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California State Water Resources Control Board
Courtney Taylor, Acting Clerk of the Board
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June 26, 2023

Re: Proposed Cease and Desist Order BlueTriton Brands, Inc. Strawberry Creek, San Bernardino County

Dear Honorable Members of the California State Water Resources Control Board:

I am requesting that the California State Water Resources Control **Board** (SWRCB, Board) please **adopt** the proposed **Cease and Desist Order** (CDO) issued to BlueTriton Brands, Inc. (BTB, BlueTriton.) **An immediate CDO to stop BlueTriton's unauthorized water diversions in the Strawberry Creek Headwaters¹** (Headwater Springs, Springs) is needed as California has entered its **dry season** and **wildfire season** adding urgency to the matter.

Hearing evidence proved that BlueTriton has no valid water right and never had a valid water right in the Strawberry Creek Headwaters. The original site for Arrowhead bottled water was on private lands in a different watershed far from the Strawberry Creek headwaters and the water bottling business was sold.²

¹ See FR 13 (Map of the current and past withdrawal sites with 1930-present Arrowhead Water sites in the San Bernardino National Forest (SBNF) Township (T) 2 North (N) Range (R) 3 West (W), San Bernardino Base Meridian (SBBM).)

² See SOS 280 for notated summary slides

Many California citizens voluntarily gave months of their time and resources to participate in the public hearing process in order to protect California’s water. The multi-year investigation⁶ by the State Water Resources Control Board, Division of Enforcement, resulted in a draft CDO issuance against the BlueTriton. The BTB requested public administrative hearing lasted for 5 months with a series of motions and delays. The overwhelming evidence presented during the public hearing confirmed that **BlueTriton Brands, Inc. has no valid water right and no valid basis for their unauthorized water diversions from Strawberry Creek.**

Hereinto, Strawberry Creek is located in the San Bernardino National Forest (SBNF, Forest, Forest Reserve, Forest Reservation). The San Bernardino Forest Reserve was founded in 1893 for the **primary purpose of protecting the watershed** for the surrounding communities.³ The Forest water was reserved in 1893 as implied reservation rights⁴. Subsequently, the U.S. Supreme Court ruled for the **right of** the Reservation to have **flowing water** even in the absence of actual use (*Winters v. United States*, 207 U.S. 564 (1908).) When the U.S. government makes a reservation, it gives implied reservation water rights with sufficient water to fulfill the reservation purposes, with the priority date established as of the date of the reservation. Thus,

³ See **FR 33** (Los Angeles Herald Aug. 29, 1894 p. 8 Public notice that was posted and published to announce San Bernardino Forest Reservation. ¶ 3 reservation is made for the “benefit of surrounding communities to maintain a permanent supply of water.” ¶ 4 gives warning not settle, occupy or use the lands for business purposes and nor use or remove natural products. ¶ 7 states that violators would be considered trespassing.)

⁴ *Implied Reservation (1867)* , Black’s Law Dictionary (11th ed. (2019)[“**implied reservation** (1867) -7. An express notice that certain **rights are not abandoned or waived** 8. The setting apart pf a designated [art pf a territory or tract of land for public uses or special appropriation. “] [emphasis added]

Strawberry Creek (Creek) should have flowing waters as reserved in 1893 for the public not to be stopped and profited from by a corporation.

BlueTriton and their predecessors since 1930 have **engaged in unauthorized water diversions turning the historically perennial Strawberry Creek⁵ into a dried creek bed with only spotty intermittent flow.⁶** BlueTriton’s diversions have negatively impacted Strawberry Creek;⁷ deprived water for the public water supply; ⁸ and, negatively impacted the Forest health.⁹ **BlueTriton diverts springs so they no longer feed Strawberry Creek¹⁰** leading to a diminished or no Creek flow, destroyed habitat, negatively impacted riparian resources and a decreased public water supply. **Strawberry Creek is a documented water source for the arid San**

⁵ See SOS 290 and SOS 291. See also FR 156 p. 73 ¶ 6 “In drawing streams care should be taken that the lines shall not become faint and uncertain near the sources of the streams, and the placing of drainage in every little gully simply to indicate that it may be a water course should be avoided. Use the symbol dash and three dots for intermittent streams.” See also FR 157 pp. 156 and p. 174 “*Perennial streams*. Streams are to be inked with a solid blue line...”

⁶ See FR 5 p. 8 “The initial studies provided by the permittee suggest that water extraction is reducing surface flow in the West Fork Strawberry Creek subwatershed downstream of boreholes 10, 11, 12, by sufficient amounts to **alter the channel from a perennial condition to an intermittent condition ...**” [emphasis added]. See also p. 32 ¶1 “The channel below boreholes 10, 11, 12 no longer supporting perennial flow.”

⁷ See FR 140 p. 2 (Daily Discharge November 2021 below the 25th percentile). See also FR 5 p. 32, 35-38, 40.

⁸ See FR 63 ¶ 2 (p. 49/ pdf p.51). See also PT 24 ¶ 4 p. 49/pdf p.55) “The large streams entering the San Bernardino area are the Santa Ana River and Lytle, Cajon, and Mill Creeks; the small streams are Plunge, **Strawberry**, City, and San Timoteo Creeks and streams in Waterman and Devil Canyons. With the exception of Lytle and Cajon Creeks, which enter Lytle and Cajon basins, respectively, all enter Bunker Hill basin. All these streams supply recharge to the several ground-water basins in the area.”[emphasis added]

⁹ See FR 5 USFS report

¹⁰See CBD 1 p. 4 ¶ ¶ 10 through 14. (Testimony of hydrologist Andrew Zdon)

Bernardino Valley Bunker Hill Basin¹¹ which supplies water to over half-a-million people¹² in the surrounding communities.¹³ Communities relying on the water supply, including **agriculture irrigation and disadvantaged communities**,¹⁴are negatively impacted ¹⁵by BlueTriton's water diversions.

BlueTriton was found to have no valid water right in the Strawberry Creek headwaters springs including springs 10, 11 and 12. Photographs and location of natural Springs 10, 11 and 12 are documented¹⁶ although BlueTriton's consultant Mark Nicholls¹⁷ testified that he never tried to use the information to locate the springs for the state investigation and report (BTB 7). Furthermore, BTB studies (Evidence BTB 7) used an "unnamed" spring

¹¹ See FR 63 ¶ 2 (p. 49/ pdf p.51). See also PT 24 ¶ 4 p. 49/pdf p.55) "The large streams entering the San Bernardino area are the Santa Ana River and Lytle, Cajon, and Mill Creeks; the small streams are Plunge, **Strawberry**, City, and San Timoteo Creeks and streams in Waterman and Devil Canyons. With the exception of Lytle and Cajon Creeks, which enter Lytle and Cajon basins, respectively, all enter Bunker Hill basin. All these streams supply recharge to the several ground-water basins in the area." [emphasis added]

¹² Based on the 2020 U.S. Census (Population of 400,776 people in the adjoining valley basins and 29,319 neighboring mountain communities)

¹³ See Bialecki 13 p. 1 ¶ ¶ 2 and 3 (A letter from Save Our Forest Association to the USFS concerning Strawberry Creek). ⁶ Water Code § 1051

¹⁴ See FR 21 (map of disadvantaged communities such as Highland and San Bernardino which rely on the Bunker Hill Basin for water).

¹⁵ Anthony Serrano testimony from 1/14/22 transcript pdf p. 52 "509-514" 1:22:47.220-1:23:42.450 states from ["**a local resident standpoint in the city of Highland**... simply outrageous to the local residents, **we have 55,000 residents in the city of Highland**....we have **the bunker hill basin, which was our groundwater and all of these items were affected**...."] [emphasis added]

¹⁶ See FR 3 Dames and Moore 1999 pdf pp. 19-20 (Document pp. 1-9 and 1-10)

¹⁷ See 5/23/2022 morning 385 00:50:25- 390 00:50:56.310 (Mark Nicholls testifies that he did not use the Dames and Moore report map and spring photos in attempts to locate natural springs 10,11 and 12) .

and omitted borehole 11 in the required tests for Boreholes 10, 11, 12¹⁸ yielding inconclusive and misleading results. Using an unnamed spring not historically associated with boreholes 10, 11, 12 to produce misleading results for an ordered report and investigation is wrong. The original draft CDO omitted springs 10, 11, 12 because at that time “The Prosecution Team does not have sufficient evidence to conclude that these diversions near Springs 10, 11, and 12 are subject to Division 2 of the Water Code.” Historic Rowe documents¹⁹ map and describe “ciegena” at the site of 10, 11 and 12. Dames and Moore²⁰ actually provide a map and photographs of the 3 natural springs (10, 11,12) associated with boreholes 10,11 and 12.

The public hearing evidence and BTB’s own evidence confirmed that BlueTriton was not the holder of a valid water right including springs 10, 11 and 12. No CDO was issued for springs 10, 11, and 12 on the basis of the draft 2021 draft CDO. BTB produced a required study (Evidence BTB 7) which intentionally used an “unnamed” spring instead of the actual springs 10, 11 and 12 thus, providing misleading evidence and misleading investigators. Nonetheless, BlueTriton’s water take at spring/borehole sites 10, 11, and 12 must cease and desist in another order.

In the meantime, the **board could make a minor change to the current order by adding a perennial stream flow requirement for the entire Strawberry Creek to the East Twin Creek junction as a stipulation for any water withdrawals at boreholes 10, 11, 12²¹ per**

¹⁸ BTB 7 p. 38 (pdf)(document p. 31) ¶ 5 “An unnamed adjacent perennial spring is located approximately 15 feet in elevation below the Borehole 10, 11, and 12 vault. ...”However, the rational hydraulic response to shut-in or turn-out of Boreholes 10 and 12 did not occur ..” Borehole 11 was not used in tests.

¹⁹ See FR 68 last paragraph of letter with corresponding map FR 69. See SOS 283 slides 5 and 7

²⁰ FR 3 see document 1-9 through 1-11.

²¹ A 20 gallon per minute or more minimum is recommended in FR 5 pp. 32, 35-38.

Water Code Section 1114 (c) 2. A perennial stream flow of Strawberry Creek would help protect against wildfire especially during the dry season to help restore California's environment and public water supply until further legal action of a cease and desist order can be issued for springs 10,11, and 12. The USFS report²² claims that BTB's own studies show that these unauthorized water extractions have altered Strawberry Creek from perennial stream conditions to intermittent conditions.

Early USGS (United States Geological Survey) topographic maps²³ were based on physical observations.²⁴ Prior to diversions, Strawberry Creek flowed even during dry months,²⁵with the Springs naturally surfacing to feed a vibrant flowing Creek lined with scrub oak, chamise, alder, dogwood, cedar, sycamore, willow, ferns, bay laurel and thimbleberry.²⁶ Rowe's field notes and reports further document that Strawberry Creek is a spring fed channel

²² See FR 5 p. 8 "The initial studies provided by the permittee suggest that water extraction is reducing surface flow in the West Fork Strawberry Creek subwatershed downstream of boreholes 10, 11, 12, by sufficient amounts to alter the channel from a perennial condition to an intermittent condition (URS, 2002). The URS (2002) report stated that during the low flow timeframe of August and September 2000, certain areas of the upper watershed had base flow values as high as 25 gpm. Based on a hydrologic analysis, URS (2002, pp.14-17) concluded that the extraction of water by the proponent resulted in a reduced flow of 20 gpm and that certain areas in the upper watershed that would have been perennial were instead intermittent. "

²³ See FR 62 (the 1905 thematic map) showing Strawberry Creek as a perennial stream and water supply. Importance of Forest in water supply discussed in FR 63 document pp 63-64.

²⁴ See SOS 288 p. 3 ¶ 5 lines 6-9 and ¶ 7 lines 19-20 (Greg Allord's Declaration Sur-Sur-Rebuttal).

²⁵ See **SOS 294** at 132,145 and 146. On p. 4 lines 9-25 (Concurs that the **USGS 1901-1905 maps accurately portray Strawberry Creek as a perennial stream** which were observed in relatively dry years.) See also SOS 1 p. 19 See also FR 60 (The resident hydrographer J.B. Lippincott reviewed the area watershed which would have included the Forest Strawberry Creek watershed in 1899 with then U.S. Forest Service representative J.W. Toumey during the dry period and would have confirmed the perennial Strawberry Creek.)

²⁶ See FR 68 (Rowe's letter pdf page 2 ¶ 2 -3 details vegetation)

with Springs 2, 3, and 7²⁷ producing tributary channels with other springs including springs 1, 8, 10, 11, and 12²⁸ documented to feed or channel into Strawberry Creek.

Prior to diversion, historic Rowe documents state that springs flowed during summer months to feed flowing Strawberry Creek.²⁹ The USFS points out that these unauthorized water diversions have altered Strawberry Creek from perennial conditions to intermittent flow.³⁰The US Forest Service report³¹ recommends a 20 gallon per minute minimum flow requirement with only allowing seasonal take. Although not party to the case but for unknown reasons included in the CDO, the San Manuel Tribe of Mission Indians, alleged property owner of the Arrowhead Springs Property, would benefit from the perennial Strawberry Creek stream flow through the Arrowhead Springs Property. The Arrowhead Springs Property has many water sources which a perennial flow from Strawberry Creek would augment.

After the Board adopts the current CDO, the Board should: 1) request further action for a CDO at 10, 11, 12; 2) direct orders for fines and penalties to be levied including increased penalties for water taken during a drought; and 3) order restoration of spring

²⁷ See FR 57 (starting p. 3) (Rowe's field notes document the springs, channels and water flow in the Strawberry Creek.) See also FR 69. (map)

²⁸ See FR 3 Dames and Moore pdf pp. 19-21 (document pp. 1-9 through 1-11).

²⁹ See FR 68 pdf p. 2 ¶ 2-3 (letter document p. 1)

³⁰ See FR 5 p. 8 "The initial studies provided by the permittee suggest that water extraction is reducing surface flow in the West Fork Strawberry Creek subwatershed downstream of boreholes 10, 11, 12, by sufficient amounts to alter the channel from a perennial condition to an intermittent condition (URS, 2002). The URS (2002) report stated that during the low flow timeframe of August and September 2000, certain areas of the upper watershed had base flow values as high as 25 gpm. Based on a hydrologic analysis, URS (2002, pp.14-17) concluded that the extraction of water by the proponent resulted in a reduced flow of 20 gpm and that certain areas in the upper watershed that would have been perennial were instead intermittent. "

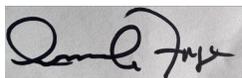
³¹ See FR 5

sites and 4) **direct action for violations of public trust**³² for the unauthorized water diversions and damage caused by BTB and their predecessors since 1930.

I have hiked Strawberry Creek many times in the past nine years including to the site of springs 10, 11, 12 and the lower parts of Strawberry Creek.³³ Stopping the water withdrawals from Strawberry Creek so perennial flow conditions return will be a major step for California to protect its water supply, help fight climate change and protect the water and environment for future generations. Allowing a private equity backed BlueTriton to continue to take and profit from California's water with no valid right and no penalty is like rewarding a thief to steal and sets precedent for any company or corporation to illegally profit from California resources.

Please adopt the current Cease and Desist Order issued to BlueTriton with directives on a CDO for sites 10, 11 and 12. Consider adding a minimal change of a perennial flow requirement for any water take at sites 10, 11 and 12. Further orders should be given for fines, penalties and damages. Evidence of a violation of public trust was given during the hearing and should be acted upon. Restoration orders of spring sites and equipment removal should be given so Strawberry Creek can flow year round for future generations.

Sincerely,



Amanda Frye

Enclosure: Amanda Frye's Closing Brief

³² Anthony Serrano testimony from 1/14/22 transcript pdf p. 52 "509-514" 1:22:47.220-1:23:42.450 states from ["**a local resident standpoint in the city of Highland...**... simply outrageous to the local residents, **we have 55,000 residents in the city of Highland....we have the bunker hill basin, which was our groundwater and all of these items were affected....**"] [emphasis added] See also See FR 63 ¶ 2 (p. 49/ pdf p.51).

³³ See FR 149 and 159 for photographs of the Strawberry Creek channel.