is typically referred to as a “paired basin” study. This study will also be used to support the Adaptive Management Plan.

The permittee will consult with the Forest Service in the development of the study plan, and will submit a draft study plan to the Forest Service for approval within 30 days of permit issuance. The permittee will implement the plan within 30 days of Forest Service approval. The study period is expected to last for a minimum of three years. The Forest Service has determined that three years is a reasonable term to complete the studies and ensure that adequate information is

available to consider a longer-term permit with appropriate terms and conditions. I recognize that additional time (up to two years) may be needed for the studies, so my decision provides for discretionary annual permits for two (2) additional years. The resource mitigation measures for the permit will provide adequate protection and ensure effects are beneath the extraordinary circumstances threshold while the studies are completed.

The study plan will incorporate the use of "test flows" to determine the response of the streams to reduction in water extractions. These "test flows" may involve suspending extraction for set time periods to evaluate any changes in streamflow. The study plan will also include an analysis of the full hydrograph and evaluate the change in the annual hydrograph from project operations. The studies will include isotope studies/chemical analysis of the extracted water to determine water source and other characteristics.

Adaptive Management Plan (AMP) – The permittee will implement an Adaptive Management Plan that addresses resource mitigation needs, and are consistent with San Bernardino National Forest LMP standards as required by the National Forest Management Act (NFMA). Adaptive management provides an implementation tool that incorporates an "implement-monitor-adapt" strategy that provides flexibility to respond to monitoring information that indicates that desired conditions are not being met. If monitoring demonstrates that the intended effects are not being achieved through the initial management action, the action can be modified using one or more of the adaptive management actions to achieve the intended effects. Each component of the Adaptive Management Plan would include:

- 1) A Forest Plan objective (standard, requirement, handbook)
- 2) A monitoring scheme to assess if the objective is being met
- 3) Trigger point(s) where the Forest Plan objective is not being met
- 4) Action(s) to meet Forest Plan objective(s)
- 5) Monitoring to assess success of mitigation and restoration

The Adaptive Management Plan outline is attached to this decision as Appendix 1. The permittee will develop the implementing details of the Adaptive Management Plan using the outline in consultation with the Forest Service and will submit the detailed Final AMP to the Forest Service for approval within 30 days of permit issuance, unless the authorized officer extends the time for submission. *The permittee will implement the plan within 30 days of Forest Service approval.* The Final Adaptive Management Plan will be active for the term of the permit, and may be amended based on the results of the paired basin studies described above.

So long as monitoring indicates that the environmental effects of the adaptive management approach do not exceed the scope of those anticipated in this decision, and the actions serve to move the project toward the intended effects, implementation continues using the "implement-monitor-adapt" cycle without the need for new or supplemental NEPA review. If any changes are proposed that are outside the scope of this decision, the provisions of Forest Service Handbook 1909.15 Section 18 would apply.

DECISION CATEGORICALLY EXCLUDED FROM ADDITIONAL DOCUMENTATION

For the reasons summarized in the following section, this action is categorically excluded from documentation in an environmental impact statement (EIS) or an environmental assessment (EA). The decision fits an identified category and no extraordinary circumstances are present which would require further analysis in an EA or EIS.

Applicable Category

This decision on the permit application fits within the category of actions is identified in agency procedures as "Issuance of a new special use authorization for a new term to replace an existing or expired special use authorization when the only changes are administrative, there are not changes to the authorized facilities or increases in the scope or intensity of authorized activities, and the applicant or holder is in full compliance with the terms and conditions of the special use authorization" (36 CFR 220.6(e)(15)). This category of action(s) is applicable because my decision to approve the issuance of a new permit replaces an existing or expired permit, specifically Nestlé's 1978 permit for the same facilities. Nestlé is in full compliance with their existing permit.

The new permit would not change any of the authorized facilities nor would it increase the scope or intensity of Nestlé's authorized water extraction activities. The additional monitoring is necessary to determine compliance with current law, policy, the LMP, and permit conditions, and the additional monitoring of helicopter landing areas are temporary and have minimum impacts. I am adding additional resource mitigation measures to ensure that the permit complies with the Land Management Plan as required by the National Forest Management Act. The Land Management Plan post-dates Nestlé's 1978 permit. I'm also correcting and updating the administrative use codes, and the number of occupied acres due to more accurate mapping. The terms and conditions of the new permit reflect those that have become standard since Nestlé was last issued a permit. These administrative changes are necessary to ensure the new permit is consistent with current law, regulation, policy and direction.

The category identified as "Approval, modification, or continuation of minor special uses of NFS lands that require less than five contiguous acres of land" (36 CFR 220.6(e)(3)) would also apply to this action. This category includes actions such as approving utility right-of-ways and approving the continued use of land where the use has not changed since authorized and no change in the physical environment or facilities are proposed. The existing facilities would not be expanded or changed, and the area occupies less than five contiguous acres.

Finding of No Extraordinary Circumstances

I find that there are no extraordinary circumstances that would warrant further analysis and documentation in an EA or EIS. This conclusion is based on implementation of the required resource mitigation measures as supported by the Adaptive Management Plan. The resource mitigation measures are designed to provide for consistency with the LMP. Implementation of the Adaptive Management Plan will allow for operational adjustments along the way to ensure the permitted actions remain consistent with the resource mitigation measures that prevent extraordinary circumstances. While the method used to achieve those resource conditions may

vary as described by the Adaptive Management Plan, meeting those resource conditions removes uncertainty as to the expected outcome.

I took into account the resource conditions identified in agency procedures that should be considered in determining whether extraordinary circumstances might exist:

1. There are no extraordinary circumstances associated with federally listed threatened or endangered species or designated critical habitat, species proposed for federal listing or proposed critical habitat, or Forest Service sensitive species based on the biological analysis for the proposed permit.

Federally listed wildlife species - Protocol surveys for species were conducted in suitable habitat in and around the project area. There were no detection of any federally listed species in the project area during these surveys. The Wildlife Biological Assessment documents the following determinations:

A *No Effect (NE)* determination has been made for the implementation of the issuance of a permit for up to 5 years for the conveyance of water across NFS lands for the following species:

Coastal California gnatcatcher, Western yellow-billed cuckoo, Santa Ana sucker, San Bernardino kangaroo rat

A *May Affect – Not Likely to Adversely Affect (NLAA)* determination has been made for the implementation of a permit for up to 5 years for the conveyance of water across NFS lands for the **California condor** due to possible disturbance from helicopter operations on condor that may be foraging in the project area in the next 5 year period.

A *May Affect – Not Likely to Adversely Affect (NLAA) with Beneficial Effect (BE)* determination has been made for the implementation of a permit up to 5 years for the conveyance of water across NFS lands, including implementation of the Adaptive Management Plan and resource mitigation measures for minimum flow requirements, for the following species:

Mountain yellow-legged frog, Arroyo toad, California red-legged frog, Southwestern willow flycatcher, least Bell's vireo

Endangered Species Act Section 7 consultation was completed June 27, 2017 with the US Fish and Wildlife Service, with a Letter of Concurrence on the determination calls for threatened and endangered species.

Forest Service sensitive wildlife species - Surveys for species were conducted in suitable habitat in and around the project area. There were detections of two-striped garter snake and willow flycatcher (migrant); both are Forest Service sensitive species. The wildlife Biological Evaluation documents the following determinations for Forest Service wildlife sensitive species:

The proposed permit will have no direct or indirect impacts (NI) for the following sensitive species:

Arrowhead blue butterfly, northern goshawk, Townsend's big-eared bat, San Gabriel Mountains elfin butterfly, bald eagle, white-eared pocket mouse, San Gabriel Mountains – Nelson's desert big horn sheep, arroyo chub, Western pond turtle, gray vireo, Orange-throated whiptail snake, three-lined boa, San Bernardino flying squirrel, Fringed myotis bat, pallid bat, California spotted owl, Willow flycatcher migrant

The proposed permit will have *May Impact Individuals or Habitat – Beneficial Impacts (MIIH-BI)* at spring sites 1, 2, 3, 4, 8 and the FS spring site for the following species (or habitat) due to the increase in surface water at these sites required by the new permit:

Large-blotched Ensatina salamander, San Gabriel Mountains slender salamander, Yellow-blotched Ensatina salamandersouthern, California legless lizard

The proposed permit will have *May Impact Individuals or Habitat – Beneficial Impacts (MIIH-BI)* for the following species at spring sites 10, 11, and 12 and associated riparian habitat on the main stem of Strawberry Creek due to the required minimum flows:

Willow flycatcher (migrant), two-striped garter snake, Santa Ana speckled dace

Federally listed plant species - The Botany Biological Assessment (as documented in the Botany Report) documents the determination that there are no currently-listed threatened or endangered plant species known to occur within the project area. There is also no suitable habitat for any Threatened and Endangered plant species that has been identified or any designated Critical Habitat for plants within the project area. The proposed reissuance of the existing permit will not affect any federally listed plant species.

Forest Service sensitive plant species - A search of existing records and project related field surveys conducted from 2015-2017 found no occurrences of FS Sensitive plant species within the project area, however for the species listed in the table below there are known occurrences of some found nearby and/or suitable habitat for some may be present within the project area.

The resource mitigation measures require that additional plant surveys be completed in the project area, as well as the paired watershed and if special status plants are found, other measures will be implemented. Therefore the determination detailed in the Botany Biological Evaluation (as documented in the Botany Report) is that due to the design criteria (resource mitigation measures), the proposed reissuance of the existing permit may affect individuals (if present but undetected), but is not likely to result in a trend toward Federal listing or loss of viability for any FS Sensitive plant species as listed in the following summary table:

Summary of Effects Determinations for TES Species

Common Name	Occurrence Information ¹	Determinations ²
Threatened & Endangered Plants		
<i>Berberis nevadensis</i> (E)	H/U	NA
<i>Brodiaea filifolia</i> (T)	Y/U	NA
<i>Dodecahema leptoceras</i> (E)	P/U	NA
Forest Service Sensitive Plants		
<i>Calochortus palmeri</i> var. <i>palmeri</i>	Y	MAI
<i>Castilleja lasiorhyncha</i>	Y/U	MAI
<i>Chorizanthe parryi</i> var. <i>parryi</i>	Y/U	MAI
<i>Imperata brevifolia</i>	Y/U	NA
<i>Lilium parryi</i>	P	MAI
<i>Monardella macrantha</i> subsp. <i>hallii</i>	P	MAI
<i>Plagiobothrys collinus</i> var. <i>ursinus</i>	P	MAI
<i>Schoenus nigricans</i>	Y/U	NA
<i>Sidalcea hickmanii</i> subsp. <i>parishii</i>	P	MAI
<i>Sidalcea malviflora</i> subsp. <i>dolosa</i>	P	MAI
<i>Sidothea caryophylloides</i>	P	MAI
<i>Symphyotrichum defoliatum</i>	H/U	MAI
¹ Occurrence Codes: Y = Species is known to occur in or near the project area. P = Occurrence of the species is possible; suitable habitat exists (or could exist with restored hydrology) and it is within the known distribution of the species. H = Historic record. U = Unlikely to be present in project area due to lack of appropriate habitat N = Outside known distribution/range of the species. ² Determination Codes: NA = No effect expected NLAA = not likely to adversely affect for T/E species; MAI = may affect individuals but not likely to lead to a trend to Federal listing for Sensitive species.		

- There are no extraordinary circumstances associated with flood plains, wetlands, or municipal watersheds. The Surface Water Hydrology Report and the Geo-Sciences Specialist Report (available in the project record) describe the effects of issuing the proposed permit on watershed resources.

Based on this analysis, the overall watershed condition for the East Twin Creek watershed (which includes Strawberry Creek) is currently "Impaired Function". Studies completed by Nestlé and validated by Forest Service field work have demonstrated that the current water extraction is drying up surface water resources (springs and streams) that would have normally been perennial water resources. This extraction of water under the existing permit is not in accordance with the subsequent adoption of Standard 46 of the Forest LMP.

Surface water diversions and groundwater extractions, including wells and spring developments may only be authorized when it is demonstrated by the user, and/or agreed to by the Forest Service, that the water extracted is excess to the current and reasonably foreseeable future needs of forest resources as required by the LMP. Implementation of resource mitigation measures will allow for Nestlé's water extraction activities consistent with applicable state water rights and the LMP. Overall these changes will move the

watershed condition up one level to "Functioning At-Risk" as described further in the Specialists' reports. This change in watershed condition is consistent with LMP direction and will help move the watershed towards the desired condition.

3. There are no extraordinary circumstances associated with congressionally designated areas such as wilderness, wilderness study areas, or national recreation areas. There are no wilderness areas, wilderness study areas, or national recreation areas in the permit area.
4. There are no extraordinary circumstances associated with inventoried roadless areas or potential wilderness areas. The permit is partially located within the City Creek Roadless Area. Roadless areas are managed under the requirements of the 2001 Roadless Area Conservation Rule (36 CFR 294 Subpart B, 2001). The purpose of the rule is to provide, within the context of multiple use management, lasting protection for inventoried roadless areas within the National Forest System. That is accomplished by the prohibition on road construction and timber cutting, sale, or removal.

As described in the Roadless Area Report (available in the project records), the authorized activities and improvements will not change the existing roadless character of the area. No roads (either constructed, reconstructed, or maintained) are proposed under the new permit. There is no timber cutting or sale associated with the new permit. The new permit will be consistent with the Roadless Area Conservation Rule.

5. There are no extraordinary circumstances associated with research natural areas. There are no research natural areas in the permit area.
6. There are no extraordinary circumstances associated with American Indians and Alaska Native religious or cultural sites. There are no religious or cultural sites present.
7. There are no extraordinary circumstances associated with Archaeological sites, or historic properties or areas. The Heritage Program Manager has documented by memo (available in the project records) that this undertaking may be treated as a Screened Undertaking (Regional PA 2013), which has no or little potential to cause effects to historic properties if they are present in an Area of Potential Effects.

This project complies with Section 106 of the National Historic Preservation Act of 1966, as amended in accordance with provisions of the Programmatic Agreement among the U.S.D.A. Forest Service, Pacific Southwest Region (Region 5), the California State Historic Preservation Officer, the Nevada State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Processes for Compliance with Section 106 of the National Historic Preservation Act for Management of Historic Properties by the National Forest of the Pacific Southwest Region (Regional PA 2013).

Standard permit conditions (Section V, conditions D and E) describe the requirements for protecting any discoveries of cultural resources.

In addition to considering the resource conditions listed in the Forest Service regulations, I considered impacts on LMP land use zones/desired conditions; general wildlife species and habitat connections; fire management; and air quality and noise impacts as requested by public comments received in response to the proposed action. None of these additional areas of concern present circumstances that require further analysis in an EA or EIS. I have included a brief

summary of those resource concerns in the Public Involvement section of this decision, and further information is located in the project record.

PUBLIC INVOLVEMENT

This action was originally listed as a proposal in the San Bernardino National Forest Schedule of Proposed Actions on January 1, 2016, and updated periodically during the analysis. I began the public scoping process for the proposed Nestlé Waters Special Use Permit on March 18, 2016. Letters were sent to over 2,000 individuals, groups, agencies, tribes, local governments, elected officials and media contacts, including land owners adjacent to the project area. Information about the project was, and continues to be, delivered over the internet through the project webpage at:

<http://go.usa.gov/cGyXH> (please note - this URL is case sensitive)

A public meeting was held on April 14, 2016 at the San Bernardino National Forest Supervisors Office in San Bernardino California. Over 100 people attended the meeting. The scoping comment period ended on Monday, May 2, 2016.

For this project, comments were accepted by email, mail, at the public meeting, and on the project web page. Over 40,000 comments were received during the scoping period (including over 3,800 duplicate submittals). The majority of individual comments (39,895) came through email, 360 comments were submitted through the project web portal, and 22 written comments were received at the public meetings. With the exception of material with offensive language, all of the comment documents are available on the web in the public reading room at the following web address:

<https://cara.ecosystem-management.org/Public/ReadingRoom?Project=48530>

Of these comments, about 30,000 were form letters, 4,200 were expanded form letters (a form letter with expanded text) and close to 1,700 were unique comment letters or emails. All of the unique letters, form letters, and expanded form letters were reviewed as part of the scoping process, and over 5,300 comments were recorded. Those comments were grouped and then categorized as either outside the scope of the analysis or within the scope of the analysis. A full description of the process is included in the Scoping Report that is part of the project record.

I incorporated several changes and clarifications to the Forest Service proposed action based on those comments and suggestions. These changes and clarifications to the proposed action include:

- No use of herbicides will be authorized (clarification)
- No expansion of the system will be authorized (clarification)
- The discussion of maintenance activities has been expanded (clarification)
- Several resource mitigation measures were added, including measures to reduce water diversions in excess of storage capacity, require minimum flows, protect wildlife, require coordination of helicopter flights, and to prevent the spread of invasive species (change).
- A discussion of the standard clauses for noxious species control plans and fire control plans was added (clarification).

- Incorporate the use of “test flows” as part of the riparian studies to determine the response of the streams to reduction in water extractions. These “test flows” may involve suspending extraction for set time periods to evaluate any changes in streamflow (change).
- Include an analysis of the full hydrograph and evaluate the change in the annual hydrograph from project operations (change).
- Include Isotope studies/chemical analysis to determine the source of water and connections between the springs and surface water (change).

These changes and clarifications are incorporated in my decision and are displayed in italics as indicated above.

I appreciate the public interest in this project and I wanted to provide further clarification on key concerns brought forward during scoping. In particular, many commenters asked for: specific analysis to be completed; questions to be answered, and alternative actions to be taken. The following section provides a summary of my consideration of the concerns expressed during the scoping comment period.

Resource analysis suggested during scoping – Commenters suggested several resource areas that should be included in the analysis of the project effects. Those resource topics and my consideration of them are presented in the following section.

Land Management Plan Land Use Zones and Place Desired Conditions - The upper portion of the proposed permit area is in a Developed Area Interface (DAI) land use zone, the lower wells and the majority of the above ground pipeline is in a Back Country Non-Motorized (BCNM) land use zone, while the balance of the above ground pipeline and the buried pipeline is within the Back Country (BC) land use zone. A map of the permit area compared to land use zones is available in the project record.

Non-Recreation special uses (low intensity land use) are listed as suitable uses (LMP Table 2.4.3) in the DAI and BC land use zones, and allowed by exception in the BCNM land use zone.

I am approving continued occupancy and use by exception in the BCNM land use zone. Roaded access in this land use zone is not authorized by the new permit and motorized access is provided by helicopter by exception (LMP Table 2.4.2). The LMP states that access to authorized facilities and private land may occur by exception when there are existing rights to such access. Nestlé’s use is of long-standing and precedes the adoption of the LMP standards. The activities and improvements authorized under the new permit will have minimal effect on the character of this zone and I have concluded that approving the continued use in this area by exception is consistent with the LMP direction.

The permit area is located within the San Bernardino Front Country Place. The desired condition for the area is to maintain a natural appearing landscape while managing vegetation to provide fire protection for adjacent urban communities, recreation areas and wildlife habitat. Habitat conditions for threatened, endangered, and sensitive species are improving over time. Heritage properties and Native American gathering areas are identified and protected. The program emphasis is on community protection from wildland fire and conservation of habitat for

threatened, endangered, and sensitive species, such as the southwestern willow flycatcher, mountain yellow-legged frog and speckled dace.

I have concluded that the resource mitigation requirements included in project design and reflected in permit terms and conditions, and the resulting effects of the authorized activities and improvements, are consistent with the direction for the San Bernardino Front Country Place.

Wildlife – As documented in the Wildlife Specialist Report (located in the project record), the new permit would not change the function of existing wildlife habitat connection corridors and would not create an impassible barrier to wildlife movement across the landscape. The new permit would not adversely impact migratory land birds or their habitats through implementation of the required resource mitigation measures. Issuing the new permit would not change the risk for the introduction of non-native terrestrial or aquatic wildlife species.

Fire and Fire Risk – As documented in the Fire and Fuels Specialist Report (located in the project record), the new permit would not present a significant impact on the San Bernardino National Forest Fire Management Program. Local fire managers are accustomed to mitigating for the presence of infrastructure that goes with fire suppression operations in an urban environment.

The public raised a concern during scoping that water extraction may alter the riparian ecosystem such that fuels, species composition, and microclimate become similar to uplands, diminishing their value in fire control as firefighter safety zones and suppression control lines. The biological reports address the nature of the vegetation within the riparian zones. The Wildfire Specialist Report considered the use of riparian areas as suppression control lines and fire fighter safety zones.

The Strawberry Creek drainage is located within a south facing watershed along the San Bernardino front country. The stream channels are steep and located within narrow canyons. Historical fire data running back to the early 1900's was analyzed for the specific drainages identified in either the proposed action or reference study area and the fire perimeters were found to have shown little regard to the watershed boundaries or stream channels. Several large fires, including the Old Fire of 2003, have burned across the entire slope. Under no circumstances were the final fire perimeter boundaries established in drainages.

Fire managers in Southern California typically look to prominent ridge systems for both direct and indirect firefighting efforts that include aerial attack supported by heavy equipment and line personnel on the ground. Drainages along south aspects are avoided and would never be considered safe areas for personnel to take shelter from an advancing fire. Based on these factors, the new permit would have no effect on the ability to suppress fires in the affected watersheds, nor would it diminish fire fighter safety.

Noise – The new permit would authorize the continued access to the permit area by helicopter. Approximately 32 flights per year are typically conducted in support of operation and maintenance activities, with additional flights needed to support monitoring. The public raised a concern regarding the noise related to use of helicopters. The Forest Service does not have requirements or LMP standards related to noise. San Bernardino County ordinances exempt temporary operation between 7 a.m. and 7 p.m., except for Sundays and Federal Holidays, from

the County regulations. The permittee is required to comply with local regulations, and would have to operate within the timeframes outlined by County regulations.

Air Quality - Maintenance of the existing facilities authorized by the new permit would generate emissions from helicopter use to transport staff to the remote site. As documented in the Air Resource Specialist Report (located in the project record), the total emissions of criteria pollutants from the operations authorized by the new permit are less than the federal general conformity de minimis threshold emission rates. Therefore, the general conformity requirements do not apply, and the decision to approve continued occupancy and use of the existing water development facilities, water transmission pipelines, electronic telemetry equipment, helicopter landing areas, and access trails on National Forest System (NFS) lands complies with the Federal Clean Air Act. The total emissions of criteria pollutants from the operations authorized by the new permit would be less than South Coast Air Quality Management District's significance thresholds and therefore complies with local rules and regulations.

Additional Questions Raised During Scoping – Many of the comments received were presented as questions regarding a broad range of topics, including questions about how the analysis would be conducted and how the decision would be made. The questions and my responses are presented in the following section.

Questions related to the general use of Science/Baseline for analysis – Many of the commenters questioned whether the proposed action relies on the use of a credible scientific approach for the required resource surveys and the Adaptive Management Plan. They also questioned the role of the permittee (Nestlé) in completing resource studies as required by the new permit. Concerns raised by the public include:

- Lack of study plan details
- Need for unbiased studies
- Need to define baseline

Forest Service Response - My decision incorporates both clarification and changes to the hydrologic studies and adaptive management plan. Although Nestlé will complete the studies, a burden that typically falls to permittees, the qualifications of the scientists and resource specialists completing the work will be reviewed and approved by Forest Service staff. In all cases the results of the studies will be independently reviewed by staff before being accepted as completed work.

Baseline is a concept that helps evaluate environmental effects from a specific condition or point in time. In this case, baseline for the environmental analysis is the current condition as it exists today, while recognizing that this baseline condition is influenced by the past and present water extraction that is authorized under the existing permit. Using the current condition as the baseline does not imply that the existing condition is producing acceptable environmental effects or is consistent with the LMP. The analysis of effects in the specialist reports for each resource area discloses the changes to baseline that will result from implementing the new permit. The specialist reports are included in the project record.

Questions about the Decision Process – Some commenters raised questions about the application of the NEPA definition of “significantly” found at 40 CFR 1508.27. Other commenters suggested that the proposed restrictions are arbitrary and capricious, questioning the

jurisdiction of the Forest Service to regulate water diversions and challenging the applicability of the Land Management Plan to the operations.

Forest Service Response - My decision and the process I used to support my decision are consistent with the Forest Service NEPA regulations found at 36 CFR Part 220, and Forest Service directives found in the Forest Service manual (FSM 1950) and Forest Service handbook (FSH 1909.15). My decision to issue a special use permit qualifies under the categorical exclusion regulations as discussed above. I have documented my finding that the degree of the effects on the listed resources did not result in extraordinary circumstances. The record also reflects the need for, and benefit of, the resource mitigation measures to comply with LMP standards which apply to this decision. The question regarding the jurisdiction of the Forest Service is addressed below.

Questions about roles and authorities – There was widespread concern about the relationship between the Forest Service and Nestlé, particularly as it relates to the role of the permittee in conducting resource studies used in the AMP. Many commenters suggested stronger roles for other agencies, or suggested an independent review of the proposed action.

Forest Service Response - While the Forest Service special use regulations allow applicants/permittees to complete studies related to the impacts of their proposed use, I am responsible for ensuring that the Forest Service completes an independent review of the submitted material. Forest Service staff reviewed the studies provided by Nestlé, and if the studies met Forest Service standards they were referenced in the appropriate specialist reports. Staff has also spent time in the field to spot check the survey work submitted by Nestlé, and to support their own independent assessment of the environmental effects. Staff has also coordinated with other agencies, and hosted an interagency field trip early in the review process and completed the necessary regulatory consultation and/or compliance. That is the role of the Forest Service as the land management agency, and my decision is consistent with that responsibility. It is not a responsibility that can be assigned to an independent review group.

Questions about consistency with law, regulation, and policy – Numerous comments were related to the consistency of the proposed action with law, regulation, and policy. Specific comments included questions whether:

- The existing permit issued to a corporation that was dissolved through merger in 1987 was valid
- The Forest Service followed policy when it accepted the application
- The Forest Service followed policy when it changed the scope of the proposed permit without consulting Nestlé
- The Forest Service properly applied the special use screening criteria
- The proposed action is consistent with the Organic Act requirements for the use of water on the National Forest (16 USC 481)
- The Forest Service analysis should be limited to the impacts of the right-of-way, and whether the impacts of water extraction related to any impacts from the right-of-way and subject to mitigation requirements imposed by the Forest Service.
- Nestlé water rights are valid existing rights exempt from the requirements of the National Forest Management Act (NFMA) or the Federal Land Management Policy Act (FLPMA)
- The proposed action must be consistent with the LMP standards

- Nestlé needs other federal or state permits
- The proposal violates other federal, state, or local plans

Forest Service Response - I appreciate the level of interest and focus on management of the San Bernardino National Forest represented by these questions. I certainly agree with many of the comments. My decision must be consistent with existing law, regulation, and policy. My decision addresses those questions in the section that discusses findings required by other laws. Rather than repeat that discussion here, I will emphasize that the Forest Service has both the authority and obligation to regulate the occupancy and use of National Forest System lands in a manner that is consistent with all applicable laws, regulations, and policy. That authority includes the ability to impose terms and conditions needed to comply with applicable law, regulation, and policy, and I believe the terms and conditions that I have adopted are within my authority and will meet my statutory obligations.

Questions regarding the use of water – Several commenters pointed out that the existing 1978 permit incorrectly categorizes the use of water as irrigation.

Forest Service Response – The comment is correct. This will be corrected in the new permit. The use will be categorized under the Forest Service special use manual direction (FSM 2720) as having a primary use code of 915; which applies to water transmission lines smaller than 12", and a secondary use of 931, which applies to wells.

Questions regarding "Spring Water" – Several commenters suggested that the designation of "Spring water" by Nestlé is not consistent with the federal Food and Drug Administration (FDA) regulations found at 21 CFR 165.110.

Forest Service Response – This is not an area within my jurisdiction, but permittees are required to comply with all applicable laws and regulations. I contacted the FDA and passed along the public concern. The FDA reviewed the information that was supplied by the Forest Service as well as what was in their own records and was able to affirm that several of the tunnels and bore holes meet the standards in the FDA regulations. They did not have sufficient information to determine the status for several other bore holes, but did not conclude that there was any violation of the regulations. I directed Nestlé to work with the FDA to resolve any outstanding questions and Nestlé provided additional information regarding these other bore holes to the FDA. In a letter dated August 21, 2017, FDA concluded that the remaining bore holes in question could be "labeled as "spring water" as long as the current conditions are as you (Nestlé) have described (i.e., the water flows from the bore hole using the same natural forces that cause the spring to flow to the natural orifice) and all other applicable provisions of the bottled water standard are met." Nestlé is in compliance with the existing permit on that basis.

This question is not related to a potential environmental impact, and does not change the expected effects of implementing the new permit, nor would any actions that the FDA may take alter or increase the environmental effects of the new permit. There is no potential that any change in the resolution of this question would lead to extraordinary circumstances.

Questions about continued use – Many commenters felt that allowing continued use during the analysis is inconsistent with the NEPA regulations that limit actions taken during the analysis.

Forest Service Response - Allowing use under an existing permit is not inconsistent with the NEPA regulation at 40 CFR 1506.1, which applies to limitations on actions taken on a proposal

during the NEPA process. Nestlé has an existing permit that allows them to occupy and use National Forest System land, and may continue to operate and maintain their improvements as the new permit is evaluated.

Questions about consistency with state water rights law – Questions were raised regarding the California state water rights held by Nestlé. Specific comments include questions whether:

- Nestlé has a valid state water right, and their use is consistent with the California water codes
- Regulating water extraction exceeds Forest Service jurisdiction in conflict with California water rights law

Forest Service Response – I recognize that the state of California regulates water rights through the State Water Resources Control Board (SWRCB). The SWRCB staff offered to assist the Forest Service in our review, and the Forest Supervisor accepted their offer in May of 2016.

The SWRCB, Division of Water Rights also received several water rights complaints against Nestlé starting on April 20, 2015, including a complaint that Nestlé was diverting water without a valid state water right. The SWRCB released their Report of Investigation (“investigation” or “report”) on December 20, 2017. The full report with attachments is available online at:

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

The SWRCB staff concluded that:

- **Nestlé is diverting water without a basis of right** – the investigation concluded that a significant portion of the water currently diverted by Nestlé appears to be diverted without a valid basis of right, after examining a variety of water rights claims put forward by Nestlé and finding them flawed.
- **Nestlé’s claim to a pre-1914 water right is not valid** – Nestlé’s claims of senior water rights that originate 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.
- **The Del Rosa judgment did not award water rights** - Nestlé claims to have pre-1914 water rights originating from its predecessor, which was awarded access to water from the upper reaches of the Strawberry Canyon Watershed under the Del Rosa Judgment. The judgement was a stipulated settlement agreement between private parties resulting from a judicial proceeding, and could not supersede requirements to comply with the 1913 Water Commission Act, which established the exclusive means of appropriating water in California through a comprehensive permitted scheme.
- **Nestlé may be able to claim a pre-1914 water right to Indian Springs** – the investigation concluded that Nestlé may have an appropriative right to 26 acre-feet (8.5 million gallons) of water per year from Indian Springs, which is a spring located on the national forest but in a different tributary from the current water system. Nestlé has never claimed this right, but the staff report concluded that it could be applied to the current

operation. The state assumed that this water right was used as part of Nestlé's water diversions.

- **Nestlé may be appropriating ground water** – the investigation concluded that Nestlé is withdrawing percolating groundwater from several horizontal wells. California does not grant the SWRCB permitting authority over groundwater, so Nestlé's diversion of groundwater may continue with permission of the overlying landowner.

Corrective Actions: the staff report identified several recommended actions that Nestlé would have to complete to be in compliance with state law, including:

- **Immediately cease any unauthorized diversions**
- **Within 30 days** file notices for both the authorized and unauthorized diversions
- **Within 60 days** submit an interim compliance plan for review and approval by the SWRCB
- **Within 90 days** submit an investigation and monitoring plan for SWRCB approval
- **Within 18 months** submit a final report and compliance plan, including a model for determining how diversions impact surface flows

Other recommendations: the staff report recommended that no action be taken on the claims of injury to public trust resources pending the implementation of the Forest Service special use process and adaptive management plan.

The staff recommendations are prospective and they indicated Nestlé's claim of water rights was reasonable if mistaken. Under these circumstances Nestlé is in compliance with the terms of their existing permit so long as they comply with the lawful orders of the SWRCB. This same standard applies to the permit approved in this decision.

As with any area where jurisdiction is shared with another agency, the Forest Service authority to regulate occupancy and use is independent of the SWRCB. Nestlé is subject to this shared jurisdiction, and will be required to follow any final direction from the state, as well as the conditions of their Forest Service permit. There is nothing in the SWRCB staff recommendations that would require the Forest Service to reduce or alter the resource mitigation measures outlined in this decision or allow for an increase in the environmental impact of the authorized actions that would result in extraordinary circumstances.

There is overlap with the SWRCB requirement for an investigation and monitoring plan and the Forest Service required hydrologic studies and Adaptive Management Plan. I will ensure that Forest Service staff coordinates with the SWRCB to the extent possible so that the studies are conducted in an efficient manner that is consistent with LMP standards and the permit requirements. Nestlé is currently conducting monitoring as part of the current permit, and that monitoring will continue under the new permit. Nestlé will need written Forest Service approval for any additional monitoring on the National Forest and must secure that approval prior to conducting any additional monitoring work on the Forest.

Nothing in my decision requires transfer of any state water right from Nestlé to the United States. Surface water in California is a public resource that is regulated by the State Water Resources Control Board, which determines the basis for Nestlé's right to use water. With full recognition of those rights, the San Bernardino National Forest Land Management Plan allows

for water extraction from National Forest System lands, but does require that permitted uses protect forest resources and operate in compliance with all applicable laws and regulations.

The Forest Service controls the use of the National Forest System lands. If a water rights holder wants to install and maintain infrastructure to access water on the National Forest, they must obtain a land-use authorization from the Forest Service and follow any terms and conditions included. If the Land Management Plan requirements can be met, and the applicant has a valid state water right, then the access and infrastructure that facilitates water extraction can be authorized.

Questions about the public involvement process – Several commenters suggested that public involvement should have included a different approach, including:

- Public field trips
- Meetings with technical work groups
- A public meeting format where agency official made a presentation and took questions from the audience
- A public meeting format where the audience could make verbal comments on the record

Forest Service Response - I used an approach that included direct mail notification to over 2,000 contacts, including property owners within the affected watershed, and held a public meeting where the public could discuss the project directly with Forest Service staff. The Forest Public Affairs Officer responded to numerous media requests, and the permit review has been widely covered in both the local and national news. I chose not to hold public field trips due to safety concerns. The permit area is located in steep, rugged terrain that is accessed by foot. Parking in the vicinity is limited and along a busy state highway with narrow road shoulders. Given those constraints it would not be practical to offer a public field trip under those conditions. I would note, as reported in the media, that small groups of interested public have accessed the site. There are no forest orders or other limits on public access to the area.

I also did not see the need to hold technical workshops. The staff that I have assigned to the project are qualified, experienced and capable of providing me with technical analysis and professional advice. Those same staff were available to discuss the project directly with the public during our public meeting. I find the informal public meeting setting more productive, efficient, and less confrontational than the suggested hearing format. People that attended the public meeting could and did submit written comments, and staff had material available to facilitate that process.

Alternative actions - I also evaluated a number of alternative actions suggested during scoping. I incorporated several changes and clarifications to the Forest Service proposed action based on public comments and suggestions (see pages 15 and 16). I have briefly summarized my considerations of these alternative actions.

Suspend Operations while studies are conducted - Many commenters who generally oppose the new permit as proposed by the Forest Service requested I consider suspending all Nestlé's operations while studies are completed. Under this approach, the Forest Service would not authorize the extraction of water while studies were being completed on Strawberry Creek, however the improvements would be authorized and Nestlé would be allowed to maintain the improvements for eventual use. Further, there would be no need for a paired basin study or adaptive management plan as all required studies would be conducted within the affected

watershed. Under this alternative action it is likely that operations would be suspended for three to five years to allow for adequate study time.

Forest Service Response - Nestlé's operations on the National Forest are of long-standing, and have been permitted since 1929. Nestlé's operations have been consistent with prevailing Forest Service law, regulation and policy through the intervening decades. Nestlé has undergone multiple permit renewals prior to the current review. In such circumstances, suspending operations to study the effects of issuing a new permit for an existing use is not necessary in the judgment of the Forest Service as long as the permittee is operating consistent with the terms and conditions of the existing authorization, as is the case here. There is no compelling evidence before the agency that suspension of the permitted activities is necessary to determine terms and conditions of a new permit for the activity that will adequately protect the federal resources.

Issue a 1 year or 10-year Permit - Several commenters suggested issuing shorter term permits. Another commenter suggested a 10-year permit would be appropriate. Forest Service regulations (36 CFR 251.56(b)(1)) require, in part, that "The duration shall be no longer than the authorized officer determines to be necessary to accomplish the purpose of the authorization and to be reasonable in light of all circumstances concerning the use...". Forest Service policy (at Forest Service Manual section 2703.3) states "Limit the use to the minimum area and period of time required to accommodate the use."

Forest Service Response - In this case the Forest Service has selected a three (3) year initial term in light of all circumstances concerning the use as an appropriate length of time to accommodate the use and associated studies, with a provision for discretionary annual permits for an additional two (2) years. The Forest Service has determined that three years is a reasonable term to complete the studies and ensure that adequate information is available to consider a longer-term permit with appropriate terms and conditions while recognizing that additional time may be needed to complete the studies prior to the expiration of the initial three-year permit. The resource mitigation measures for the 5 year timeframe will ensure effects are beneath the extraordinary circumstances threshold while the studies are completed. A short term permit would not allow enough time to complete meaningful studies. While extending the term may be more advantageous to the permittee, it does little to ensure that the operations and water extraction are conducted in a manner that protects national forest resources within the shortest amount of time.

Implement Voluntary Measures - Nestlé proposed a voluntarily Adaptive Management Plan during scoping and offered a detailed plan as an alternative action to the Forest Service proposed Adaptive Management Plan. Under this proposed approach, implementation of the Adaptive Management Plan would be discretionary on the permittees part. Under such a voluntary approach, the Forest Service would have no regulatory recourse if the permittee were to change its commitment to the plan.

Nestlé submitted an unsolicited "Final Draft Adaptive Management Plan" (Final Draft AMP) to the Forest Service on December 20, 2017. According to Nestlé, this Final Draft AMP is based on their proposed AMP submitted on May 2, 2016. Nestlé stated that this latest version of their Draft AMP reflects communications with the USFS on the appropriate elements of an AMP.

The proposed alternative Adaptive Management Plan would study the same objectives as the Forest Service proposed plan, but the triggers and actions for riparian area objectives would be

different. Triggers for streamflow would be based on the Palmer drought index as a trigger for reduction in water extraction. Reductions would be implemented by reducing extraction using a fixed percentage of the extracted flow. Under the original proposed Adaptive Management Plan submitted in 2016, water extraction would be reduced, potentially up to 50% in extreme drought conditions. Under the December 2017 Final Draft AMP, the proposed reductions in extraction have been modified so that the range is now potentially up to 30% decrease in extreme drought, or 40% if photo monitoring shows a 30% loss of riparian canopy from the prior year.

Forest Service Response - FLPMA requires that "Each right-of-way shall contain (a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment...", and Forest Service regulations (36 CFR 251.56(a)(1)) require that "Each special use authorization must contain: (i) Terms and conditions which will: (A) Carry out the purposes of applicable statutes and rules and regulations issued thereunder; (B) Minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment;...". Voluntary adoption of a plan to protect riparian resources is not consistent with the requirement that each permit must contain such conditions. Voluntary measures are not reasonable when the regulatory structure requires mandatory conditions.

Further, the proposed alternative Adaptive Management Plan and the updated Final Draft AMP are inconsistent with the Land Management Plan (LMP) and FLPMA requirements and therefore do not meet the Purpose and Need for this Forest Service action. LMP Standard 46 requires that water extraction will only be authorized when the user demonstrates that the water extracted is excess to the needs of National Forest resources. Under the LMP standards, if the riparian resource needs are met, any water in excess of that need is available for extraction. While the alternative approach would reduce extraction by 10%, 20%, 30%, or 40% there is no mechanism proposed to assure that the various levels of reduction will provide adequately for riparian resources. In addition, the approach proposed does not provide a measurable basis for a starting point from which flows would be reduced. While this approach provides for a greater degree of certainty for water extraction operations, it does not satisfy the LMP requirements. This alternative AMP was not considered further because it is not consistent with the LMP.

Reissue a New Permit Under the Same Terms as the 1978 Permit—One comment suggested that the Forest Service should evaluate an alternative action that would issue a permit for a 10 year term that does not contain permit terms that differ from the existing 1978 permit. More specifically, the comment suggested that the Forest Service should evaluate a new permit that does not include conditions that would restrict the extraction of water from National Forest System lands.

Forest Service Response - New permits must use the most current standard form, and from an administrative standpoint it would not be feasible to issue a new permit based on the old permit form, which is now obsolete. In addition, as explained in the purpose and need section, any new permit issued must comply with Forest Service law, regulation, policy, and LMP standards, all of which have changed since Nestlé was last issued a permit. The LMP, first adopted in 1989 and revised in 2005, places an increased focus on balancing development with environmental protection, and imposes specific direction for protecting watershed function. The 1978 permit, which was issued 11 years prior to the first LMP, does not include conditions that reflect this management direction.

When a permit does not provide for renewal, as is the case here, the decision to reauthorize the use is discretionary. Consistent with Forest Service regulations (36 CFR 251.64), the authorized officer may modify the terms, conditions, and special stipulations to reflect new requirements in current land use plans. The proposal to maintain terms and conditions from the expired permit does not meet the project purpose and need, which includes the need to respond to a request to authorize a permit that is consistent with state and federal law, regulation, policy, and with the San Bernardino National Forest LMP.

Actions outside the scope of the analysis - A few comments suggested actions that are outside the scope of this analysis, including reducing plastic waste, changing the diversion to the lower watershed, and evaluating the area for wild and scenic designation.

Several comments suggested an alternative action that reduces plastic waste. According to those comments, Nestlé may produce up to 13 billion bottles of water from the water extracted from the San Bernardino National Forest. The proposed alternative action presumes that many of these bottles end up as waste and or litter. No specific reduction is proposed.

There is no question that reducing waste and recycling plastic bottles is an important societal issue. California has an extensive recycling program that includes producers, distributors, recycling facilities, along with a redemption program. Nestlé must participate in this program as a producer. Developing an alternative action that goes beyond the existing framework is beyond the scope of this analysis and outside of Forest Service jurisdiction.

Several commenters suggested moving the extraction point to the lower end of the Strawberry Creek / East Twin Creek watershed. This alternative action is based on the premise that extracting water in the lower watershed would have less impact on Strawberry Creek surface water flows within the National Forest. One comment suggested that Nestlé relocate to another location with more plentiful supply of water such as headwaters of the Mississippi river.

As this is an existing use of long-standing, the decision framework is whether or not I will approve continued use and occupancy and authorize a new permit for the existing facilities at the request of the permittee, and if so what conditions apply. My decision does not include a need to find a new location for the facilities if I chose not to approve the continued use of NFS lands. It would be up to Nestlé to determine if they wanted to pursue a new permit for a different location. Therefore, an alternative action to relocate the facilities is outside the scope of this analysis.

One comment suggested an alternative action that would consider and evaluate Wild and Scenic River eligibility for Strawberry Creek. Wild and Scenic River eligibility was evaluated as part of the LMP revision in 2005. As described in Appendix E of the LMP Final Environmental Impact Statement, free flowing streams with outstandingly remarkable characteristics were evaluated. Strawberry Creek did not make the eligible rivers list. Since this alternative action was already considered in the LMP, it is outside the scope of this analysis.

CONSULTATION WITH OTHER GOVERNMENT AGENCIES

The March 18, 2016 scoping notice was distributed to federal, state, and local agencies. Written replies were received from the US Environmental Protection Agency, the US Fish and Wildlife Service, the State Water Resources Control Board (SWRCB), the Santa Ana Regional Water Quality Control Board, the California Department of Fish and Wildlife, and San Bernardino County. Copies of the correspondence are available in the project record.

The SWRCB is conducting their own investigation into the water rights held by Nestlé, and the Forest Service has worked directly with the SWRCB staff on that matter, including participation in a June 15, 2016 site visit. As I've described earlier in the decision, the SWRCB staff issued their Report of Investigation on December 20, 2017. Although the SWRCB staff has made numerous recommendations in their report, the SWRCB has not taken formal action. The Forest Service will continue to work with the SWRCB as requested.

The Forest Service is also working directly with the US Fish and Wildlife Service (FWS) and the California Department of Fish and Wildlife (CDFW). I have incorporated the FWS suggestion that our watershed studies measure the isotopes in the water to help determine travel time and source locations. I have consulted with the FWS as required by Section 7 of the Endangered Species Act, requesting informal consultation for the findings documented in the Wildlife Biological Assessment. The FWS concurred with the findings by letter of June 27, 2017.

As discussed above, the Forest Service corresponded with the FDA to relay public concerns relating to Nestlé's labeling of its bottled water.

TRIBAL CONSULTATION

The Forest Service initiated government to government consultation with the San Manuel Band of Mission Indians by letter of January 23, 2016. The Front Country District Ranger and Forest Tribal Liaison met with tribal leaders and staff in August of 2016 to discuss the proposed permit in more detail. Government to Government consultation is on-going.

OTHER PERMITS REQUIRED

Nestlé, as the permittee, is subject to the jurisdiction of other federal agencies, as well as state and local agency requirements. Nestlé must comply with federal and state drinking water standards, follow state and local requirements for their wells, hold a valid state water right, and comply with any Regional Water Quality Control Board discharge requirements. The California Department of Fish and Wildlife may also require permits related to stream alteration.

FINDINGS REQUIRED BY OTHER LAWS AND REGULATIONS

The findings related to the Endangered Species Act, the National Historic Preservation Act, the Migratory Bird Treaty Act, the Clean Water Act, and the Clean Air Act were addressed in my evaluation of extraordinary circumstances or in response to resource topics suggested by the public during scoping. I also considered the following laws, regulations and policy as they relate to my decision.

The Organic Act

The Organic Act established the forest reserves and continues to provide the basic authority for the management of those lands. Part of the act states that "All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated, or under the laws of the United States and the rules and regulations established thereunder." (16 USC 481). The State of California Water Resources Control Board regulates water rights and beneficial uses of water within the state. The Santa Ana Regional Water Quality Control Board (a subdivision of the SWRCB) has identified beneficial uses for the Santa Ana watershed, including the use of surface waters of

Strawberry Creek as “Municipal and Domestic Supply” (MUN), which are waters that are used for community, military, municipal or individual water supply systems. These uses may include, but are not limited to, drinking water supply. Based on my review of the basin plan, I have concluded that the authorized use of the water is consistent with the requirements of the Organic Act.

Multiple-Use Sustained-Yield Act (MUSYA)

The MUSYA provides that:

“It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.”(16 USC 528)

My decision is consistent with the purposes for which the San Bernardino National Forest was established. The resource mitigation measures include provisions for the protection of watershed, wildlife, and fish (aquatic) resources.

The Federal Land Policy and Management Act (FLPMA)

Under FLPMA, the Secretary of Agriculture has authority to issue rights-of-way for:

“...reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, tunnels, and other facilities and systems for the impoundment, storage, transportation, or distribution of water...”(43 USC 1761)

Provided:

“Each right-of-way shall contain--

(a) terms and conditions which will (i) carry out the purposes of this Act and rules and regulations issued thereunder; (ii) minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment; (iii) require compliance with applicable air and water quality standards established by or pursuant to applicable Federal or State law; and (iv) require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance of or for rights-of-way for similar purposes if those standards are more stringent than applicable Federal standards...”(43 USC 1765).

My decision adopts resource mitigation measures, terms, and conditions that will protect the environment and require compliance with applicable federal, state, and local laws. My decision is consistent with the requirements of FLPMA.

The National Forest Management Act (NFMA)

The NFMA provides the statutory direction for the development of Land and Resource Management Plans (commonly called Land Management Plans). It also requires that:

“Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” (16 USC 1604(i))

The current LMP was adopted by the Regional Forester on April 3, 2006. The Record of Decision that adopted the LMP required that re-issuance of existing authorizations be treated as new decisions, which must be consistent with the new direction described in the revised LMP. The various specialist reports include an evaluation of the consistency with the San Bernardino National Forest LMP requirements, and based on that analysis my decision is consistent with LMP direction. Two standards in particular were important to my decision. Those standards are:

- **S45:** All construction, reconstruction, operation and maintenance of tunnels on National Forest System lands shall use practices that minimize adverse effects on groundwater aquifers and their surface expressions.
- **S46:** Surface water diversions and groundwater extractions, including wells and spring developments will only be authorized when it is demonstrated by the user, and/or agreed to by the Forest Service, that the water extracted is excess to the current and reasonably foreseeable future needs of forest resources.
 - Consideration of beneficial uses, existing water rights, and the absence of other available water sources will be part of the water extraction application.
 - Approved extractions and diversions will provide for long-term protection and reasonable use of surface water and groundwater resources.
 - Feasibility and sustainability assessments should be appropriately scaled to the magnitude of the extraction or diversion proposed.

Based on the record and the analysis provided by staff, I have concluded that minimum flows are required to meet the current and foreseeable needs of forest resources during the term of the new permit. The paired basin study and adaptive management plan provide practices to adjust those minimum flows during the permit term to ensure that resource mitigation measures are met, which then ensure that the degree of potential adverse effects on the surface expression of the water associated with Nestlé's tunnels and horizontal wells are minimized.

Executive Order 13112 of February 3, 1999

This order directs federal agencies to prevent the introduction of invasive species, detect and respond rapidly to and control such species, not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species unless the agency has determined and made public its determination that the benefits of such actions clearly outweigh the potential harm caused by invasive species; and that all feasible and prudent measures to minimize risk of harm will be taken in conjunction with the actions.

I have adopted standard permit conditions that address the requirements of this Executive Order, and have adopted additional resource mitigation measures that provide additional detail as to how invasive species will be detected and controlled. My decision to authorize this use is consistent with this Executive Order.

Executive Order 13790 of April 25, 2017

The "Promoting Agriculture and Rural Prosperity in America" executive order establishes policy that states:

"A reliable, safe, and affordable food, fiber, and forestry supply is critical to America's

national security, stability, and prosperity. It is in the national interest to promote American agriculture and protect the rural communities where food, fiber, forestry, and many of our renewable fuels are cultivated. It is further in the national interest to ensure that regulatory burdens do not unnecessarily encumber agricultural production, harm rural communities, constrain economic growth, hamper job creation, or increase the cost of food for Americans and our customers around the world.”

The order also creates a Task Force and includes direction for that Task Force to “identify legislative, regulatory, and policy changes to promote in rural America agriculture, economic development, job growth, infrastructure improvements, technological innovation, energy security, and quality of life.” Among the changes that the Task Force is directed to consider are “changes that would... ensure that water users’ private property rights are not encumbered when they attempt to secure permits to operate on public lands...”

The executive order is a prospective approach creating a Task Force to consider possible changes on many topics, including any changes that might be warranted to avoid encumbrance of water users’ private property rights in federal permitting. The order does not change applicable current law, regulation, or Forest Service policy, nor does it “impair or otherwise affect” the authority granted by law to executive departments or agencies or the heads thereof.

My decision is consistent with current law, regulation, and policy, which includes requirements for measures for the protection of fish and wildlife resources, and when necessary, measures to comply with Land Management Plans. My decision does not attempt to encumber, expand, or determine the scope of, any private property rights Nestlé may have in association with their water use. As discussed above, my decision leaves any issue concerning the extent of Nestlé’s water rights to the state agency who has that authority--the SWRCB.

Executive Order 13807 of August 15, 2017

The “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects” executive order applies to Federal review of certain infrastructure projects. Policy established by the order includes direction to find more efficient and effective ways to develop infrastructure without sacrificing environmental, health and safety, transparency, and other concerns. The order further establishes a definition for an “infrastructure project” and provides process enhancements to achieve the policies expressed in the order.

The order does not apply to my decision because the decision is not authorizing an infrastructure project. The Nestlé wells, pipelines, and other support facilities in question already exist and no new pipelines or other improvements are authorized. In addition, Nestlé’s water extraction and transport operations are for purposes of its private commercial bottling operations and are not an infrastructure project “designed to provide or support services to the general public.” My decision also is consistent with the spirit of the order in that it involves a single federal agency decision utilizing a categorical exclusion with conditions based on the agency objective to authorize and manage special uses of National Forest System lands in a manner which protects natural resources and public health and safety and is consistent with the Land Management Plan.

Special Use Regulations and Policy

Forest Service regulations for special uses found at Title 36 of the Code of Federal Regulations (CFR) Part 251 Subpart B apply to the analysis and decision, as well as Special Use policy in the Forest Service Manual section 2700.

Nestlé's predecessor requested a new permit in 1987. That request was accepted as an application for a new permit, and is being processed under the current regulations. Those regulations at 36 CFR § 251.64 provide:

(a) When a special use authorization provides for renewal, the authorized officer shall renew it where such renewal is authorized by law, if the project or facility is still being used for the purpose(s) previously authorized and is being operated and maintained in accordance with all the provisions of the authorization. In making such renewal, the authorized officer may modify the terms, conditions, and special stipulations to reflect any new requirements imposed by current Federal and State land use plans, laws, regulations or other management decisions. Special uses may be reauthorized upon expiration so long as such use remains consistent with the decision that approved the expiring special use or group of uses. If significant new information or circumstances have developed, appropriate environmental analysis must accompany the decision to reauthorize the special use.

(b) When a special use authorization does not provide for renewal, it is discretionary with the authorized officer, upon request from the holder and prior to its expiration, whether or not the authorization shall be renewed. A renewal pursuant to this section shall comply with the same provisions contained in paragraph (a) of this section.

The 1978 permit does not provide for renewal, however the paragraph (b) requirements incorporate the provisions of paragraph (a), including the provision for modifying the terms consistent with new land use plans, and the requirement to conduct appropriate environmental analysis. Consistent with that direction, I have adopted terms and conditions that reflect new requirements imposed by Forest Service regulations and the LMP. I have completed an environmental analysis as documented in this Decision Memo. The new permit itself reflects the latest version of the standard Forest Service special use permit (FS-2700-4), and includes numerous standard administrative conditions as well as project specific terms. My decision is consistent with this regulation.

My decision is also consistent with the terms of the existing permit clause 23, which states in part "a new permit to occupy and use the same National Forest land may be granted provided the permittee will comply with the then existing laws and regulations governing the occupancy and use of National Forest lands..."

Water Uses and Development Policy

Forest Service Water Uses and Development policy in the Forest Service Manual 2540 provides additional direction for privately held water rights and special use authorizations for water developments. Section 2541.34 states, in part:

"The establishment of a water right on National Forest System land does not limit the Regional Forester's authority to regulate land use and occupancy, nor to prevent injury to

property of the United States. Although a permittee may make beneficial use of water on National Forest System land, the Regional Forester retains the authority to determine management actions needed to comply with rules and regulations for land use and occupancy.”

Section 2541.35 directs:

“Special-use authorizations that involve water storage, transmission, or diversion facilities on National Forest System lands (FSM 2729) authorize occupancy of the land only for the specific development purpose. In no case does the United States necessarily relinquish any water right it may have, or waive the right to use such water. Include stipulations in the authorizing documents to ensure the quantities of water needed to fulfill purposes of the National Forest and for environmental needs will be maintained instream. Clearly inform the permittee that the authorization does not confer any legal right to the use of the water, nor does it provide a basis for acquiring such a right as against the United States (FSM 2782 and 2783.12).”

My decision, which includes resource mitigation measures, is consistent with this policy direction. The Forest Service has developed standard permit terms that further implement this direction, and standard permit clause D-25 will be included in the new permit.

REFERENCE MATERIAL

All documents referenced in this Decision Memo, such as the various reports and assessments, are available on-line through the project webpage at:

<http://go.usa.gov/cGyXH> (please note - this URL is case sensitive)

ADMINISTRATIVE REVIEW (APPEAL) OPPORTUNITIES

This decision is not subject to the 36 CFR Part 218 Project-Level Pre-decisional Administrative Review Process. The Forest Service no longer offers notice, comment and appeal opportunities for categorically excluded projects pursuant to 36 CFR Part 215, which were replaced by the 218 rule.

My decision is not subject to appeal under the 36 CFR Part 214 Post-decisional Administrative Review Process For Occupancy Or Use Of National Forest System Lands And Resources regulations as specified in 36 CFR § 214.4(c). Specifically my decision to issue a new permit is not a decision to modify, suspend, or revoke a special use authorization. The existing special use permit does not provide for renewal and will terminate according to its terms once the new permit is executed or the implementation process described below is complete.

IMPLEMENTATION

This decision to authorize the continued use, subject to terms and conditions that implement the LMP, concludes the Forest Service review of Nestlé’s application for a new permit. The new permit will become effective when signed by both the applicant and me (as the authorized officer). The permit must be signed by Nestlé and returned to me within 60 days of its receipt by Nestlé, unless I extend that time. Refusal by Nestlé to sign and accept a special use authorization within the time allowed, and before its final approval and signature by an authorized officer,



shall terminate an application and constitute denial of the requested use and occupancy (36 CFR 251.62).

CONTACT

For additional information concerning this decision, contact: Tasha Hernandez, Forest Planner, at nestle_decision_sbnf@fs.fed.us.

JUN 27 2018

Joseph Rechsteiner

Date

District Ranger

San Bernardino National Forest

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THE STORY OF
STUFF
PROJECT

May 1, 2016

Stiv Wilson
Campaigns Director
The Story of Stuff Project
Stiv@storyofstuff.org
503.913.7381

Front Country Ranger District Office
1209 Lytle Creek Road
Lytle Creek,
CA 92358
Attn: Nestle Waters

Re: Nestlé Waters North America Inc. Special Use Permit #48530

Dear US Forest Service:

I respectfully submit the following comments regarding Nestle Waters North America Inc. Special Use Permit #48530 on behalf of The Story of Stuff Project, a California registered 501c3 that works on issues of waste and public resources, representing over one million concerned citizens, globally. The Story of Stuff Project reaches over 100 million people, annually.

For almost three decades, The United States citizen taxpayers have been subsidizing a foreign corporation's occupation of public lands, severely diminishing the health and recreational value of our publicly owned National Forest System. Since the expiration of the permit, Nestle has drawn nearly 1.8 billion gallons of water from public lands according to San Bernardino Municipal Water District records including during a time of prolonged drought. As such, The Story of Stuff Project, The Center for Biological Diversity, and Courage Campaign filed suit in federal court, demanding that Nestle's SUP be subject to review, and as such, given proper scrutiny as required by the National Environmental Policy Act and several other relevant federal statutes.

The Forest Service should conduct an independent, publicly transparent, and incredibly stringent Environmental Impact Statement, paid for but not conducted by Nestle, to determine the impacts to our publicly owned lands, as massive amounts of water are being taken. No other SUP is even near the size of Nestle's take. The proposed Adaptive Management Plan, made public several weeks ago Forest Supervisor Jody Noiron, allows Nestle's operation to continue unabated, which is unacceptable. This is illogical for a number of reasons. For one, in order to determine whether the water Nestle extracts is surplus to the needs of the forest, which is the only criteria by which Nestle would be

continued to occupy lands with water extraction infrastructure, The Forest Service must immediately halt Nestle's extraction in order to determine natural, baseline flows in Strawberry Creek. On April 4th at 17:30 Pacific Daylight Time, according to USGS's publicly viewable stream gaugeⁱⁱ, Strawberry Creek recorded the lowest flow ever for Strawberry Creek; flowing at less than 10% of a 94 year mean, which undoubtedly is disastrous to our public lands and the animals and plants legally protected in these areas.

Subsidizing Waste

Over the past decade, The National Parks Service has actively worked to ban the sale of bottled water within the park system, given the tremendous amount of waste that bottled water products create, both in the waste stream and accounting for litter in the parks themselves. Grand Canyon National Park was the first park to ban water, and since then, at least 17 other parks have followed suit. According to Los Angeles based Container Recycling Institute, the average package size for bottled water is 16.9 ounces in plastic bottles. This translates to The Forest Service subsidizing over 13.68 billion plastic bottles entering the waste stream, where only half were recovered for recycling. What's ironic, given the fact that Nestle is the largest water bottler in the world, it's likely that at least some of the plastic bottles littered in the Grand Canyon National Park originated from San Bernardino National Forest and Nestle's operation there. Beyond the irony, it's clear that The National Parks system, though managed differently than National Forests, has taken a stance against bottled water for its inherent wastefulness.

The Forest Service has not only indirectly subsidized an incomprehensible amount of waste as a result of allowing Nestle to occupy public lands, it has also indirectly contributed to greenhouse gas emissions associated with bottled water production to the tune of 675,000 tons of carbon dioxide, roughly equivalent to the emissions of 112,000 cars, annuallyⁱⁱⁱ.

Though Nestle has argued that they own a valid water right, public records show that The Forest Service has not done its due diligence with regard to determining whether Nestle owns a valid water right in the first place.^{iv}

In addition to comments made here, The Story of Stuff Project is submitting an additional comments of over 280,000 concerned taxpayers regarding The Forest Service's mismanagement of public resources. We hope that given the tremendous amount of citizen outrage associated with Nestle's operation in San Bernardino National Forest, The Forest Service will amend their SUP review to ensure that no more damage will be done to our public lands, nor will The Forest Service continue to subsidize the tremendous waste the extraction creates.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized name, possibly "J. Smith" or similar, written in a cursive or semi-cursive style.

Stiv J. Wilson
Campaigns Director
The Story of Stuff Project

ⁱ <http://www.sbcity.org/civicax/filebank/blobdload.aspx?BlobID=3722>

ⁱⁱ http://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&cb_00065=on&format=gif_default&site_no=11058500&period=4&begin_date=2015-07-13&end_date=2015-08-12

ⁱⁱⁱ <http://pacinst.org/publication/bottled-water-and-energy-a-fact-sheet/>

^{iv} [file:///Users/agentstiv/Downloads/2015-10-13%20-%20Dkt%20001%20-%20COMPLAINT%20\(1\).pdf](file:///Users/agentstiv/Downloads/2015-10-13%20-%20Dkt%20001%20-%20COMPLAINT%20(1).pdf)

paragraphs: 32, 33, 37, 38, 39, 44, 45, 53.



EDMUND G. BROWN JR.
GOVERNOR

MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

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.
5772 Jurupa Street
Ontario, CA 91761

CERTIFIED NO. 7003 1680 0000 2962 1098

Rita Maguire, Esq.
Maguire, Pearce & Storey, PLLC
2999 North 44th Street, Suite 650
Phoenix, AZ 85018

CERTIFIED NO. 7003 1680 0000 2962 1104

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 NWNA), 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

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

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, NWN'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. NWN 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)

Larry Lawrence
Rita Maguire, Esq.

- 5 -

DEC 20 2017

cc: (w/out enclosures)

League of Women Voters
of the San Bernardino Area
PO Box 3394
San Bernardino, CA 92413

San Bernardino County
Department of Public Works, Environmental
Management Division
Attention: Nancy Sansonetti, AICP, Senior Planner
825 East Third Street, Room 123
San Bernardino, CA 92415

ec: (w/out enclosures)

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Facsimile: (310) 798-2402

*Attorneys for Plaintiffs Story of Stuff
and Courage Campaign*

Case No. 5:15-cv-02098-JGB-DTB

**DECLARATION OF STEVE LOE
(SECOND) RE: REMEDIES**

VS.

Defendants.

1 Los Angeles Metropolitan Water District ("LAMWD") on the Arrowhead-Inland
2 Feeder Tunnel Project ("Tunnel Project"). The Inland Feeder is a 44-mile long
3 high capacity water conveyance system that connects the California State Water
4 Project to the Colorado River Aqueduct and Diamond Valley Lake. The
5 Metropolitan Water District of Southern California designed the system to increase
6 Southern California's water supply reliability in the face of future weather pattern
7 uncertainties, while minimizing the impact on the San Francisco Bay/Sacramento-
8 San Joaquin River Delta environment in Northern California. The Arrowhead East
9 Tunnel travels across lower Strawberry Canyon and required a special use permit
10 from the San Bernardino National Forest. The Forest Service required substantial
11 redesign to make the tunnel nearly waterproof to prevent groundwater inflow (loss
12 from the Forest) as part of the final project. This was the largest tunnel on any
13 National Forest in the country. I was the lead biologist for the Forest Service and
14 the more than decade-long project included the protection of Strawberry Creek
15 from any tunnel impacts.

16 4. As a professional biologist I am heavily involved in species protection
17 and restoration in southern California. I am a founding member of the Southern
18 California Freshwater Fauna Working Group ("Freshwater Working Group"). This
19 is a group of professional fish and wildlife biologists from dozens of agencies and
20 academic institutions, as well as independent biologists that work together to
21 protect and restore native freshwater fauna in southern California. Protection of
22 Strawberry Creek and its Santa Ana speckled dace and other riparian and aquatic
23 species has been a focus of this group for many years. For over two years this
24 group has been petitioning the Forest Service to protect Strawberry Creek from the
25 Nestlé water removal during the extreme drought we are currently experiencing.

1 5. In 2004, I was awarded the National Forest Service's Jack Adams
2 Award for sustained and dedicated service on behalf of fish and wildlife resources
3 on the National Forest System lands. Each year, the person that best exemplifies
4 the character of Jack Adams in the entire Forest Service is awarded this honor.

5 **Impact of Water Removal**

6 6. Based on over ten years of intensive study and monitoring of the
7 Tunnel Project, the Forest Service and LAMWD learned what the impacts of
8 groundwater withdrawal were on streams, seeps, springs and riparian areas in the
9 San Bernardino National Forest. Drawing from my experience and the data
10 generated in studying the Tunnel Project, it is clear that Nestlé's removal of up to
11 over 500 acre feet (162 million gallons) of water each year from the Strawberry
12 Creek headwaters is having a significant detrimental impact to that watershed.

13 7. Independent of Nestlé's water removal, the Strawberry Creek
14 Watershed is experiencing a prolonged and extreme drought. According to San
15 Bernardino County Flood Control measurements, the Strawberry Creek Watershed
16 has received approximately 60 percent of average precipitation for this water year,
17 based on readings of rain gauges in and around the Strawberry Creek
18 Watershed.¹ Based upon my experience on the Tunnel Project during the past
19 five years, the region has never received rainfall of the amount and duration that
20 produces significant recharge of aquifers in these mountains. My opinion of the
21 likely effect of the drought on groundwater recharge in the Strawberry Creek area
22 is supported by observation of local aquifers throughout Southern California,

23
24
25
26 ¹ SAN BERNARDINO COUNTY FLOOD CONTROL, RAINFALL TOTALS,
27 <http://www.sbcounty.gov/dpw/pwg/alert/index.html> (last visited May 3, 2016).
28 DECLARATION OF STEVE LOE RE REMEDIES
5:15-cv-02098-JGB-DTB

1 which are reaching lowest levels recorded and continuing to drop.² The situation is
2 so dire that fish are being rescued from some local streams because of drying.

3 8. Continued removal of groundwater by Nestlé during this drought is a
4 severe threat to the Strawberry Creek Watershed, the San Bernardino National
5 Forest, and adjacent communities. In addition to five years of below-average
6 precipitation, the rainfall pattern has contributed to groundwater depletion as the
7 region has not received the type of winter rains that result in significant
8 groundwater recharge. In my professional opinion, the cumulative effect of
9 Nestlé's removal of groundwater with the drought is likely severely depleting
10 groundwater stores.

11 9. Nestlé has reported taking between 25 and 130 million gallons of
12 water annually from the Strawberry Creek Watershed. In my professional opinion,
13 removal of this amount of water from the Strawberry Creek Watershed is
14 immediately detrimental and protection of the resources is unsustainable over any
15 period of time.

16 10. The United States Geological Service stream gauge showed in-flow
17 measures of Strawberry Creek at the lowest level in 93 years (the extent of
18 recorded measurement) for some days last summer.³ The summer of 2016 is

20 ² Charlie Frye, *Strawberry Creek Area Water Levels*,
21 [http://landscapeteam.maps.arcgis.com/apps/Viewer/index.html?appid=f51db12000](http://landscapeteam.maps.arcgis.com/apps/Viewer/index.html?appid=f51db12000a24b11823d652211e6fff7)
22 [a24b11823d652211e6fff7](http://landscapeteam.maps.arcgis.com/apps/Viewer/index.html?appid=f51db12000a24b11823d652211e6fff7) (last visited May 3, 2016).

23 ³ United States Geological Service, National Water Information System: Web
24 Interface, *USGS 11058500 E Twin C NR Arrowhead Springs CA* (May 3, 2016,
25 1:23 P.M.) USGS Streamgauge (East Twin/Strawberry Creek combined flows,
26 [http://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&cb_00065=on&format=](http://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&cb_00065=on&format=gif_default&site_no=11058500&period=15&begin_date=2016-03-04&end_date=2016-03-24)
27 [gif_default&site_no=11058500&period=15&begin_date=2016-03-](http://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&cb_00065=on&format=gif_default&site_no=11058500&period=15&begin_date=2016-03-04&end_date=2016-03-24)
28 [04&end_date=2016-03-24](http://nwis.waterdata.usgs.gov/ca/nwis/uv?cb_00060=on&cb_00065=on&format=gif_default&site_no=11058500&period=15&begin_date=2016-03-04&end_date=2016-03-24).

1 predicted to be dryer than the exceptional summer of 2015, and if the predicted La
2 Niña materializes, conditions could be drier than normal for several years.⁴
3 Lacking significant recharge this winter and spring (2015-2016) of the
4 groundwater that is the source of most summer flow in Strawberry Creek, it is
5 likely that Summer 2016 will have the lowest flows in recorded measurement, and
6 in all likelihood the lowest flows in recorded history due to the combined effect of
7 the severe drought and unsustainable diversion by Nestlé over the course of the
8 five year drought. This could result in the complete drying of large reaches of the
9 Creek. In addition, the few remaining untapped springs in the Strawberry Creek
10 Watershed will likely lose surface expression for the first time in recorded history
11 due to the excessive removal of groundwater.

12 11. The portions of the Watershed able to support riparian vegetation will
13 significantly shrink as the watershed continues to dewater, and this will adversely
14 affect many wildlife and plant species.

15 **Species**

16 12. Presently I am working with the California Department of Fish and
17 Wildlife and the United States Fish and Wildlife Service as well as local water
18 agencies to restore native fish and other species where they have been extirpated.
19 The Strawberry Creek Watershed is a very important stream and has been a

21 ⁴ Kurtis Alexander, *Dry La Nina period likely to follow El Niño*, S.F CHRONICLE
22 (April 22, 2016), <http://www.sfchronicle.com/bayarea/article/Dry-La-Ni-a-period-likely-to-follow-El-Ni-o-7294795.php>; Piper Dixon, *NOAA predicts La Niña for next winter, big snow for PNW*, TETON GRAVITY RESEARCH (April 20, 2016),
23 <http://www.tetongravity.com/story/news/noaa-predicts-la-nina-for-next-winter>;
24 Eric Holthaus, *We Already Know 2016 Will Be the Warmest Year on Record – and It's Only April*, SLATE (April 20, 2016),
25 http://www.slate.com/blogs/the_slatest/2016/04/20/record_temperatures_again_in_march.html.
26

1 priority for restoration, but only if more natural flows can be assured. With more
2 natural flows Strawberry Creek would support significantly improved habitat for
3 the threatened, endangered, and sensitive species that already use the Watershed.
4 Species that have been extirpated from this portion of the creek due to unnatural
5 water removal such as the Santa Ana speckled dace (and, potentially, mountain
6 yellow-legged frog) would be able to be restored. The amount of riparian habitat
7 and surface water available for hundreds of species would increase significantly.
8 Areas that are unnaturally dewatered would recover and become lush, productive
9 habitat again.

10 13. The critical impact of water diversion during this drought is creating
11 imminent danger to the Strawberry Creek Watershed. I anticipate that the
12 following effects on wildlife may be felt in the Summer 2016:⁵

- 13 a. Drying of springs in the Strawberry Creek Watershed which can result
14 in the total loss of some invertebrate species such as springsnails that
15 evolved at that spring system. Due to the remoteness of the stream and
16 springs, species that have never been found or described could be lost
17 forever.
- 18 b. Wildlife species that are dependent on riparian habitat and surface or
19 near surface moisture will lose a significant portion of their suitable
20 habitat. This includes least Bell's vireo and southwestern willow
21 flycatcher,⁶ both endangered species, and the southern rubber boa, a

22
23 ⁵ See generally, United States Forest Service, *Southern California National Forest*
24 *Animal Species Accounts*, http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3832681.pdf (last visited May 3, 2016).

25
26 ⁶ UNITED STATES FISH AND WILDLIFE SERVICE, CARLSBAD OFFICE, APPX. B TO
27 HABITAT CONSERVATION PLAN FOR L.A. DEPT. OF WATER & POWER (2015),
28 *available at*:

DECLARATION OF STEVE LOE RE REMEDIES
5:15-cv-02098-JGB-DTB

1 California Threatened species. Drying of the stream mid- to late-
2 summer could result in the loss of any nesting that has started for the
3 two endangered bird species. Southern rubber boa could be severely
4 affected by drying of their summer and winter hiding and hibernating
5 areas deep in fractures and cracks in bedrock and outcrops near the
6 wells and tunnels. Use of the surface by boas in the summer would be
7 difficult as the area unnaturally dries from excessive groundwater
8 removal.

- 9 c. Wildlife species that require surface flows such as frogs, toads, and
10 the two-striped garter snake, a Forest Service Sensitive Species, will
11 be significantly affected. Breeding of tree frogs and western toads that
12 starts before the stream dries could fail as the stream recedes. Losing
13 reproduction of these species for a year or multiple years is a
14 significant impact. Two-striped garter snake can only survive in this
15 area with surface water to support prey like the frogs and toads.
- 16 d. California-listed Threatened southern rubber boa uses rock outcrops
17 and their fissures and cracks in rock to find moisture and temperature
18 conditions to survive hot summers and cold winters.⁷ Reducing the
19

20 https://www.fws.gov/carlsbad/HCPs/LADWP/Appendix_B_Species_Habitat_Suitability_Analysis_Models_SW_Willow_Flycatcher_Survey_Results.pdf.

22 ⁷ Stephen A. Loe, *Habitat management guide for southern rubber boa (Charina*
23 *bottae umbratica) on the San Bernardino National Forest*. Prepared for the U.S.
24 Dept. of Ag. San Bernardino National Forest (1985); Robert H. Goodman, Mark R.
25 Jennings, Glenn R. Stewart, *Sensitive Species of Snakes, Frogs, and Salamanders*
26 *in Southern California Conifer Forest Areas: Status and Management*, in
27 PLANNING FOR BIODIVERSITY: BRINGING RESEARCH AND MANAGEMENT TOGETHER
(2015), available at: <http://www.treesearch.fs.fed.us/pubs/27022>;

1 moisture in southern rubber boa habitat has always been considered a
2 significant impact when biologists are judging project effects. The
3 trough of depression in the aquifer caused by continued removal of
4 groundwater through Nestlé's diversion tunnels and horizontal wells
5 is undoubtedly having an increasingly damaging and growing impact
6 on the southern rubber boa.

- 7 e. California spotted owl which needs cool, moist canyons to summer
8 and successfully breed in this predominately chaparral environment
9 will be adversely affected as the canyon dries.⁸ They are not able to
10

11 Santa Ana Watershed Association, *Sensitive Species of the Santa Ana Watershed*
12 *Southern Rubber Boa (Charina umbratica)* (Jan. 20, 2010), [http://sawatershed.org/](http://sawatershed.org/sites/default/files/posters/SouthernRubberBoaFactSheet.pdf)
13 [sites/default/files/posters/SouthernRubberBoaFactSheet.pdf](http://sawatershed.org/sites/default/files/posters/SouthernRubberBoaFactSheet.pdf); IUCN Red List of
14 Threatened Species Entry for *Charina bottae* (Rubber Boa, Southern Rubber Boa),
available at <http://www.iucnredlist.org/details/62228/0> (last visited May 3, 2016).

15 ⁸ See Rachelle Meyer, *Strix occidentalis*, in *Fire Effects Information System*;
16 UNITED STATES FOREST SERVICE, ROCKY MOUNTAIN RESEARCH STATION, FIRE
17 SCIENCES LABORATORY (2007), available at: [http://www.fs.fed.us/database/feis/](http://www.fs.fed.us/database/feis/animals/bird/stoc/all.html)
18 [animals/bird/stoc/all.html](http://www.fs.fed.us/database/feis/animals/bird/stoc/all.html); Cameron W. Barrows, *Roost site selection by spotted*
19 *owls: An adaptation to heat stress*, in *The Condor*, vol. 83, no. 4, COOPER
20 ORNITHOLOGICAL SOCIETY (1981), available at:
21 http://www.jstor.org/stable/1367496?seq=1#page_scan_tab_contents. Gordon I.
22 Gould, Jr., *Habitat requirements of the spotted owl in California*, in. *Wildlife*
23 *Transactions*, CALIFORNIA/NEVADA SECTION OF THE WILDLIFE SOCIETY (1975),
24 available at: <http://www.tws-west.org/transactions/Gould.pdf>; Cameron Barrows
25 and Katherine Barrows, *Roost Characteristics and Behavioral Thermoregulation*
26 *in the Spotted Owl*, in *Western Birds* vol. 9, no. 1, UNIVERSITY OF CALIFORNIA
27 (1978), available at [http://angelo.berkeley.edu/wp-](http://angelo.berkeley.edu/wp-content/uploads/Barrows_WesternBirds1978.pdf)
28 [content/uploads/Barrows_WesternBirds1978.pdf](http://angelo.berkeley.edu/wp-content/uploads/Barrows_WesternBirds1978.pdf); United States Fish & Wildlife
Service, *Habitat Suitability Index Models: Spotted Owl*, in *Biological Report*
82(10.113), DEPARTMENT OF THE INTERIOR (1985), available at
<http://www.nwrc.usgs.gov/wdb/pub/hsi/hsi-113.pdf>.

1 tolerate high temperatures. The loss of live oak, bigcone Douglas- fir,
2 and riparian cover is occurring and will increase due to the drying
3 conditions and this will make this watershed unsuitable for owls.

4 Every bit of moisture in the watershed is critical due to the stressed
5 condition of the water dependent vegetation. Humidity is important in
6 cooling habitats during the summer months providing cooler
7 conditions for the birds.

8 14. The California Department of Fish and Wildlife ("Department") and
9 U.S. Fish and Wildlife Service ("Service") are aware of the situation in Strawberry
10 Creek. Now that the Forest Service is beginning a new NEPA process, it will need
11 to prepare a Biological Assessment/Biological Evaluation and provide it to the
12 Service as part of consultation under the Federal Endangered Species Act. The
13 Service will later render a Biological Opinion regarding impacts to federally listed
14 species. The Department requires that projects which take state protected species
15 also obtain a take permit under California law, and the project proponent is
16 responsible for obtaining that permit. The Forest Service does not formally consult
17 with Department, but has a memorandum of understanding that it will cooperate in
18 considering projects that affect state protected species. There is little doubt that
19 take of some protected species could occur with the current conditions, Nestlé's
20 water removal, and extreme drying in the summer.


21 **Fire Suppression**

22 15. Riparian areas that are unnaturally dry due to water removal do not
23 have the fire suppression benefits of well-watered riparian areas. The susceptibility
24 of the Strawberry Creek Drainage and surrounding lands and structures to wildfire
25 will be increased by the continued drying of the watershed. Healthy, well-watered
26 riparian areas are beneficial in reducing the spread and intensity of wildfires,

1 aiding in the ability to fight fire, and reducing damage from wildfire.⁹ Since several
2 communities sit directly above the Strawberry headwaters, this poses a threat to the
3 community as the canyon dries from the drought and groundwater removal.

4 16. Strawberry Creek is a regionally significant riparian area. It has an
5 East-West orientation while other nearby waterways are oriented North-South.
6 This lateral orientation could help seriously reduce the threat and spread of fire up
7 the mountain from the foothills above San Bernardino.

8
9 I declare under penalty of perjury that the foregoing is true and correct and
10 was executed this 4th day of May, 2016, at Yucaipa, California.

11
12 
13 Steve Loe
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24 ⁹ J. Boone Kauffman, *Workshop on the Multiple Influences of Riparian/Stream*
25 *Ecosystems on Fires in Western Forest Landscapes Summary Report*, presented to
26 Rocky Mountain Forest and Range Experiment Station, Stream Systems
27 Technology Center (2001), available at: [http://www.stream.fs.fed.us/publications/](http://www.stream.fs.fed.us/publications/PDFs/Riparian%20Fire%20Final.pdf)
28 [PDFs/Riparian%20Fire%20Final.pdf](http://www.stream.fs.fed.us/publications/PDFs/Riparian%20Fire%20Final.pdf).



State of California - Natural Resources Agency
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Inland Deserts Region
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EDMUND G. BROWN, Jr., Governor
CHARLTON H. BONHAM, Director



May 2, 2016

Front Country Ranger District
1209 Lytle Creek Road
Lytle Creek, CA 92358
Attn: Nestle Waters

Subject: Nestle Waters Special Use Permit
File Code 1950; 2720

Dear US Forest Service, Front Country Ranger District:

The Department of Fish and Wildlife (CDFW) appreciates the opportunity to comment on the San Bernardino National Forest's proposed issuance of a 5-year special use permit to Nestle Waters to authorize continued occupancy of and use of National Forest Service lands for the extraction and transmission of water using existing improvements. Pursuant to The Guidelines for the Implementation of CEQA (Cal. Code Regs., tit. 14, § 15000 *et seq.*; hereafter CEQA Guidelines), CDFW has reviewed the scoping materials distributed on the project and offers comments and recommendations on those activities involved in the project that are within CDFW's area of expertise and germane to its statutory responsibilities, and/or which are required to be approved by CDFW (CEQA Guidelines, §§ 15086, 15096 & 15204).

CEQA ROLE

CDFW has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of those species (i.e., biological resources). CDFW is a Trustee Agency with responsibility under CEQA for commenting on projects that could affect biological resources. As a Trustee Agency, CDFW is responsible for providing, as available, biological expertise to review and comment upon environmental documents and impacts arising from project activities (CEQA Guidelines, § 15386; Fish & G. Code, § 1802).

CDFW may also act as a Responsible Agency based on its discretionary authority regarding project activities that impact streams and lakes (Fish & G. Code, §§ 1600 – 1616), or result in the "take" of any species listed as candidate, threatened, or endangered pursuant to the California Endangered Species Act (CESA; Fish & G. Code, § 2050 *et seq.*).

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations presented below to assist the San Bernardino National Forest (SBNF) in adequately identifying and/or mitigating the project's significant, or potentially significant, impacts on biological resources.

CDFW Specific Comments

Authorized improvements, and operations and maintenance

The proposed action will permit facilities and appurtenances associated with Nestle Water's current operations as well as maintenance of the system and the associated Forest Service access road 1N24. CDFW recommends that the SBNF evaluate, at a minimum: impacts associated with the operation and maintenance of the project, including but not limited to: the water collection tunnels, horizontal wells, concrete vaults, pipes and delivery systems; vegetation removal and/or trimming; road/trail maintenance; installation of BMPs to reduce erosion; restoration of habitat where equipment/vehicles have departed from designated roads, trails and staging areas; spill prevention and containment measures; and long-term trash removal.

Impacts to Biological Resources

CDFW is concerned with the lack of analysis of impacts to biological resources in the proposal and the deferral of this analysis to a later date. The proposal states that initial studies conducted by Nestle suggest that water extraction is reducing surface flow in Strawberry Creek, but that the effect of this flow reduction has not been thoroughly studied. Further, CDFW does not agree a "paired basin" study is the appropriate method to determine the conditions that would exist if there was no extraction in Strawberry Creek. Due to the volume of water and the placement of the extraction at the headwaters, a site specific study is justified. CDFW requests the NEPA process include a study to adequately assess and identify the impacts of the extraction within Strawberry Creek.

Also, although some information on wildlife and botany was supplied with the proposal, no specific information about this data was provided. For example, the proposal fails to provide information on the source of the data, how it was collected, when it was collected, etc. CDFW is concerned that species list is not comprehensive and excludes a number of species that are known to occur in the project area.

Where a project could affect the hydrologic regime of a watershed, the necessary elements to successfully maintain the downstream biological diversity needs to be identified to facilitate sound management decisions. Based on CDFW's review of the proposal, this information is not currently available. Instead, the proposal states that water extraction will continue during the period when such baseline data is collected. CDFW is concerned by this proposed approach, and recommends that a baseline study

be completed to identify the environmental impacts and effects since the expiration of the previously issued permit.

CDFW recommends that the NEPA document require the following:

1. A thorough assessment of the quantity of water extracted in the water collection tunnels, horizontal wells, and concrete vaults, with a focus on seasonal fluctuations.
2. A thorough assessment of the habitat, species, and life history criteria specific to the project area and downstream.
3. A *recent* and thorough assessment of the flora and fauna within, adjacent to, and downstream of the project area, with particular emphasis on identifying endangered, threatened, and sensitive species and sensitive habitats. The assessment should rely on protocol surveys. Use of species databases (for example, CDFW's California Natural Diversity Database, and those maintained by the US Forest Service) may provide current information on any previously reported sensitive species and habitat, in the vicinity of the proposed project. However, please note that these databases are not exhaustive in terms of the data they house, nor are they absence databases. CDFW recommends that they be consulted as a starting point in gathering information about the *potential presence* of species within the general area of the project site.
4. Identification of minimum instream flows necessary to maintain the health and perpetuation of aquatic resources and associated habitat in Strawberry Creek.
5. Quantification of the loss of biological resources and impacts to biological resources that may occur as a result of reduced surface flow in Strawberry Creek and downstream. The analysis should contain a thorough discussion of direct, indirect, and cumulative impacts expected to adversely affect biological resources, with specific measures to offset such impacts. Project impacts should be analyzed relative to their effects on offsite habitats. Specifically, this should include nearby streams located downstream of the project, public lands, open space, mitigation sites, adjacent natural habitats, and riparian ecosystems.
6. A specific proposal to reduce water extraction to restore surface flow within Strawberry Creek to allow for maintenance of any existing riparian and aquatic habitat, fish, and wildlife resources
7. A specific proposal to reduce water extraction to provide minimum flows in Strawberry Creek for maintenance of any existing riparian and aquatic habitat, fish, and wildlife resources.
8. A detailed mitigation plan to replace lost plant, fish, and/or wildlife resources. This plan must include a survey which quantifies the loss of resources that will occur as a result of this project. It must also specify measures that will be taken to offset impacts to resources and outline specific mitigation and monitoring programs.

CDFW recommends that the NEPA document prepared for this project contain sufficient, specific, and current biological information on the existing habitat and species at the project site; measures to minimize and avoid sensitive biological resources and important biological areas; and mitigation measures to offset the loss of native flora and fauna.

Based on CDFW's review of proposal, the project includes facilities and appurtenances that have been constructed within the bed, bank, or channel of a stream. As maintenance of these areas is included in the proposal, the project has the potential to impact areas within CDFW's jurisdiction under section 1600 *et seq.* of the Fish and Game Code. CDFW recommends that Nestle Waters consult with CDFW as soon as possible to determine if a Lake or Streambed Alteration Agreement may be required for operations and maintenance activities. Additional information on CDFW's Lake and Streambed Alteration Program is found later in this letter.

CDFW General Comments

California Environmental Quality Act (CEQA)

As defined by CEQA Guidelines Section 21065, a "project" is "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency...(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." Based on information included in the scoping materials the project may require approval from local, state, and federal agencies due to the potential of these activities to have both direct and indirect changes on the environment. For these reasons, the activities proposed in the special use permit may be considered "projects" under CEQA; thus CEQA may need to be addressed by Nestle Waters.

CDFW acknowledges that Nestle Waters is not required to address CEQA concurrently with NEPA however CDFW strongly recommends they do so in order to maintain coordination between state and federal agencies and to avoid delays in the CEQA process and any permitting processes.

Please note that as a Responsible Agency, CDFW must rely on the CEQA document prepared by the Lead Agency in order to prepare and issue a Lake or Streambed Alteration Agreement and/or Incidental Take Permit (ITP) for the project. If the CEQA document for this project fails to identify all project impacts and adequately mitigate those impacts, the project proponent may be required to reinitiate the CEQA process at their expense, or fund another CEQA process under the direction of CDFW to ensure that all project impacts are identified and adequately mitigated.

California Endangered Species Act (CESA)

CDFW is responsible for ensuring appropriate conservation of fish and wildlife resources including threatened, endangered, and/or candidate plant and animal species, pursuant to the CESA. CDFW recommends that a CESA ITP be obtained if the project has the potential to result in "take" of State-listed CESA species, either through construction or over the life of the project. CESA ITPs are issued to conserve, protect, enhance, and restore State-listed CESA species and their habitats. Revisions to the California Fish and Game Code, effective January 1998, require that CDFW issue a separate CEQA document for the issuance of a CESA ITP unless the project CEQA document addresses all project impacts to listed species and specifies a mitigation monitoring and reporting program that will meet the requirements of a CESA permit.

Fully Protected Species

Several of the species having the potential to occur within or adjacent to the project area, including, but not limited to: American peregrine falcon (*Falco peregrinus anatum*), bald eagle (*Haliaeetus leucocephalus*), and golden eagle (*Aquila chrysaetos*), are fully protected species under the Fish and Game Code. Fully protected species may not be taken or possessed at any time. Project activities should be designed to completely avoid any fully protected species that have the potential to be present within or adjacent to the project area.

CDFW recommends that the environmental document fully analyze potential adverse impacts to fully protected species due to habitat modification, loss of foraging habitat, and/or interruption of migratory and breeding behaviors. CDFW recommends that the environmental document include an analysis of how appropriate avoidance, minimization and mitigation measures will reduce indirect impacts to fully protected species.

Nesting Birds and Migratory Bird Treaty Act

Please note that it is the project proponent's responsibility to comply with all applicable laws related to nesting birds and birds of prey. Migratory non-game native bird species are protected by international treaty under the federal Migratory Bird Treaty Act (MBTA) of 1918, as amended (16 U.S.C. 703 *et seq.*). In addition, sections 3503, 3503.5, and 3513 of the Fish and Game Code (FGC) also afford protective measures as follows: Section 3503 states that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird, except as otherwise provided by FGC or any regulation made pursuant thereto; Section 3503.5 states that it is unlawful to take, possess, or destroy any birds in the orders Falconiformes or Strigiformes (birds-of-prey) or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by FGC or any regulation adopted pursuant thereto; and Section 3513 states that it is unlawful to take or possess any migratory nongame bird as designated in the MBTA or any part of such migratory nongame bird except as provided by rules and regulations adopted by the Secretary of the Interior under provisions of the MBTA.

CDFW recommends that the NEPA document include the results of avian surveys, as well as specific avoidance and minimization measures to ensure that impacts to nesting birds do not occur.

Wildlife Movement and Connectivity

The project area supports significant biological resources and contains habitat connections and supports movement across the broader landscape, sustaining both transitory and permanent wildlife populations. Onsite features, which contribute to habitat connectivity, should be evaluated and maintained. Aspects of the project could create physical barriers to wildlife movement from direct or indirect project-related activities. Indirect impacts from noise, dust, and increased human activity may displace wildlife in the general area. A discussion of both direct and indirect impacts to wildlife movement and connectivity should be included in the NEPA document.

Lake and Streambed Alteration Program

For any activity that will divert or obstruct the natural flow, or change the bed, channel, or bank (which may include associated riparian resources) of a river or stream or use material from a streambed, the project applicant (or "entity") must provide written notification to CDFW pursuant to Section 1602 of the Fish and Game Code. Based on this notification and other information, CDFW then determines whether a Lake and Streambed Alteration (LSA) Agreement is required. CDFW's issuance of an LSA Agreement is a "project" subject to CEQA (see Pub. Resources Code 21065). To facilitate issuance of an LSA Agreement, if necessary, the environmental document should fully identify the potential impacts to the lake, stream or riparian resources and provide adequate avoidance, mitigation, and monitoring and reporting commitments. Early consultation with CDFW is recommended, since modification of the proposed project may be required to avoid or reduce impacts to fish and wildlife resources. To obtain a Lake or Streambed Alteration notification package, please go to <http://www.dfg.ca.gov/habcon/1600/forms.html>.

As previously mentioned, the project includes facilities and appurtenances that have been constructed within the bed, bank, or channel of a stream. Based on this information CDFW encourages Nestle Waters to contact CDFW as soon as possible to determine if an LSA may be required for this project. Please note that although the proposed project occurs on the San Bernardino National Forest (SBNF) and the SBNF may be issuing a special use permit for this project, it does not preclude CDFW's jurisdiction under section 1600 *et seq.* of the Fish and Game Code, should the project anticipate impacts to any streams.

The following information will be required for the processing of a Notification of Lake or Streambed Alteration and CDFW recommends incorporating this information into the CEQA document to avoid subsequent documentation and project delays. Please note that failure to include this analysis in the project's environmental document could preclude CDFW from relying on the Lead Agency's analysis to issue an LSA Agreement.

without CDFW first conducting its own, separate Lead Agency subsequent or supplemental analysis for the project:

- 1) Delineation of lakes, streams, and associated habitat that will be temporarily and/or permanently impacted by the proposed project (include an estimate of impact to each habitat type);
- 2) Discussion of avoidance and minimization measures to reduce project impacts; and,
- 3) Discussion of potential mitigation measures required to reduce the project impacts to a level of insignificance. Please refer to section 15370 of the CEQA Guidelines for the definition of mitigation.

Further Coordination

CDFW appreciates the opportunity to comment on the proposed special use permit for Nestle Waters (Project Code 1950; 2720). If you should have any questions pertaining to the comments provided in this letter, please contact Jeff Brandt at (909) 987-7161, or at jeff.brandt@wildlife.ca.gov.

Sincerely,



Leslie MacNair
Regional Manager

For

cc: State Clearinghouse, Sacramento

Date submitted (UTC): 5/1/2016 4:21:05 PM
First name: Steve
Last name: Loe
Organization: Southern California Native Freshwater Fauna Working Group
Title: Co-Coordinator and Strawberry Permit Lead
Official Representative/Member Indicator:
Address1: b6
Address2:
City: Yucaipa
State: CA
Province/Region:
Zip/Postal Code: 92399-2337
Country: United States
Email: b6
Phone: b6
Comments:

Southern California Native Freshwater Fauna Working Group

May 2, 2016
Jody Noiron, Forest Supervisor
San Bernardino National Forest
602 S. Tippecanoe Ave.
San Bernardino, CA 92408

Re: Input to Scoping for Nestle Permit NEPA in Strawberry Creek
Dear Ms. Noiron:

We are a group of citizens and scientists who are dedicated to the protection and restoration of the Southern California native freshwater fauna. Our group has members from the general public and from many government agencies, universities and conservation groups.

We are extremely concerned about the on-going historic and potentially long-term drought and the effects of a long-expired permit on Strawberry Creek (San Bernardino Mountains, Santa Ana Watershed) and associated resources. We are also concerned that the Forest Service permit for the spring development and removal of water by Nestle expired a long time ago, but they continue to remove all the water they can draw from the headwater aquifer for bottled water. Conditions have changed greatly since the permits were issued. We now know much more about groundwater/surface water relationships, the habitat, and riparian/aquatic species use in this area as a result of all the work done by the Forest Service and Metropolitan Water District (MWD) on the Arrowhead Tunnel project. We now know the stream is very important to many imperiled species.

Our group has been concerned about the health of Strawberry Creek for many years. Strawberry Creek supported Santa Ana speckled dace (*Rhinichthys osculus* ssp.) for thousands of years; the dace were only recently extirpated. This was in part we believe because of a drying climate and the unnatural removal of so much water from the headwaters. The Santa Ana speckled dace is a California Species of Special Concern (SSC) and has been a focus of effort for our group, the Forest Service and the Dept. of Fish and Wildlife. California Department of Fish and Wildlife has designated certain species as SSC because declining population levels, limited ranges, and/or continuing threats have made them vulnerable to extinction. This fish is designated as Sensitive by the U.S. Forest Service and Threatened by American Fisheries Society. Restoring Santa Ana speckled dace to Strawberry Creek and East Twin has been a priority for all the cooperators.

Many of our members have worked in Strawberry Creek. The stream is severely impacted by the removal of up to 500 acre feet per year in high rainfall years and an average of 200 acre feet per year. This is a huge amount of water for a stream like Strawberry Creek when it is taken from the headwaters. Removal of water in the summer months results in large areas of the stream being dewatered. With this severe drought, even the areas that have not dried for thousands of years could dry up. Even the combined flow of West and East Twin and Strawberry Creek is almost non-existent in recent summers due to the severe drought and groundwater removal.

We are concerned about the health of the watershed for all other species that are dependent upon surface water, moist conditions and water within reach of roots for native perennial plants. We are seeing some loss of riparian plants due to lack of water on the margins of the stream in areas we have been able to visit. Strawberry

Creek has been identified as a priority for reintroduction of Santa Ana speckled dace and as having potential for future mountain yellow-legged frog (*Rana muscosa*) reintroduction. We are concerned about the potential loss of two-striped garter snake from the watershed and believe the unnatural drying of the watershed is adversely affecting tree frogs, toads, and salamanders. We are also concerned about the adverse effects of water withdrawal on other riparian dependent species known to use the area such as least Bell's vireo and southwestern willow flycatcher. Strawberry Creek is an extremely valuable resource in maintaining southern California's biological diversity. This is a priority in the Forest Plan and a priority of our group. Please explain how this proposal complies with the Forest Plan and laws and regulations regarding Threatened and Endangered Species, wetland and riparian protection, maintenance of stream flows, and the public trust. We were a part of the groups and individuals who wanted to meet with the Forest Service and Nestle in September of 2014 regarding the stream and the expired permit, and were very disappointed that the Forest Service and Nestle were not willing to meet at that time. Changes in water withdrawal were needed then and still need to be made immediately to protect the stream this next summer and in perpetuity. Please don't put off a decision to stop water removal. It needs to be done now to let the stream recover.

With the continued severe drought and almost no rain in the highest rainfall months of the year, Strawberry Creek is in big trouble. This summer is looking like it might be even dryer than last year when some day's flows were the lowest ever recorded for that date. Please consider not removing any water from the Strawberry Creek wells and tunnels until the drought is over, the permit is brought up to date and includes measures that will protect the ecosystem. We have members who have knowledge of Strawberry Creek and groundwater/surface water relationships that are willing to volunteer to help find management solutions and design studies to help determine what is in excess to National Forest needs.

We have reviewed the Forest Service proposed action and adaptive management plan. The proposed action is to continue to allow Nestle to take all the water they can while studying the issue for 5 years. Nestle is to hire and manage consultants and the Forest Service is to monitor the consultants and approve their work as we understand it. Since Strawberry can't recover or function naturally while Nestle is taking water, the proposal is to study East Twin to see how a natural stream would act. If problems with water removal are proven by Nestle's contractors, then the permit could be modified under an adaptive management strategy to try to create a more natural stream in Strawberry. A request for a field trip so people could see the resource has been denied by the Forest Service.

We have major concerns with this proposal.

1. There is so much variability in the geology, topography and vegetation, aspect and other factors that using another watershed is a problem and will not give an accurate picture of what Strawberry would do if water removal was stopped. Only by seeing how the stream, springs and riparian areas will function outside the drought and without artificial withdrawal can you determine the amount of water that is in excess of National Forest needs and thus available to Nestle.

2. If the consultants work directly for Nestle, they will have a very difficult time being independent and making conclusions and determinations that might not favor the client. It is best for everyone concerned that any consultants work for and take direction from the Forest Service as the managers and protectors of the public lands. Nestle can and should be involved, but not in control in any manner. Nestle has told us in our initial meeting in 2014 that they are not in favor of restoring populations of Santa Ana speckled dace or mountain yellow-legged frog to Strawberry Creek. With such a different philosophy and mandate than the Forest Service they cannot be expected to be unbiased. One example of this is the speckled dace evaluation they did for Perrier/Nestle in the early 2000's. They concluded that there would be more habitat and better habitat with the more natural flows, but that it was insignificant because the biomass of dace lost by water removal is minor and not significant. Using biomass as the measure shows the difference in missions. The study, if done and directed by the Forest Service would have evaluated things like summer survival, drought survival, wildfire survival with reduced flows, connectivity of suitable habitat with increased flows, long term survival etc., etc.. Not just how much biomass would be lost.

3. There must be some other alternatives considered than allowing them to continue unlimited water removal. One alternative has to be not renewing the permit, which is a very likely scenario when considering how the Forest manages its land under today's laws and mandates. No way would the Forest Service give a permit for taking groundwater from the headwaters of a stream that was occupied by numerous threatened and endangered species. Front Country perennial streams are very important to maintaining the diversity of the flora and fauna and the Forest Service would not even consider such a proposal today.

An alternative that removes groundwater from springs at the bottom of the watershed with horizontal wells as currently practiced in the top of the watershed would be much more environmentally sound and easy to manage for protection of the watershed. There are some springs as shown on topo maps at the furthest

downstream National Forest property. The temporary disturbance to install wells and infrastructure would be minor compared to dewatering the watershed in perpetuity as is currently planned. This lower area is some of the best Santa Ana speckled dace habitat and also supports southwestern willow flycatcher and least Bell's vireo. By removing water down at the bottom of the watershed, the existing USGS Twin Creek stream gage would be ideal to use for monitoring. As long as the stream was flowing adequately at the stream gage, the ecosystem of the entire watershed would be protected from the taking of water. The 40th Street crossing in North San Bernardino would also be a good and easy spot to monitor flows and set trigger points for the lower end. This would be a huge difference from the current practice of removal all the groundwater possible above 5000 feet and cumulatively dewater the watershed all the way to the bottom. Please consider and analyze this alternative if believe you are forced to provide water to Nestle.

4. Use caution if you use the studies done in the early 2000's. They were commissioned and managed by Nestle in part to give them the non-significant reports they thought they needed to renew their permit without a lot of constraints. The Forest Service and Fish and Game biologists that reviewed the reports had serious problems with the methods and conclusions. The same findings even though questionable would have been considered significant by the Forest Service ID team and Fish and Game using what we now know about stream flows, dace, springs, southern rubber boas, two-striped garter snake, mountain yellow-legged frogs, least Bell's vireo, and southwestern willow flycatchers. There is no excess water in southern California streams except during floods.

5. Based on field work completed last summer, we believe that dace were more widely distributed historically in the watershed than was documented in recent years. We believe their distribution included more and longer reaches than were occupied in recent years up until 2004. As part of your analysis, we would request that you do a habitat assessment of the entirety of Strawberry Creek to determine where flows, gradient and substrate would be suitable dace reintroduction. Since you will be looking at East Twin Creek, we request that you survey the habitat in both drainages for suitability for both dace and mountain yellow-legged frog. Being able to do this for Strawberry will require letting the watershed recover with no removal of groundwater.

6. We would appreciate a field trip to see the lower canyon. Several of our members that have worked in Strawberry Creek for many years as Forest Service and Fish and Game biologists, contractors, and volunteers are suffering from various ailments that make it impossible for them to walk into the site from the long distances required. We also have new members that would like to see Strawberry during this drought to better understand the resources at stake. There is a good access road into the confluence of Strawberry and East Twin that we have used for years. This would be a good place to look at the stream as many of our members have been there in the past. The Forest Service has administrative access and the fact that Campus Crusade has a FS water permit should make them cooperative. If the Forest Service cannot provide access, should we ask Fish and Wildlife about organizing a field trip? We would be happy to help with logistics.

7. We have heard and seen the claims of Nestle that they own the water they are taking. The State owns the water. Some of our members have been looking into the water rights claims and it seems that Nestle is and has been running a bluff. They have no California surface rights with a point of diversion in upper Strawberry. All they have are horizontal wells and tunnels on National Forest and they report the amount of groundwater taken from the wells as groundwater. It is groundwater and the Forest Service has control of how much water can be removed that is in excess to National Forest needs and for maintaining favorable conditions of flow. The Forest Service has reserve rights even for groundwater. Nestle is using the Forest to produce water under FS permit and that permit is all the rights they have. If their wells collapsed, they would have no State rights to take any surface water. They would be dependent on landowner giving them the right to drill new groundwater wells. Please really investigate the state water rights justification given to the Forest Service by Nestle's attorney. We have, and there are many, many holes in their justification. Please don't trust them without really checking out all of their claimed connections and past company relationships. They do not have State water rights that predate the FS as they claim.

Please call Steve Loe at b6 or Jonathan Baskin at b6 if we can help. This permit is extremely important to our shared mission.

Sincerely,

Steve Loe, Certified Wildlife Biologist, TWS
Co-coordinator and Strawberry Creek

Permit Lead, SCNFFWG

Jonathan N. Baskin, Ph.D.
Co-Coordinator, SCNFFWG
Emeritus Professor of Biological Sciences
California State Polytechnic University Pomona
Pomona, CA 91768

Cc:
Southern California Native Freshwater Fauna Working Group

To Whom It May Concern,

2018 DEC -4 PM 12:30

I am writing this letter because I am a responsible outdoors and hunting enthusiast who would like to see the hunting regulations in our state be amended to allow the expanded use of airguns as a legal weapon for taking game. Airgun technology has improved greatly and airguns are more capable than ever before. Traditionally air rifles have been available in small calibers only (.177,.22,and .25), but with the advent of pre-charged pneumatic air rifles it is not uncommon to see rifles chambered in .30,.35,.45, or even .50 caliber. These guns are capable of producing substantial muzzle energy which makes them capable of humanely taking game animals. Unfortunately current regulations allow only limited use of air guns for hunting purposes, which is why I am writing you.

Many states such as Arizona, Michigan, and Texas have already made concessions to allow the use of airguns on big game such as deer, black bear, hog and antelope, and in these states hunters have successfully taken game with their air rifles. The techniques used in airgun hunting are very similar to those used in bow hunting and as such they contribute greatly to the "fair chase" mentality. Airgunners rarely take shots from more than 50 yards away, they will typically hunt from blind or tree stands thus reducing errant shots, and due to the relatively short effective range of air rifle projectiles they run far less risk of projectiles traveling long distances and striking unintended targets. Airguns are also much quieter than standard firearms thus reducing the noise pollution of hunters who are shooting in areas that may be near livestock or dwellings.

Airgunning is one of the fastest growing shooting sports, and as such the technology related to airguns continues to grow. Airguns are capable of more than ever before and it's time for the hunting laws in our state to reflect that change to allow greater use of these tools in the field. Many sportsmen, just like me are interested in the added challenge that using an air rifle brings to hunting. Seeing these laws change is important to us. We know that your influence on lawmakers in our state can be a huge asset to hunters and sportsman and we look forward to working together to make the future of airgun hunting bright.

Respectfully,

ROBERT LARKINS

Name

R. Larkins

Signature

ELDRIDGE, CA

City, State

11-29-18

Date

** For your consideration I have included the following links to more information about airguns and their use as it pertains to hunting.

<http://www.airgundepot.com/hunting-guide.html>
<http://www.crosman.com/get-hunting/hunting-with-airguns>
<http://www.pyramydair.com/blog/ethical-airgun-hunting/>
<http://www.airforceairguns.com/Articles.asp?ID=309>

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FISH AND GAME
COMMISSION

California Fish and Game Commission
1416 Ninth Street
Suite 1320
Sacramento, Ca 95814

2018 DEC -4 PM 12:30

Subject: Muzzleloading Regulations Update

Chairman Sklar, Commission Members and Staff:

As the use of hunting with lead is being prohibited, the use of steel balls in muzzleloading guns presents a problem of not being humane and of fire ignition should a steel projectile strike a rock in a hunting situation. Other concepts also need to be looked at since the introduction of modern muzzleloading guns designed for hunting.

I would request that you refer this to your Wildlife Resources Committee and both I and your patient staff who has helped me could discuss the revisions and additions on January 10 when I hope to be in the Sacramento area.

Thanks for the Commission's and Staff's consideration of this proposal.

Sincerely,



Dennis Fox

(Approved?) Muzzleloading firearms (usually?) consist of two types: an original or reproduction sidelock smoothbore or of various barrel twist ratios ignited by direct flame, such as flintlock, or percussion caps and the modern inline gun, which has a fast barrel twist conducive to bullet use and always uses percussion ignition including cartridge primers.

All muzzleloaders for hunting in California are restricted to use of black powder or its substitute, In line rifles may utilize pelletized black powder or its substitute.

Sound suppressers use with muzzleloaders is prohibited?/ Allowed?

Projectiles must be non-magnetic, over 40 caliber, have either an expanding tip, hollow point bullet or ball over 80? 100? 105? 120? grains of weight.

(Side lock guns may utilize a non-magnetic round ball projectile or a pistol caliber non-magnetic bullet or non- magnetic shotgun slug.

Round balls must be over 80?100?105? 120? Grains in weight or a non-magnetic pistol caliber bullet.)??

The Commission may mandate certain areas or hunts to be restricted to side lock or in line gun use only.

The Commission may allow single shot, non- revolving pistols to be possessed and used as a necessary second shot for specific hunts or locales.

Metalic sights including Peep? Tang? Fiber optic? Florescent ? are allowed.

Telescopic sights may only be used with a free Department issued permit. This may be issued upon receiving a submitted prescription by a medical doctor (optometrist?) containing his contact information and the need to compensate for vision that is 20X200 (???)with a field of view of 20 (??) uncorrected.

Applicants successfully drawn for any California deer tag may not apply for a muzzleloading only hunt as a second tag the same year.