

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – ADMINISTRATIVE HEARINGS OFFICE
SEPTEMBER 19, 2023**

ITEM 7

SUBJECT

CONSIDERATION OF JULY 7, 2023 REVISED PROPOSED ORDER (REVISED PROPOSED ORDER) PREPARED BY THE ADMINISTRATIVE HEARINGS OFFICE (AHO) ON THE DRAFT CEASE AND DESIST ORDER (DRAFT CDO) ISSUED BY THE ASSISTANT DEPUTY DIRECTOR FOR THE DIVISION OF WATER RIGHTS (DIVISION) PERMITTING AND ENFORCEMENT BRANCH TO BLUETRITON BRANDS, INC. (BLUETRITON), AND ON BLUETRITON'S JUNE 2 AND JUNE 26, 2023 REQUESTS TO SET ASIDE PROPOSED ORDER, JUNE 2, 2023 MOTION TO STAY FURTHER ACTION, AND AUGUST 11, 2023 MOTION TO DISREGARD AND STRIKE THE AMENDED PROPOSED ORDER.

DISCUSSION

Background

As shown in Figures 1, 2, 7 and 8 to the revised proposed order, Strawberry Creek is located in the Santa Ana River watershed in San Bernardino County. This proceeding concerns the diversions of water by BlueTriton by the two tunnels and ten boreholes depicted in Figure 8. BlueTriton conveys this water through the 4-inch pipeline to the 80/20 split valve depicted in this figure. From this split valve, BlueTriton conveys some water to the San Manuel Band of Mission Indians (San Manuel Band) for its uses on the Arrowhead Springs Hotel property (the location of which is depicted in Figure 2). BlueTriton conveys the remaining water (except for water it discharges to Strawberry Creek or East Twin Creek) to the load station depicted in Figure 8. At this load station, BlueTriton fills tank trucks, which then convey the water to various bottling facilities, where BlueTriton uses the water to fill bottles it then markets as "Arrowhead Brand 100% Mountain Spring Water."

Between April 2015 and September 2017, the State Water Board received seven complaints against BlueTriton's predecessor, Nestlé Waters North America (Nestlé). These complaints contained many allegations, including allegations that Nestlé was diverting water without a valid basis of right, was unreasonably using water, was injuring public trust resources, and was not reporting or was incorrectly reporting its diversions.

The Division issued a report of investigation in December 2017. After receiving comments from Nestlé, some of the complainants, and several other agencies and organizations, the Division prepared a revised report of investigation, responses to comments and a draft cease-and-desist order (draft CDO) in April 2021, and circulated them to interested parties. If it had gone into effect, the draft CDO would have required Nestlé to immediately cease all diversions greater than 7.36 acre-feet per year of water

that is subject to Division 2 of the Water Code from Tunnels 2, 3 and 7 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8, based on the conclusion that Nestlé did not have any water rights authorizing diversions above this annual rate through these facilities. The draft CDO would have required Nestlé's to submit a report regarding its diversions from Boreholes 10, 11 and 12.

The revised report of investigation concluded that there was not sufficient information to determine if Nestlé's authorized diversions were causing injuries to public trust resources that outweighed the beneficial uses of the diverted water. Accordingly, the draft CDO did not contain any findings regarding public trust resources, or any orders based on potential impacts to such resources. The draft CDO also did not contain any provisions regarding alleged unreasonable uses of water.

In May 2021, an attorney for BlueTriton filed a request for hearing on the revised report of investigation and draft CDO. Water Code section 1112, subdivision (a)(2), provides that the AHO shall conduct such hearings.

AHO Proceedings

The AHO held a hearing on various days between January 10 and May 23, 2022, and conducted a site visit on February 16-17, 2022. BlueTriton, the State Water Board's Prosecution Team (consisting of attorneys from the Board's Office of Enforcement and staff from the Division's Permitting and Enforcement Branch), a local water district, three non-governmental organizations and four individuals participated in the hearing and the site visit.

After completing the hearing and receiving closing briefs and related papers from the parties, the AHO prepared a draft proposed order and circulated it to the parties for review and comments in April 2023. After receiving comments from the parties, the AHO prepared a final proposed order and transmitted it to the Clerk of the Board (pursuant to Water Code section 1114, subdivision (c)(1)) on May 26, 2023.

The AHO circulated Change Sheet # 1 to the May 26 proposed order on July 7, 2023. On July 10, 2023, BlueTriton's attorney filed a letter with the Board, which, among other things, asked for 30 days for interested parties to submit comments on the May 26 proposed order with the July 7 proposed changes.

On July 12, 2023, the AHO hearing officer and the Board's Chief Counsel sent a letter to BlueTriton's attorney. This letter stated that the AHO had decided to withdraw its transmittal of the May 26 proposed order to the Clerk of the Board, and to submit the May 26 proposed order with the changes in the July 7 Change Sheet # 1 as the "July 7, 2023 Revised Proposed Order." This letter stated that the Clerk of the Board would remove the item regarding the May 26 proposed order from the agenda for the Board's July 18 meeting, and that the deadline for submitting comments on the July 7, 2023 Revised Proposed Order was August 11, 2023.

The Office of Chief Counsel has considered the comments submitted on or before the August 11 deadline and has prepared a Change Sheet # 1 for the July 7, 2023 Revised Proposed Order.

Revised Proposed Order

The revised proposed order discusses the general topography and hydrology, historical developments and water use, the tunnels and boreholes that Nestlé’s predecessors developed in the Strawberry Creek watershed, various notices and reports prepared by representatives of and consultants to Nestlé, and the AHO hearing.

The revised proposed order discusses the applicable legal rules, the application of these rules to BlueTriton’s diversions and uses and BlueTriton’s water-right claims. The revised proposed order concludes that BlueTriton’s diversions through Tunnels 2, 3 and 7 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 are subject to the Board’s water-right permitting and enforcement authorities, and that BlueTriton does not have any water rights that authorize these diversions.

The revised proposed order concludes that the Board should issue a cease-and-desist order (CDO) to BlueTriton, which should limit BlueTriton’s diversions through its Tunnels 2, 3 and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C, and 8 to the amounts BlueTriton delivers to the San Manuel Band. The revised proposed order concludes that the CDO should not limit BlueTriton’s diversions through Boreholes 10, 11 and 12. The revised proposed order would require BlueTriton to maintain flow meters and records and provide monthly reports regarding its diversions to the Division.

Appendix A to the revised proposed order briefly discusses prior decisions by the State Water Board and its predecessors involving the Board’s water-right permitting authority over waters associated with springs and tunnels.

Appendix B to the revised proposed order discusses BlueTriton’s June 2 and June 26, 2023 requests to set aside proposed order and its June 2 motion to stay further action, and the comments by BlueTriton and other parties on the May 26, 2023 proposed order. Text on the last page of Appendix B would deny BlueTriton’s requests and motion.

POLICY ISSUE

Should the State Water Board adopt the Proposed Order?

FISCAL IMPACT

The activity is budgeted within existing resources and no additional fiscal demands will result from adoption of the Proposed Order.

REGIONAL BOARD IMPACT

None.

OFFICE OF CHIEF COUNSEL RECOMMENDATION

The Office of Chief Counsel recommends that the State Water Board adopt the proposed order.