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January 4, 2007

**Via Federal Express**

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Re: **Nestle Waters North America McCloud Water Bottling Project  
Draft Environmental Impact Report/Environmental Assessment**

Dear Ms. Barber and Mr. Hupp:

This firm represents California Trout, Inc. ("California Trout") and Trout Unlimited, Inc. ("Trout Unlimited") on matters relating to the Nestle Waters North America McCloud Water Bottling Project ("the Project"). On behalf of our clients, we respectfully submit these comments to help ensure that agency decision-makers fully comply with the California Environmental Quality Act ("CEQA"), Public Resources Code § 21000 *et seq.*, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, with respect to the proposed Project. California Trout and Trout Unlimited are non-profit conservation organizations whose mission is to protect and restore wild trout and steelhead and their waters. Our clients are deeply concerned about the far-ranging environmental impacts the Project may have on the vitality of the McCloud River watershed.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 2

After carefully reviewing the Nestle Waters North America McCloud Water Bottling Project Draft Environmental Impact Report/Environmental Assessment (“DEIR”) for the Project, we have concluded that it fails in numerous respects to comply with the requirements of CEQA and NEPA. As described below, the DEIR violates CEQA because: (a) it fails to adequately describe the Project, (b) it fails to analyze the significant environmental impacts of the Project and propose adequate mitigation measures to address those impacts, and (c) it fails to undertake a legally sufficient study of alternatives to the Project. The document also violates NEPA by artificially limiting the scope of environmental review under the responsibility of the Forest Service to only a segment of the Project.

The Environmental Impact Report (“EIR”) is “the heart of CEQA.” Laurel Heights Improvement Ass’n v. Regents of University of California, 47 Cal. 3d 376, 392 (1988) (“Laurel Heights I”) (citations omitted). It “is an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return. The EIR is also intended ‘to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.’ Because the EIR must be certified or rejected by public officials, it is a document of accountability.” Id. (citations omitted). Likewise, NEPA requires that federal agencies “consider every significant aspect of the environmental impact of a proposed action . . . [and] inform the public that [they have] indeed considered environmental concerns in its decision-making process.” Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1300 (9th Cir. 2003) (citations omitted).

Where, as here, the environmental review document fails to fully and accurately inform decision-makers, and the public, of the environmental consequences of their actions, it does not satisfy the basic goals of either statute. See Pub. Res. Code § 21061 (“The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”); 40 C.F.R. § 1500.1(b) (“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”).

As a result of the DEIR’s numerous and serious inadequacies, there can be no meaningful public review of the Project. Siskiyou County (“County”) must revise and re-

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 3

circulate its DEIR as a revised DEIR in order to permit an adequate understanding of the environmental issues at stake. In addition, the United States Forest Service (“Forest Service”) must discard the Environmental Assessment and prepare an Environmental Impact Statement (“EIS”) addressing the full panoply of impacts of this Project. Of course, the agencies may agree to prepare a joint EIR/EIS. California Code of Regulations, title 14 (“CEQA Guidelines”), § 15170.

**I. THE DEIR’S PROJECT DESCRIPTION DOES NOT PERMIT MEANINGFUL PUBLIC REVIEW OF THE PROJECT.**

The DEIR provides woefully insufficient detail about the nature of the proposed water bottling project. Indeed, the DEIR’s description of the Project is so vague, contradictory and speculative that it undermines the DEIR’s entire analysis, thereby violating CEQA’s core principles.

CEQA defines an EIR as primarily “an informational document.” Pub. Res. Code § 21061. The regulations add that, as such, its main purpose is to “inform public agency decisionmakers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project.” CEQA Guidelines § 15121(a). The CEQA Guidelines define “project” as “the whole of an action, which has a potential for resulting in a either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” *Id.* § 15378(a).

A clear and comprehensive description of the project being proposed for approval is critical to meaningful public review. A project description that omits integral components of the project can easily result in an EIR that fails to disclose the actual impacts of the project. Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 829 (1981). Thus, it has been said that “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 193 (1977). While extensive detail is not necessary, the law mandates that EIRs should describe proposed projects with sufficient detail and accuracy to permit informed decision-making. See CEQA Guidelines, § 15124 (requirements of an EIR). As explained below, this DEIR fails to meet this basic threshold.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 4

Several cases provide examples of project descriptions found inadequate under CEQA. In Santiago County Water Dist., 118 Cal. App. 3d at 829-30, an EIR for a sand and gravel mining operation was found inadequate because the project description omitted mention of the construction of water delivery facilities that were an integral part of the project. The court concluded that, because of this omission, important aspects of the project remained hidden from public review, in violation of CEQA. Similarly, in Whitman v. Board of Supervisors, 88 Cal. App. 3d 397, 414-15 (1979), an EIR prepared for a test oil well project failed to consider the environmental impacts associated with an oil pipeline to service the facility. In San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus, 27 Cal. App. 4th 713, 731-32 (1994), the court held that a project description for a housing development that did not include the expansion of a public wastewater treatment plant was legally inadequate because the expansion was an integral component of the project. Id. at 733-354; accord, Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 194-95 (1996).

The deficiencies in this DEIR are of even greater import. Not only are important aspects of the Project virtually omitted, but the document contains fundamental contradictions and ambiguities relating to what is at the very core of the Project, the amount of water that will be taken. We explain these deficiencies below.

**A. The DEIR's Description of the Amount of Water That the Project Will Use Contains Fundamental Contradictions and Is Vague and Ambiguous.**

The DEIR Project Description section asserts that the proposed Project “has two primary components. The first component involves construction of a bottling facility . . . [and] the second component involves the construction of new pipelines to the bottling facility.” DEIR at 2.0-1. Yet it is undisputed that the taking of water is a fundamental aspect of this Project. Indeed, the Court of Appeal so acknowledged in its recent decision in the related case of Concerned McCloud Citizens v. McCloud Community Services District and Nestle Waters North America (“Concerned McCloud Citizens”), dated January 2, 2007 (Court of Appeal for the Third Appellate District, Siskiyou, C050811). The court stated that “[t]here is no disagreement among the parties, and we agree, that the ultimate purchase and sale of spring water to Nestle by the District, *involving the taking of a significant amount of water from the District's springs*, trucking and/or piping the water to Nestle bottling facilities, constructing a new local bottling facility, potentially digging new water wells, and the other related activities . . . amount to a project requiring CEQA compliance.” Concerned McCloud Citizens at 15 (emphasis added).

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 5

Even though the taking of water is a fundamental aspect of this Project, the DEIR fails to provide a stable estimate of the total amount of water that the Project will take from the springs and aquifers of the area. The DEIR states that Nestle may purchase “up to 1,600 acre-feet per year at an instantaneous rate not to exceed 1,250 gallons per minute.” DEIR at Appendix S.0-2. The use of the words “up to” in this statement suggests that the 1,600 acre-feet is a maximum limit, or cap, on the amount of water that Nestle may purchase per year. The same impression is conveyed by the document’s later description of the 1,600 acre-feet as “the annual cap.” Id.

Tellingly, however, the DEIR also contains statements suggesting that this cap is *not* effective, statements that are borne out by the Agreement for the Sale and Purchase of Spring Water, entered between Nestle and the McCloud Community Services District (“MCSD”) on October 1, 2003 (“Agreement”), which is included as an attachment to this DEIR. See DEIR, Appendix S.1-2. In fact, because Nestle may purchase more than 1,600 acre-feet per year of spring water, and because the company may also use groundwater wells, the purported 1,600 acre-feet cap appears illusory and thus would not serve as an accurate description of the Project for CEQA purposes.

**(1) Nestle’s Use of Spring Water.**

While the DEIR would create the impression that Nestle is limited to 1,600 acre-feet of spring water per year, the company is bound by no such limitation. In fact, the DEIR expressly concedes that MCSD “*may sell additional spring water*” to Nestle (DEIR at 2.0-4, emphasis added), thus negating the effect of the purported 1,600 acre-feet yearly cap.

Equally troubling, the Agreement’s provisions defining “Qualified Water” suggest other ways that Nestle may obtain spring water in excess of the alleged annual cap of 1,600 acre-feet. Qualified Water is defined as spring water that meets, in Nestle’s “sole and absolute discretion,” each of the following standards: (a) the standards for identity of spring water; (b) the local, state and federal standards for quality of spring water; and (c) the company’s own Internal Standards. DEIR, Appendix S.1-2 at 3. The company’s Internal Standards are defined, in turn, as “the quantitative analytical standards for water quality adopted and amended by [Nestle] from time to time and uniformly applied by [it] to its California spring water sources.” DEIR, Appendix S.1-2 at 2-3. These standards are attached as Exhibit D to the original Agreement, but are confidential and protected from disclosure as trade secrets under the California Public Records Act. Cal. Gov. Code

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 6

§ 6254(k). “Non-Qualified Water,” on the other hand, is defined as spring water that, in Nestle’s “sole and absolute discretion” does not meet any one of these standards. DEIR, Appendix S.1-2 at 3.

Under the Agreement, Nestle has the ability to change the Internal Standards unilaterally, simply by giving MCSD 30 days’ advance notice. The Agreement explicitly states that this notice is for “informational purposes only” and that MCSD will not have the power to “alter or change, or to consent or object to the Internal Standards, which shall at all times and from time to time during the Term be determined by [Nestle] in its sole and absolute discretion.” DEIR, Appendix S.1-2 at 9. Moreover, while the document does establish a reconciliation mechanism to be used upon discovery of Non-Qualified Water (including the performance of independent laboratory tests and the requirement that the parties cooperate in resolving any discrepancies), it also states, unequivocally, that “[b]ecause of the importance to [Nestle]’s business of its being able to . . . enforce its strict quality standards,” ultimately Nestle would “make all final determinations, in its sole and absolute discretion, as to any and all claims that Spring Water is Non-Qualified Water.” *Id.* at 8-9. In other words, the Agreement grants Nestle absolute discretion to determine not only its Internal Standards, but also whether the spring water complies with those (and other) standards, in order to be deemed “Qualified Water” and count towards the 1,600 “cap.”

Furthermore, the Agreement provides that Nestle may elect to take delivery of Non-Qualified Water. DEIR, Appendix S.1-2 at 8. There is no limit regarding how much of this water it can take. By definition, any Non-Qualified Water Nestle chooses to take would not be included in the 1,600 “cap” for Qualified Water. *See* DEIR, Appendix S.1-2 at 3 (defining Qualified Water and Non-Qualified Water as opposites).

These provisions, read together, give Nestle the ability to obtain high-quality spring water far in excess of the 1,600 acre-feet cap. Because Nestle has unlimited authority to modify the standards for Qualified Water, the company could alter these standards, over the lengthy term of the Agreement, to obtain 1,600 acre-feet of spring water of the highest quality – higher than that meeting federal and state standards. Thus, in addition to satisfying its cap in this manner, the company could proceed to obtain unlimited amounts of Non-Qualified Water. Since Nestle’s standards for Qualified Water can be whatever it dictates, this Non-Qualified Water could in fact be spring water of very high quality, that would serve Nestle’s commercial purposes.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 7

In short, the expansive powers accorded to Nestle under the Agreement to unilaterally dictate – and change – the characteristics of spring water subject to the 1,600 acre-feet cap effectively render that cap meaningless.

**(2) Nestle’s Use of Well Water.**

Even a cursory reading of the DEIR and the Agreement reveals that Nestle’s use of well water could also enable it to exceed the supposed annual “cap” of 1,600 acre-feet. In fact, the DEIR expressly provides that Nestle “*may* request” MCSD to “install groundwater wells on the proposed site for the bottling facility,” in addition to the spring water. DEIR at 2.0-5.<sup>1</sup> Moreover, the Agreement provides: “The amount of water Purchaser uses from the ground water wells . . . *shall not be included, in any event, in the calculation of the Maximum Take.*” DEIR, Appendix S.1-2 at 16 (emphasis added).

The DEIR purports to offer guarantees that “[n]otwithstanding [sic] any provisions to the contrary in the agreement any groundwater extracted from the wells on the proposed site for use by the bottling facility will be included in the 1,600 acre-feet per year volume limitation.” DEIR at 2.0-5. But this argument is untenable. The Agreement between MCSD and Nestle constitutes the operative, legally binding contract between these parties, not the DEIR. In case of a conflict, the provisions in the first, not the latter, would prevail. See Civ. Code § 1636 (“A contract must be so interpreted as to give effect to the mutual intent of the parties as it existed at the time of contracting”); § 1638 (“The language of the contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.”); see also Concerned McCloud Citizens at 17, n.6 (“It is the terms of the agreement that control, not counsel’s ambiguous comments . . . .”).

For the same reason, the assurances offered by Nestle in its comment letter of September 11, 2006 are irrelevant and have no legal effect – other than constituting an

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<sup>1</sup> It is worth noting that while the DEIR describes the ground water wells vaguely, simply by saying that Nestle “*may*” request that MCSD install such wells, the Agreement specifies that, once Nestle has made a request, MCSD “*shall* design, construct, and install” the wells. DEIR, Appendix S.1-2 at 16 (emphasis added). Thus, this is not something trivial that may or may not happen, but implies concrete legal obligations that MCSD has already agreed to undertake.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 8

admission on the part of Nestle that the DEIR's project description is, indeed, vague and ambiguous. In that letter, Nestle acknowledges that "the Agreement . . . *does not explicitly restrict* the amount of total water (spring water and well water) [Nestle] may purchase from MCSD." See Nestle's Comment Letter dated September 11, 2006 (attached herein as Exhibit A) (emphasis added). It then adds, "However, [Nestle] has explicitly agreed, through the project description in the DEIR/EA that the proposed project will be limited to 1,600 acre-feet of total water per year, regardless of the source of the water. Put simply, the proposed project does not include any purchase of more than 1,600 acre-feet of total water per year by [Nestle] from MCSD." *Id.* Yet, *these statements are not legally binding or enforceable*. In fact, under the Agreement, "[n]o addition or modification of any term or provision shall be effective unless set forth in writing and signed by the District and Purchaser." DEIR, Appendix S.1-2 at 25. Accordingly, if Nestle wants to change its legal obligations under the Agreement, it would need to enter into a new contract to that effect with the MCSD. The company's informal attempt to re-characterize its legal rights and duties towards the MCSD, through comments on an EIR, are futile, and only highlight the inadequacy of the EIR's project description.

### **(3) Nestle's Diversion of Water From the Lakin Dam.**

The project description fails to mention or evaluate the environmental consequences of Nestle's plans to divert water from the Lakin Dam. Indeed, the document is unclear even whether the Lakin Dam forms a part of the proposed Project. In the technical appendices, the EIR explains that while "re-establish[ing] an existing water right to divert water from the McCloud River at Lakin Dam" was one of the Project's original hydrological components, this component "was removed from the proposed project." DEIR, Appendix 3.9-7 at 1. Specifically, the DEIR states that "the Lakin Dam is a small dam, approximately 8 feet high that spans the river width, and is located on the McCloud River, approximately seven miles east of the community of McCloud. The dam was constructed around 1925 to divert water from the McCloud River via pipeline and channels to the mill site for a variety of industrial uses associated with the mill operation." DEIR, at 3.9-13. The document explicitly states, on the map at page 3.9-4, that the "[e]xisting Lakin Dam diversion [is] not a part of this project."

Nevertheless, on October 13, 2006, Nestle issued a press release, entitled "Nestle Waters North America Aids Local Firefighting Efforts by Providing a Reliable Source of Water on its McCloud Property" (attached herein as Exhibit B), that confuses the issue.



Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 9

In that press release, Nestle announced that it will “fill in an existing pond on its property . . . [which] will be fed by the Lakin Dam water line.” It adds that “the water from the Lakin Dam was always recognized as a back-up supply for the community,” and that Nestle has “decided to reestablish a pipeline from the Lakin Dam aqueduct to the pond on its McCloud property for use of helicopters and other firefighting needs.”

Nestle’s goals may well be to contribute to local fire-fighting efforts. However, CEQA demands that the DEIR fully disclose, prior to commencement of the Project, all of its major components. Santiago County Water Dist., 118 Cal. App. 3d at 829. The document has failed to do so, by contradictorily providing assurances that the Lakin Dam diversion is not part of the Nestle project, when apparently it is. If the diversion is indeed part of the Project, its environmental impacts on hydrological and biological resources in the area need to be fully analyzed, and adequate mitigation measures need to be implemented.

In sum, the gaps and contradictions within the DEIR, and between the DEIR and the Agreement, are so fundamental as to render the DEIR’s project description useless. Amazingly, the DEIR provides no consistent information as to the following fundamental issues: (a) whether there is an annual cap on the amount of spring water that Nestle can take; (b) whether the company will request MCSD to install ground water wells at its bottling facility; (c) whether any water obtained from these wells would be credited towards the presumed annual cap; (d) whether, and under what circumstances, the company will determine that some spring water does not conform to its Internal Standards; (e) whether, and under what circumstances, the company will elect to take delivery of such water, despite this alleged, and unilaterally decided, non-conformity; and (f) whether, and to what extent, the company will divert water from the McCloud River by re-establishing the Lakin Dam diversion.

Without this crucial information, there can be no reasoned and informed decision-making regarding the environmental impacts resulting from the Project. Laurel Heights Improvement Ass’n v. Regents of University of California, 6 Cal. 4th 1112, 1123 (1993) (“Laurel Heights II”); Citizens of Goleta Valley v. Board of Supervisors, 52 Cal.3d 553, 564 (1990) (the EIR process “protects not only the environment but also informed self-government”); see also CEQA Guidelines § 15002(a)(1) (one of the “basic purposes” of CEQA is to inform decision-makers and the public about the environmental consequences of their projects). As these cases inform, an unstable and vague project

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 10

description undermines the validity of each section of the EIR analyzing its impacts and identifying mitigation.

**B. The DEIR Fails to Describe with Sufficient Particularity Other Fundamental Elements of the Project.**

In addition to the DEIR's failure to disclose the total amount of water that will be diverted to Nestle, the document's project description section fails to disclose other major components of the Project.

First, while construction of the bottling plant is plainly a fundamental aspect of this Project (DEIR at 2.0-1), nowhere does the DEIR describe the total production capacity of the plant. The DEIR describes the location of the plant (DEIR at 2.0-1), construction methods and materials (DEIR at 2.0-5, 6), the building's LEED certification (DEIR at 2.0-7), the plant's road access and parking (DEIR at 2.0-8), signage (DEIR at 2.0-9), lighting (DEIR at 2.0-12), and landscaping (DEIR at 2.0-14). It also describes in some detail the water bottling process, the materials used in making the bottles, and the labeling and storing of the different kinds of drinks. DEIR at 2.0-18. Yet, remarkably, the document fails to contain the basic information about what the total production capacity of the facility will be, or how much water will actually be bottled in it. This information is important because if the plant could *accommodate* more than 1,600 acre-feet of water per year, the Project could ultimately *use* more than 1,600 acre-feet of water per year. Without this crucial information as to plant capacity, there can be no meaningful analysis of Project impacts and thus no informed decision-making. Laurel Heights II, 6 Cal.4th at 1123; Citizens of Goleta Valley, 52 Cal.3d at 564; CEQA Guidelines § 15002.

This omission is particularly troubling inasmuch as the DEIR notes that Nestle "may bottle spring water from other sources" by importing bulk spring water to the facility. DEIR at 2.0-18. The capacity of Nestle's plant obviously will determine the extent to which this importation practice will occur, as well as the severity of the environmental impacts resulting from the practice. Moreover, not only does the DEIR fail to identify the *origin* of these "other sources" of water, but it also does not disclose the *amount* of water to be taken from these sources. Obviously, such information is essential to evaluate the environmental impacts associated with the Project.

The DEIR also fails to disclose the capacity of the Project's pipelines. The document describes the length of each pipeline (24,200 feet for the Intake Spring

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 11

Pipeline, 25,500 feet for the Upper Elk Spring Pipeline, and 19,200 feet in the case of the Lower Elk Pipeline). DEIR at 2.0-19. The location of each pipeline is also described (immediately adjacent to the existing Intake Spring pipeline installed in 2003 in the case of the Intake Spring Pipeline; within MCSD's existing 16.5 foot-wide easement in the case of the Upper Elk and Lower Elk Pipelines). DEIR at 2.0-19. Critically, however, the pipelines' capacity remains undisclosed, even though this feature obviously will determine, in many ways, the magnitude of this Project's impacts on the environment.

Further, the DEIR states that Nestle may request that MCSD install boreholes to collect the spring water at Intake Spring, Upper Elk Spring and Lower Elk Spring. DEIR at Appendix 2.0-5 and 2.0-20. Other than explaining that boreholes are a "more sanitary and secure method of collection" of spring water, however, the document provides insufficient detail regarding these structures. It does not describe their size, construction materials, capacity, or, most importantly, their effects upon groundwater resources.

Likewise, important details associated with the Project's two-mile access road remain undisclosed. This road is currently a dirt road, and the document says that it will "largely" be paved with asphalt. DEIR at 2.0-8, 9. The road will be used by large, 18-wheel diesel powered trucks (DEIR at 2.0-18), yet the DEIR makes no reference whatsoever to its width or even its precise location. See Section II, below. Without this critical information, the EIR cannot analyze the environmental impacts of this key Project element.

In addition, the DEIR does not provide sufficient information about how processed wastewater will be treated to determine whether there will be impacts to water quality. The DEIR vaguely mentions that processed water backwash will be pH-adjusted, then treated in a "constructed wetland filtration system and/or other treatment processes," but it provides no specifics. DEIR at 2.0-19. Under CEQA, Nestle cannot leave until another time – after Project approval – the important decision as to how the wastewater will be processed. If Nestle's Project will involve, for example, the construction of a wetland filtration system, the impacts of that system must be analyzed now.

Finally, the DEIR fails to provide any details associated with the construction and operation of the Project's concrete batch plant.

In short, basic CEQA principles preclude the DEIR's casual approach to project description – an approach omitting critical information about key aspects of the facility.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 12

The document's failure to supply this information is not a superficial deficiency. Rather, the DEIR's glaring omissions of essential Project components impede reasoned and informed consideration of its environmental impacts. See Santiago County Water Dist., 118 Cal. App. 3d at 829; Whitman, 88 Cal. App. 3d at 414-15; San Joaquin Raptor, 27 Cal. App. 4th at 721-22; Stanislaus Natural Heritage Project, 48 Cal. App.4 th at 194-95.

**C. The DEIR Fails to Contain Basic Information as to the Permits Required for the Project.**

Finally, the DEIR fails to comply with CEQA's basic requirement to disclose all the permits associated with the Project. The Guidelines mandate that "[t]he description of the project *shall* contain . . . [a] statement briefly describing the intended uses of the EIR. This statement *shall* include . . . [a] list of permits and other approvals required to implement the project." CEQA Guidelines § 15124(d)(1)(B) (emphases added). The Guidelines' use of the word "shall," not once, but twice, shows that this is mandatory, not a mere suggestion. See also CEQA Guidelines § 15120(c) ("Drafts EIRs shall contain the information required by Sections 15122 through 15131."). The DEIR's project description section must be revised to set forth a list of all the necessary permits and approvals associated with the Project.

In summary, the DEIR must be revised to provide a complete and accurate description of the proposed Project. Only thus can the document begin to fulfill CEQA's ultimate goal to "inform the public and its responsible officials of the environmental consequences of their decisions before they are made." Laurel Heights II, 6 Cal. 4th at 1123; see also CEQA Guidelines § 15002(a)(1) (listing as one of the "basic purposes" of CEQA to "[i]nform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities"); § 15121 ("[a]n EIR is an informational document").

**II. THE DEIR DOES NOT ADEQUATELY DISCLOSE OR ANALYZE THE SIGNIFICANT ENVIRONMENTAL IMPACTS OF THE PROJECT.**

The discussion of a proposed project's environmental impacts is at the core of an EIR. See CEQA Guidelines § 15126.2(a) ("[a]n EIR *shall* identify and focus on the significant environmental effects of the proposed project") (emphasis added). As explained below, the DEIR fails to analyze the Project's myriad environmental impacts, most saliently in the areas of hydrological resources, biological resources, traffic, air

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 13

quality and noise. These inadequacies require that the DEIR be revised to provide a complete and accurate analysis of the proposed Project's significant environmental impacts and feasible mitigation for those impacts, as required by law. See CEQA Guidelines, § 15002(a)(1) (listing as one of the "basic purposes" of CEQA to "[i]nform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities").

**A. The DEIR's Analysis of and Mitigation for the Project's Impacts on Hydrology Are Inadequate.**

As detailed in the report from Phil Williams Associates ("PWA Report") (attached herein as Exhibit C), the DEIR's hydrological impact analysis suffers from two overarching flaws. First, because the DEIR is ambivalent about the amount of water that Nestle would use, it is impossible to determine exactly what demand would be placed on the water supplies of the MCSD and on the McCloud River watershed. Second, the document fails to provide a sufficient description of the existing hydrological conditions of Mud Creek, Squaw Valley Creek or the McCloud Area Groundwater Basin. As a result, the DEIR does not provide sufficient context in terms of water quantity and the relationships between parts of the hydrologic system potentially impacted by the Project. Astonishingly, we can find no evidence in the DEIR or elsewhere that Nestle or the County have even attempted to conduct the necessary studies to understand the McCloud hydrological system or made any real effort to determine how the use of this water by Nestle would affect surface water flow or groundwater supplies.

**(1) It Is Impossible to Determine the Project's Hydrological Impacts Until Such Time as Nestle and the MCSD Clearly Establish Nestle's Intended Water Usage.**

As discussed extensively in Section I of this letter, the DEIR fails to provide a stable estimate of the total amount of water that the Project will take from the springs and aquifers in the area. While the document states that Nestle may purchase up to 1,600 acre-feet per year (at S.0-2), it also clearly states that MCSD will provide additional potable water to the bottling facility for domestic uses and that this water is not included in the 1,600 acre-feet. Appendix S.1-2 at 7. In addition, the document explains that Nestle may request MCSD to install groundwater wells for use by the bottling facility, thereby implying that additional groundwater would be used. DEIR at 2.0-5.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 14

Importantly, the Agreement between MCSD and Nestle does not limit the volume of groundwater that Nestle could use.

Although the DEIR's Project Description is extraordinarily vague, the document's hydrological impact analysis clearly assumes the Project would use only 1,600 acre-feet annually. Until such time as Nestle and MCSD clearly establish maximum water diversion to the bottling plant, however, it is impossible to determine the severity and extent of this Project's impacts on surface flows and groundwater supplies.

**(2) The DEIR Fails to Accurately Describe the Hydrological Setting.**

Even a cursory review of the DEIR's hydrology and water quality section reveals that the authors were faced with an impossible task: they must evaluate the consequences of taking surface and groundwater to support the Nestle Project without a thorough understanding of the area's hydrology. The DEIR does not address the relative magnitude of the relationships between Squaw Valley Creek, Mud Creek, the McCloud River and the groundwater basin. As the PWA Report makes clear, all these components of the hydrologic system are connected. The Report goes on to state that "[l]ittle information exists to characterize the quantities of water present in these components or their relationship to each other, but some fundamental level of understanding must be developed to understand the potential for significant impacts to these systems from the proposed project." PWA Report at 3.

The PWA Report describes the DEIR's attempts to characterize existing groundwater conditions as "exceptionally poor." *Id.* PWA further states that the DEIR fails even to make use of published groundwater basin data, noting, in particular, that the DEIR ignores relevant information contained in two United States Geological Service reports on water resources in the Mount Shasta area.

The DEIR's description of streamflow conditions is also inadequate. Specifically, there is no acknowledgment of the seasonal variability of streamflow in the two potentially affected creeks – Squaw Valley and Mud creeks. The PWA Report explains that, because impacts of proposed diversions on these creeks would be expected to vary dramatically during the year, basing an impact assessment only on average annual flow values could have dramatic implications for aquatic ecosystems and factors such as siltation and erosion.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 15

To make matters worse, the DEIR errs in its attempt to estimate the values of average annual streamflow in Squaw Valley and Mud creeks. According to PWA, the document inappropriately assumes relationships for the McCloud River watershed in order to estimate runoff for Squaw Valley Creek and Mud Creek. Because the methodology for analyzing streamflow on Squaw Valley and Mud creeks is flawed, streamflow values for each creek are grossly overstated.

**(3) The DEIR Fails to Adequately Analyze and Mitigate the Project's Hydrological Impacts.**

CEQA requires that an EIR must be detailed, complete, and reflect a good faith effort at full disclosure. CEQA Guidelines § 15151. The document should provide a sufficient degree of analysis to inform the public about the proposed project's adverse environmental impacts and to allow decision-makers to make intelligent judgments. Id. Consistent with this requirement, the information regarding the project's impacts must be "painstakingly ferreted out." Environmental Planning and Information Council of Western El Dorado County v. County of El Dorado, 131 Cal. App. 3d 350, 357 (1982) (finding an EIR for a general plan amendment inadequate where the document did not make clear the effect on the physical environment).

The DEIR's treatment of hydrological impacts stemming from the Nestle Project does not come close to meeting this legal standard. It is not surprising, given the paucity of hydrological data, that the DEIR is incapable of accurately analyzing the Project's effect on groundwater resources and surface flow. This inadequacy becomes clear when the document time and again defers the analysis of hydrological impacts and mitigation until after the Project is implemented. For example, under the impact discussion relating to the depletion of groundwater supplies, the DEIR asserts that "MCSD will need to determine the safe production yield for wells drilled on the project site," using pumping tests and observation wells over a period of time, in order "to determine how the aquifer will respond to pumping from a production well." DEIR at 3.9-28. The fact that the DEIR recognizes the future need to determine the safe production yield for groundwater supplies demonstrates the substantive inadequacies of the current environmental review. Moreover, the DEIR may not use the failure of its review to avoid identifying appropriate mitigation: "The agency should not be allowed to hide behind its own failure to gather relevant data." Sundstrom v. County of Mendocino, 202 Cal. App. 3d 296, 361 (1988). As the PWA Report confirms, "[t]he potential for significant impacts on groundwater conditions from the installation and operation of groundwater wells is simply not

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 16

evaluated, nor is any mitigation for a potentially significant impact specified, though the potential for impacts is certainly implied.” PWA Report at 5.

As for the Project’s impacts on surface water flow affecting Mud and Squaw Valley creeks, here, too, the document falls far short of CEQA’s requirements. Indeed, the document is silent on the potential impacts to Mud Creek other than to assert that since most water from Elk Springs is already being diverted, the effect of the increase will not be significant. The document, however, provides no analysis or evidentiary support for this conclusion. Although the DEIR contains some analysis of impacts to Squaw Creek, for the reasons described in the PWA Report, the document’s conclusions are based on a deeply flawed average annual flow characterization.

Finally, the DEIR lacks sufficient basis to conclude that mitigation measures would reduce the Project’s hydrological impacts to a less than significant level. For example, Mitigation Measure 3.15.18 purports to mitigate impacts on surface water flow to a less than significant level. Yet, once again, the document promises to begin long-term monitoring of Squaw Valley Creek to provide “base information” necessary to evaluate long-term impacts associated with the Project. The mitigation measure further notes that once the Project progresses, MCSD will determine what flow is needed in the water course to avoid significant hydrological and biological impacts. DEIR at 3.9-38. For the reasons set forth above, this approach does not comply with CEQA’s stringent requirements. Nor does the document’s approach to impact analysis and mitigation comply with sound hydrological engineering principles, as the following statement from the PWA Report confirms:

It is simply inappropriate to conclude that impacts from a project do not need to be evaluated because data is not available – or that data collection subsequent to project implementation can provide a baseline of information adequate to “determine what flow is needed in the water course, to avoid significant hydrological and biological impacts.” Mitigation measures should not defer evaluation of project impacts until after project implementation, nor may they be based on future studies. Observations made after project implementation cannot provide baseline information on pre-project conditions.



Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 17

PWA Report at 5-6.

In conclusion, the DEIR must be revised to: (1) clarify the actual amount and source of water to be used by the Project; (2) provide sufficient data about the context for the Project, including data on streamflows, groundwater levels and the interaction between these systems; (3) analyze the Project's impacts on Squaw Valley and Mud creeks and on groundwater resources in the area; and (4) identify appropriate mitigation to avoid or lessen those impacts. The revised DEIR should then be recirculated for public review and comment.

**B. The DEIR Fails to Adequately Analyze and Mitigate the Project's Impacts on Aquatic and Riparian Resources.**

The DEIR both understates the severity of the potential harm to aquatic and riparian resources resulting from the Nestle bottling operation and overstates the effectiveness of proposed mitigation. Given that analysis and mitigation of such impacts are at the heart of CEQA, the EIR will not comply with the Act until these serious deficiencies are remedied. Sundstrom, 202 Cal. App. 3d at 311 ("CEQA places the burden of environmental investigation on government rather than the public."). As concluded by California Trout and Trout Unlimited's biologists, Spring Rivers Ecological Sciences, LLC ("Spring Rivers"), the EIR fails to adequately analyze or mitigate the Project's impacts on the aquatic and riparian ecosystems of the McCloud Watershed. See Spring Rivers report, dated December 19, 2006, attached hereto as Exhibit D.

**(1) The DEIR's Analysis of Impacts Is Doomed to Failure Since It Does Not Include Necessary Baseline Information Relevant to the Affected Creeks' Hydrology.**

As discussed above, it is not possible to adequately evaluate the environmental consequences of Nestle's proposed bottling operations because the DEIR lacks sufficient baseline information about potentially affected streams and their biota. Understanding the hydrology of a stream is essential to understanding the aquatic habitats and associated biota that it supports and the potential impacts that could result from water withdrawal or sedimentation. CEQA is clear in this regard: without a measurement of baseline conditions, it is impossible to accurately gauge a project's impacts. County of Amador v. El Dorado County Water Agency, 76 Cal. App. 4th 931, 953 (1999).

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 18

A full understanding of the McCloud Watershed's aquatic habitats and associated biota is especially critical here because coldwater spring ecosystems such as Squaw Valley Creek, Mud Creek and the springs feeding these creeks are relatively rare and warrant protection. As Spring Rivers states: "Coldwater springs provide high quality, but vulnerable habitats that support unique communities of invertebrates, including rare (often endemic) species. They also support more ubiquitous species of invertebrates and fish, such as rainbow trout, that often exhibit unusual life-history traits as a result of adaptation to the spring environment." Because many species of invertebrates are adapted to spring environments, the Nestle DEIR should have surveyed and classified these species.

In order to evaluate impacts to aquatic and riparian resources, the revised DEIR must first provide sufficient existing data on Squaw Valley Creek, Mud Creek and the springs feeding these creeks' hydrology, geomorphology, water quality and temperature. In addition, the revised DEIR must fully describe the unique ecological function of coldwater spring systems. Finally, the revised document must identify those aquatic resources, including non-special status fish species, that have the potential to occur in these coldwater systems and fully analyze impacts to these species resulting from Nestle's bottling operations.

**(2) The EIR Fails to Support With Substantial Evidence Its Conclusion That Impacts to Sensitive Aquatic Species Would Be Less Than Significant.**

As described above, the DEIR is severely hamstrung by its failure to describe the existing hydrology, aquatic habitats and associated biota of the McCloud watershed. Not surprisingly, the DEIR's attempt to analyze impacts to aquatic resources falls well short of CEQA's requirements. Indeed, the document fails to describe the changes in hydrology, and the subsequent changes in fluvial geomorphologic processes (channel formation, sediment transport, and riparian growth), water quality and temperature that would result from operation of the bottling facility. As a consequence, the DEIR also fails to adequately address how the change in these processes and phenomena from implementation of the Nestle Project will affect aquatic habitats and cause changes in the macro invertebrate, fish and amphibian populations. Specific deficiencies in the DEIR's impact analysis are addressed below.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 19

**a. Impacts Caused by Removal of Riparian Habitat During Construction (Impact 3.5-17).**

The DEIR correctly acknowledges that construction activities associated with the proposed Project, including the removal of riparian vegetation and ground disturbance, or increases in water turbidity due to these activities, could result in mortality to frog species, frog eggs, and tadpoles. DEIR at 3.5-66. The DEIR does not, however, analyze the severity and extent of this impact, as required by CEQA. Specifically, the document never identifies the exact location of the ground disturbance, nor does it identify the amount of riparian vegetation that would be destroyed as a result of Project construction activities. The DEIR also does not explain the extent of water turbidity caused by these construction activities. Given that turbidity is the key factor in determining water quality, it is critical to understand how construction activities would affect water turbidity. The EIR must disclose the specific nature of these activities in order to discern the severity of the impacts to aquatic species.

Nor can the DEIR rely upon alleged compliance with the Riparian Reserve Aquatic Conservation Strategy objectives (“Objectives”) to conclude that these impacts would be less than significant. *Id.* If adhered to, these Objectives would certainly reduce the Project’s impacts on aquatic species. Yet the DEIR fails to provide any indication that the Nestle Project would comply with these Objectives. In fact, according to the Spring Rivers Report, implementation of the Project would likely cause the very impacts that the Objectives were intended to prevent. Thus, the DEIR lacks the necessary evidentiary support to ensure that the adverse ecological impacts from the Project will actually be compensated, as required by CEQA. The EIR must set forth specific mitigation measures or set forth performance standards that such measures would achieve by various, *specified* approaches. *See* CEQA Guidelines § 15126.4; see also Sacramento Old City Ass’n v. City Council of Sacramento, 229 Cal. App. 3d 1011, 1034 (1991). Unless the DEIR provides specific information as to how the Nestle Project would comply with each Objective, it cannot rely on these Objectives as mitigation for the Project’s significant impacts.

**b. Impacts to Aquatic and Riparian Frog Habitat (Impact 3.5-18).**

The DEIR correctly acknowledges that the bottling facility could result in impacts to special status frogs and their habitat as a result of a reduction of water quantity in Squaw Valley Creek. DEIR at 3.5-66, 67. Yet, rather than fully analyze this impact as

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 20

required by CEQA, the DEIR simply asserts that “[t]he potential biological impacts of any decreased flows in Squaw Valley Creek cannot be quantified because of a lack of data” and, consequently, “the extent of the impact is not possible to predict.” Id. at 67. Here, as with the hydrologic analysis discussed above, the EIR authors use their failure to gather data as an excuse for their inability to document the Project’s impacts. Such an approach violates a fundamental tenet of CEQA. Without such data, it is all but impossible to accurately gauge the severity and extent of the environmental impacts that would result from Nestle’s bottling operations. The agency has a duty to “painstakingly ferret out” the Project’s impacts. Envtl. Planning and Information Council, 131 Cal. App. 3d at 357. The DEIR must be revised to provide this analysis.

The DEIR stumbles further with its promise to implement a monitoring program for Squaw Valley Creek once the bottling plant is operational, as purported mitigation for impacts to aquatic and riparian frog habitat. Specifically, the DEIR states that “should results of water monitoring program conclude that there is a decrease in habitat viability as a result of the proposed project, further construction of the Nwana water bottling facility shall be suspended until the biological impacts can be addressed.” Id. This approach to mitigation is fraught with problems.

First, the DEIR’s promise to evaluate the Project’s effect on biological resources after Project approval is impermissible under CEQA. In Sundstrom, Mendocino County attempted to satisfy CEQA by approving a project subject to conditions requiring the applicant later to prepare two hydrology studies for planning staff review and to adopt mitigation measures recommended in those studies. The court rejected this approach because, by requiring that the applicant prepare the hydrology studies, the county improperly delegated its legal responsibility to assess a project’s environmental impact. 202 Cal. App. 3d at 307. The court emphasized that CEQA requires the lead agency itself prepare or contract for the preparation of impact assessments (citing CEQA § 21082.1), that such assessments reflect an agency’s “independent judgment,” and finally, that the Board of Supervisors, not County planning staff, be responsible for reviewing and certifying the assessment. Id.

The fundamental concern underlying Sundstrom was that even if the required conditions of project approval had been adequate, the need for post-approval studies demonstrated the inadequacy of the County’s environmental review prior to project approval. Id. Similarly here, the fact that the DEIR calls for the evaluation of biological impacts after Project approval highlights the substantive inadequacies of the DEIR. In

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 21

fact, the DEIR even admits that such monitoring might demonstrate that the bottling facility could have a significant impact on habitat viability. DEIR at 3.5-67. A thorough analysis must be prepared *now* in order to evaluate and mitigate the Project's impacts to aquatic and riparian frog habitat.

Second, the DEIR lacks the necessary evidentiary support to ensure that the adverse ecological impacts from the Project will actually be mitigated. CEQA requires that an EIR must set forth either: (1) specific mitigation measures, or (2) performance standards that such measures would achieve by various, *specified* approaches. See CEQA Guidelines § 15126.4; see also Sacramento Old City Ass'n, 229 Cal. App. 3d at 1034. Here, the DEIR's mitigation measure calling for a monitoring program does not include *any* performance standards. While the DEIR tries to rely on its promise to conduct this monitoring in compliance with regulatory agencies as a substitute for identifying the necessary performance standards, this approach also fails. The County may not avoid its responsibilities to identify specific details of the monitoring protocol for aquatic resources by delegating its responsibilities to another agency. Finally, without any baseline data on streamflow, water temperature and turbidity, it is not even clear what standard would have to be met or how the monitoring would be conducted to ensure that aquatic resources will be sufficiently protected.

Third, even if the DEIR's mitigation measure contained the necessary performance standards, the duration of the monitoring program is inadequate. Nestle proposes to monitor for only five years following Project buildout, despite the fact that the bottling operation would continue for 100 years. DEIR at 3.5-67 and Appendix S.1-2 at 12. Under the best of circumstances, water supply and water quality would be expected to vary considerably within the McCloud watershed over a 100-year period. Given the climatic uncertainties associated with global warming, one can expect even greater variations in the watershed over the next century. A five-year monitoring program is clearly inadequate to detect potential environmental consequences over the life span of the Project.

Fourth, cases have consistently rejected mitigation measures, like the one offered in the DEIR, that propose to halt a project in the future in order to evaluate its environmental impacts. For example, in Stanislaus Natural Heritage Project, the Court of Appeals found that the EIR for a 29,500-acre, 5,000-residential project, to be built over a 25-year period, was inadequate. The mitigation measure at issue there stated that "[b]ecause long-term water supplies beyond the five-year buildout have not been assured,

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 22

development requiring over 1,200 acre-feet per year of water shall not be permitted unless the applicant can show to the County's satisfaction that adequate water supplies have been made available, and that environmental impacts of those sources have been studied and mitigated per CEQA requirements." 48 Cal.App.4th at 195. The court found that "the County's approval of the project under these circumstances defeated a fundamental purpose of CEQA: to inform the public and responsible officials of the environmental consequences of their decisions before they are made. The CEQA EIR process protects not only the environment but also informed self-government." *Id.* (citations omitted). In essence, the project proponent in Stanislaus sought to do what Nestle is proposing now: to proceed with the project in the absence of relevant environmental analysis, with the understanding that development could be halted after later studies were conducted. As the Stanislaus Natural Heritage Project held, CEQA requires more. See also Santiago County Water Dist., 118 Cal. App. 3d 818.

Finally, the DEIR calls for supplementing flow in Squaw Valley Creek in the event that monitoring demonstrates a significant impact on biological resources. DEIR at 3.5-68. This proposal, too, raises all sorts of red flags. As a preliminary matter, the DEIR does not provide any indication of what this other source of water would be. Nor does it describe how this supplemental water source would be introduced into Squaw Valley Creek, or how the other water source would mitigate for impacts to aquatic species. For example, if the bottling Project causes increases in turbidity and declines in water quality, how would a supplemental water source ameliorate this impact? What would be the interim impacts to aquatic resources in Squaw Valley Creek, and points downstream, until this supplemental water source arrives? What would be the impacts to riparian habitats and aquatic resources from taking water from this supplemental source? Finally, at what point would the supplemental water source be discontinued? These are just a few of the questions that cast doubt upon the efficacy of this "mitigation measure."

**c. Non-Special Status Species.**

As the DEIR acknowledges and as discussed above, Forest Service Standards and Guidelines prohibit, or regulate, activities in riparian reserves that would hinder or prevent attainment of the Objectives. DEIR at 3.5-11. The DEIR further notes that the riparian reserve is considered the stream itself as well as the area on each side of the stream (*id.*) and that land in or adjacent to Squaw Valley Creek and Mud Creek, as well as the smaller creeks that originate from Upper Elk and Lower Elk Springs, are contained within this riparian reserve area.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 23

Given the extraordinary importance that the Forest Service places on these riparian areas, one would expect the DEIR to have thoroughly examined impacts to these sensitive areas. Of course, CEQA requires such an analysis. Specifically, CEQA's Appendix G requires a lead agency to evaluate whether a project would have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, or regulations. Although the DEIR purports to analyze the Project's potential to violate the Objectives (see Impact 3.5.24 at pages 3.5-90 and 91), it never actually provides this analysis. Furthermore, while Impact 3.5.18 (discussed above) purports to analyze the Project's effect on aquatic and riparian habitat, the DEIR acknowledges that such analysis is impossible because of lack of data. DEIR at 3.5-67. Clearly, as the Spring Rivers report explains, the Nestle Project has the potential to alter water quality, water quantity, chemistry and water temperature, and therefore would violate the Objectives. Accordingly, the DEIR should have analyzed the Project's impact on riparian reserves, using the Objectives as its significance criteria.

In sum, the EIR's discussion of biological resources is incomplete, misleading and unsupported by necessary analysis. In light of the flaws identified above, the EIR must be substantially revised and recirculated before the County can properly consider moving forward with the Project. Given the nature and severity of potential Project impacts, the County must conduct detailed and comprehensive studies. A meaningful analysis would include, for example, site-specific surveys to comprehensively identify those species that rely on the coldwater ecosystems of the McCloud watershed, as well as an analysis of the severity and extent of impacts to these species from Nestle's operations.

**C. The DEIR Fails to Adequately Analyze and Mitigate the Project's Traffic Impacts.**

The DEIR's analysis of traffic impacts is crippled in large part because of the document's failure to analyze traffic from the Nestle Project during snowy and icy conditions. Of critical concern is the Project's impact on State Route ("SR") 89, which is the community's major inter-city route. SR 89 is a two-lane hilly roadway. Its characteristics and operations change considerably during snowy and icy conditions, when snowfall causes the roadway's travel lanes to become narrow and far more slick. In some instances, passing lanes become inoperable. Visibility diminishes from falling snow as well as from truck spray. There is a corresponding slowing of traffic as well as a marked increase in the potential for accidents. Given the transformation of the roadway's

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 24

operational characteristics during snowy conditions, one would expect the DEIR to have carefully analyzed impacts of increased traffic during the winter.

SR 89 already suffers from traffic congestion during non-snowy conditions. The roadway operates at level of service (“LOS”) D during the p.m. peak hour. DEIR at 3.3-10. The Nestle Project would add almost 1,100 daily trips (600 of which are truck trips) during the peak season and almost 900 trips (400 of which are truck trips) during the non-peak season to this roadway. See 3.3-22 (Table 3.3-10). This increase in traffic is substantial in comparison to existing traffic volumes on this segment. At some locations, Nestle’s traffic would increase volumes on this roadway by 58 percent (see, e.g., 3.3-27 (Table 3.3-13) which shows two-way a.m. peak hour traffic volumes). The DEIR’s failure to analyze how the Nestle Project would affect SR 89’s operation under snowy and icy conditions is a critical oversight.

Moreover, the DEIR fails to realistically portray Nestle-related travel impacts on SR 89 even during the non-snowy season. As discussed above, SR 89 already suffers from heavy traffic congestion. Certain segments of SR 89 currently operate and are projected to continue to operate at LOS D during the p.m. peak hour without the Nestle Project. DEIR at 3.3-10 and 3.3-30 (Table 3.3-15). The Nestle Project would add up to 1,090 daily vehicular trips on SR 89. In some locations, the Project would add almost 60 percent more traffic to this already congested roadway. Id. at 3.3-27 (Table 3.3-13) and 3.3- 31 (Table 3.3-17). Despite this substantial increase in traffic, the DEIR finds that the addition of these trips would decrease vehicle speed by only a second or two during peak month conditions. DEIR 3.3-22 (Table 3.3-10), 3.3-27 (Table 3.3-13), 3.3-30 (Table 3.3-15), 3.3-31 (Table 3.3-17) and 3.3-34 (Table 3.3-19). It is inconceivable that the addition of 600 heavy duty trucks on a two-lane road that already operates at LOS D would add only a second or two of delay.

Nor does the DEIR adequately analyze the potential increase in hazards along SR 89 resulting from the addition of Nestle’s heavy-duty trucks. Rather than actually evaluate whether the Nestle truck traffic would increase the risk of accidents on this roadway, the document simply asserts that the Project “does not propose the utilization of incompatible transportation uses.” DEIR at 3.3-53. Under CEQA, such self-evident ruminations cannot substitute for meaningful analysis. City of Antioch v. City Council, 187 Cal. App. 3d 1325 (1986). Rather, an EIR must contain analysis sufficient to allow informed decision-making. An analysis of the Project’s potential to increase the risk of accidents would necessarily begin with a description of the existing accident rate on SR



Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 25

89 and an evaluation of how that road's accident rating compares to state and county averages. Those records will allow for a determination as to whether there are any existing safety problems or accident statistics along this roadway. Using that data and information as a baseline, the County's engineers would then be able to determine whether the increase in vehicular and truck trips to and from the Nestle facility would substantially increase traffic hazards to motor vehicles, bicyclists or pedestrians. It is important to reiterate that the tremendous increase in Nestle truck traffic would make driving along SR 89 during snowy and icy considerations even more hazardous.

In addition, the DEIR inappropriately concludes that it is not obligated to assess construction-related traffic impacts, claiming that "these impacts will be far less than the impacts associated with full buildout." DEIR at 3.3-18. The fact that construction of the bottling plant and pipelines will generate less traffic than the full bottling operation is irrelevant. Construction activities would nonetheless result in potentially significant traffic impacts that are undisclosed in the DEIR. Specifically, area roadways will be affected by construction vehicles and equipment. The slow movements and larger turning radii of construction trucks reduce road capacity. Construction-related truck and vehicular traffic from 7:00 to 9:00 a.m. and from 4:00 to 6:00 p.m. would coincide with peak-period roadway traffic, again impacting roadways. The DEIR offers no analysis and therefore no mitigation for this clearly significant impact.

Despite the DEIR's failure to depict the extent or severity of the Project's impact on SR 89, the document nonetheless correctly concludes that impacts to this roadway and certain of its intersections would be significantly impacted. DEIR at 3.3-50. The document fails, however, to present sufficient evidence that these impacts would be mitigated to a less than significant level. For example, the DEIR states that the Project proponent's payment of its pro-rata share of the cost of installing a traffic signal at the intersection of SR 89 and Broadway Avenue would mitigate impacts at this intersection to a less than significant level. DEIR at 3.3-50.

Fee-based mitigation programs for traffic impacts based on fair share infrastructure contributions by individual projects have been found to be adequate mitigation measures under CEQA. Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, 87 Cal. App. 4th 99, 140 (2001). To be adequate, however, these mitigation fees must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing. Id. at 140-41. See also Anderson First Coalition v. City of Anderson, 130 Cal. App. 4th 1173, 1188-89 (2005) (explaining that fee-based

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 26

traffic mitigation measures have to be specific and part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation of the traffic impacts at issue). Here, the DEIR's proposed mitigation simply assumes that the payment will occur, that it will cause the signal to actually be installed, and that it will adequately mitigate the impacts, without providing a reasonably enforceable plan to achieve those results. CEQA requires more. Moreover, as suggested above, until the County analyzes the effect of Nestle-generated traffic on regional roadways during icy and snowy conditions, it is not possible to determine the extent of necessary mitigation.

**D. The DEIR Fails to Adequately Analyze and Mitigate the Project's Air Quality Impacts.**

California Trout and Trout Unlimited are particularly concerned about the Project's potential to substantially increase air pollution in the McCloud airshed. Numerous studies demonstrate the relationship between air pollution and water quality degradation. Pollution from the air may deposit onto water bodies and affect water quality in these systems. Airborne pollution falls to the ground in raindrops, in dust, or simply due to gravity. As the pollution falls, it may end up in streams, lakes, or estuaries, affecting the water quality there. See United States Environmental Protection Agency's Report entitled "Atmospheric Deposition and Water Quality" (attached herein as Exhibit E). As the attached hydrological and biological reports show, degraded water quality has a detrimental effect on fisheries.

This firm was provided a copy of the report prepared by Greg Gilbert at Autumn Wind Associates ("Gilbert Report") concerning the proposed Nestle facility. The Gilbert Report explains that the DEIR underestimates the Project's impact on air quality primarily because it: (1) does not accurately characterize existing air quality in the vicinity of McCloud, (2) fails to use thresholds of significance adequate to protect citizens and localized air quality in the McCloud area, and (3) relies on inappropriate modeling assumptions and methodology. This firm concurs with the critique and findings of the Gilbert Report. As such, the Gilbert Report is incorporated, by reference, into this letter.

In addition to the deficiencies raised by the Gilbert Report, the DEIR's air quality analysis has other fundamental gaps. First, and of critical concern to California Trout and Trout Unlimited, is the document's failure to mitigate the clearly significant impacts relating to construction-related NOx emissions. Although NOx emissions would be almost double the Siskiyou County Air Pollution Control District thresholds of

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 27

significance, the DEIR suggests there is no obligation to mitigate this impact, claiming the increase in emissions would be “temporary.” DEIR at 3.4-6. Even if the emissions were temporary in nature, which they clearly are not given the sustained construction schedule associated with the bottling facility, CEQA does not distinguish temporary versus long-term emissions. The increase in NO<sub>x</sub> from construction constitutes a significant impact and must be mitigated.

Second, the DEIR fails to propose any mitigation for the PM<sub>10</sub> emissions generated by the construction-related fuel combustion emission sources. The DEIR identifies a substantial increase in PM<sub>10</sub> emissions (3.4-6 [Table 3.4-1]) and clearly attributes some of these emissions to fuel combustion (at 3.4-6), but Mitigation Measure 3.4.1 would reduce PM<sub>10</sub> emissions only from fugitive dust generation. Fuel combustion emissions are of particular concern since much of the construction equipment would use diesel-powered engines. The combustion of diesel fuel in engines produces diesel exhaust, which contains some 40 compounds that are listed by the U.S. Environmental Protection Agency as hazardous air pollutants and by the California Air Resources Board (“CARB”) as toxic air contaminants. Diesel particulate matter (“DPM”) emitted from diesel exhaust is a serious public health concern. It has been linked to a range of serious health problems, including an increase in respiratory disease, lung damage, cancer, and premature death. Fine diesel particles are deposited deep in the lungs and can result in increased respiratory symptoms and disease, particularly in children and individuals with asthma. (See, e.g., “Study Pinpoints Diesel Soot Range: Trucks called predominant source of cancer-causing air pollution . . .” (Contra Costa Times, 10/23/06); “A Study Links Trucks’ Exhaust to Bronx Schoolchildren’s Asthma” (New York Times, 10/29/06) (Exhibit F). Project construction would expose workers, as well as residents of adjacent neighborhoods, to elevated concentration of diesel exhaust. The DEIR must distinguish between fuel combustion and fugitive dust emissions so that appropriate mitigation measures for both sources can be implemented. Moreover, and as discussed in the next paragraph, since construction of subsequent phases of the bottling facility will be occurring simultaneously with bottling operations, the health risk assessment must be revised to include construction-related toxic air contaminants.

Third, the DEIR’s air quality analysis inappropriately considers construction emissions as an impact distinct from the concrete batch plant emissions and the Project’s operational emissions. Upon completion of Phase I, the Project will be generating operational emissions from mobile sources (trucks and automobiles) and on-site processes, while construction activities for later phases are ongoing. At the same time,

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 28

the Project would have undisclosed emissions from the concrete batch plant. Pollutants from operational and construction sources as well as from the batch plant would thus be emitted at the same time. By artificially dividing its analysis by source and by presenting construction, operational and batch plant impacts separately, the DEIR underplays the significance of the Project's degradation of air quality. The air quality impacts from a given pollutant are the same regardless of where the pollutant comes from; the document must therefore identify and analyze the increase in emissions from the entire Project.

In sum, the DEIR's analysis of air quality impacts is hamstrung by the issues raised in the Gilbert Report, as well as by the issues identified above. Because this DEIR cannot serve to inform the public and decision-makers of the true air quality consequences of the Project, it must be revised substantially and re-circulated as a DEIR/EIS.

**E. The DEIR Fails to Adequately Analyze and Mitigate the Project's Noise Impacts.**

Although the DEIR is extraordinarily vague regarding the duration of each phase of construction, it is clear that the initial phase of construction of the bottling plant, including the demolition of the mill, will span the course of a year. DEIR at 2.0-45. Construction of Phase II would occur between two and five years after Phase I, and construction of Phase III would occur between two and five years after Phase II. *Id.* at 2.0-44. Upon build-out, the facility would include over 1,000,000 square feet of office, production and warehouse space. *Id.* Clearly, this is a demolition and construction project of monumental proportions that will span a prolonged period, and noise levels from Project construction would be extensive and ongoing. However, rather than undertake a detailed evaluation of how the noise from these demolition and construction activities would impact nearby sensitive receptors, the DEIR simply asserts that "[d]ue to the number of variables surrounding project construction, it is difficult to accurately predict construction noise levels at the nearest residences at any specific time." DEIR at 3.7-18.

Although the DEIR acknowledges that construction-related noise would be potentially significant, this self-evident statement does not suffice under CEQA. Meaningful analysis effectuates one of CEQA's fundamental purposes: to "inform the public and responsible officials of the environmental consequences of their decisions before they are made." Laurel Heights II, 6 Cal. 4th at 1123. To accomplish this purpose, an EIR must contain *facts and analysis*, not just an agency's bare conclusions.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 29

Citizens of Goleta Valley, 52 Cal. 3d at 568. Thus, a conclusion regarding the significance of an environmental impact that is not based on an analysis of the relevant facts fails to fulfill CEQA's informational goal. The Nestle DEIR fails to fulfill this paramount CEQA purpose both because it neglects to present all relevant facts relating to the Project's noise impacts and because its cursory conclusions are based upon no analysis.

Nor can the DEIR evade its obligation to conduct the impact analysis by claiming that such an analysis is difficult. The California Supreme Court has clearly rejected such an approach. As explained by the Court in Laurel Heights I, 47 Cal.3d at 399, "We find no authority that exempts an agency from complying with the law, environmental or otherwise, merely because the agency's task may be difficult."

Given the nature and severity of potential noise impacts from Project construction, the DEIR must conduct detailed noise studies. A meaningful analysis would include, for example, identification of each noise source, decibel ratings associated with each source, and a quantitative assessment of how these noise sources would impact nearby sensitive receptors. Unless and until such an evaluation is undertaken, it is unrealistic to assume, as the DEIR does, that simply limiting construction hours would sufficiently mitigate noise impacts.

Like the DEIR's flawed analysis of construction noise, the document also fails to adequately identify or analyze how noise levels associated with the operation of the bottling facility would impact nearby sensitive receptors. Although the DEIR never identifies the complete list of noise-generating sources, it does acknowledge that the facility would include electrical pumps, HVAC units and generators. DEIR at 3.7-19. In addition, the bottling facility is expected to have loading dock activities, idling and mobile forklifts and cargo trucks, and their associated back-up alarms. Unfortunately, however, the document falls short of actually analyzing the operational noise levels; instead, it simply asserts the bare conclusion that the water bottling plant could potentially exceed the County noise threshold. DEIR at 3.7-19. Moreover, while the DEIR contains a mitigation measure that essentially promises that noise-generating equipment will be operated in a manner that ensures compliance with County standards, it is impossible to determine whether this is feasible since there has been no attempt to calculate how noisy the facility would be. In the absence of an analysis examining the severity and extent of the noise impacts, the DEIR has no basis for concluding that impacts would be mitigated to a less than significant level. This analysis must occur prior to Project approval.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 30

Not surprisingly, the DEIR also fails to adequately analyze noise impacts from truck traffic to and from the bottling facility. Indeed, the document admits that traffic noise levels at the nearest residences were not modeled. DEIR at 3.7-12. What analysis does exist is confusing and appears to be erroneous. Specifically, the document asserts that Project-related truck traffic would have no effect whatsoever at 19 representative roadway locations. See 3.7-14 (Table 3.7-7). This startling conclusion – that the addition of 600 heavy-duty truck trips would result in a zero percent change in noise levels – belies common sense. The revised DEIR/EIS must either provide a logical explanation for this conclusion or re-analyze the impact.

**F. The DEIR Fails to Adequately Analyze the Project’s Cumulative Impacts.**

An EIR must discuss significant “cumulative impacts.” CEQA Guidelines § 15130(a). “Cumulative impacts” are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” CEQA Guidelines § 15355(a). “[I]ndividual effects may be changes resulting from a single project or a number of separate projects.” CEQA Guidelines § 15355(a). A legally adequate “cumulative impacts analysis” views a particular project over time and in conjunction with other related past, present, and reasonably foreseeable future projects whose impacts might compound or interrelate with those of the project at hand. “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” CEQA Guidelines § 15355(b). The cumulative impacts concept recognizes that “[t]he full environmental impact of a proposed . . . action cannot be gauged in a vacuum.” Whitman, 88 Cal. App. 3d at 408.

The DEIR’s analysis of cumulative effects is deficient because it fails to analyze the effect of the Lakin Dam diversion, together with the proposed water bottling Project, on hydrological and biological resources. As discussed above, it is our understanding that Nestle has already begun diverting water from Lakin Dam to the proposed bottling site, purportedly to provide an additional source of water for local fire fighting needs. If, as discussed above, this water diversion is part of the Nestle Project, the EIR should have analyzed the effect that this use of water would have on the McCloud watershed and biological resources in the area. If the Lakin Dam diversion is not part of the bottling operation, the EIR must include the effects of this water use in its cumulative impacts analysis. Either way, the DEIR is deficient because it does not take into account the environmental ramifications of this Lakin Dam diversion. The diversion of this water,

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 31

together with the water associated with the bottling operation, will undoubtedly significantly impact the McCloud watershed and its biological resources. The recirculated EIR must analyze and mitigate these significant impacts.

### **III. THE DEIR FAILS TO CONSIDER A REASONABLE RANGE OF ALTERNATIVES TO THE PROJECT.**

The requirement to set forth and analyze impacts of alternatives within an EIR is crucial to CEQA's mandate that significant environmental damage be substantially lessened or avoided where feasible. Pub. Res. Code § 21002; CEQA Guidelines §§ 15002(a)(3), 15021(a)(2), 15126.6; Citizens for Quality Growth v. City of Mount Shasta, 198 Cal. App. 3d 433, 443-45 (1988). "Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process. . . . [Courts will not] countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials." Laurel Heights I, 47 Cal. 3d at 404.

CEQA grants lead agencies considerable discretion in the selection of project alternatives in an EIR, as "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." CEQA Guidelines § 15126.6(a). Courts have explained that under this "rule of reason," "[c]rystal ball' inquiry is not required. . . . Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco, 106 Cal. App. 3d 893, 910 (1980); see also Citizens of Goleta Valley, 52 Cal. 3d at 565.

The statute and the regulations do make clear, however, that agencies must exercise this discretion to further the purpose of avoiding or minimizing environmental impacts. In enacting CEQA, the Legislature declared that "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available *which would substantially lessen the significant environmental effects of such projects.*" Pub. Res. Code § 21002 (emphasis added). The Guidelines further explain that "[b]ecause an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment, *the discussion of alternatives shall focus on alternatives to the project or its location which are capable of*

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 32

*avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.”* CEQA Guidelines § 15126.6(b) (emphasis added).

It is especially important in the alternatives phase of the CEQA process that the agency keep an open mind to all feasible options of achieving the project’s objectives. “‘The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal.’ [citation omitted]. . . . [T]he lead agency may determine an environmentally superior alternative is more desirable or [that] mitigation measures must be adopted. . . .” Kings County Farm Bureau v. City of Hanford, 221 Cal. App. 3d 692, 736-37 (1990). See also Concerned McCloud Citizens at 17 (“the agreement expressly recognizes the ultimate water bottling project is subject to CEQA, *and the agreement may be modified as a result*”) (emphasis added).

In the present case, the DEIR failed to heed these basic mandates. First, the document blatantly underestimated the Project’s environmental impacts, concluding that all of its impacts could be reduced to a level of insignificance through the implementation of mitigation measures. See, e.g., DEIR at S.0-4. This conclusion, however, does not withstand scrutiny. See Section II, above; PWA Report, and Spring Rivers Report. Then, the DEIR proceeded to perform a superficial analysis of alternatives to the Project, failing to consider any alternatives that could actually avoid or lessen the Project’s environmental impacts, as required by law.

Other than the no-project alternative, the DEIR considered only two alternatives to the proposed Project: one that would ship the water bottled in the facility by rail; and another that would retain of some of the structures currently present at the site. See DEIR at 4.0-13 - 4.0-29. Notably, both of these alternatives would have *more severe* environmental impacts than the proposed Project: thus, the DEIR could conveniently justify the choice of the Nestle Project as the environmentally superior alternative. DEIR at 4.0-30 (“Therefore, between the proposed project, Alternative 2, and Alternative 3, the proposed project is the environmentally superior alternative”).

In its selection of alternatives, the County did not even attempt to consider options that would avoid or lessen the Project’s environmental impacts. For example, the DEIR certainly could have considered as an alternative a scaled-down version of the proposed Project, one that would result in less water being taken from the springs and aquifers of



Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 33

the area. Obviously, such an alternative would minimize the hydrological and biological impacts of the Project on the McCloud Creek watershed, as well as impacts to traffic, air quality, noise, and the McCloud community's drinking water supply. See, e.g., Citizens of Goleta Valley, 52 Cal. 3d at 565-73 (EIR held to provide "a full range of project alternatives," where EIR analyzed four alternatives to the original 574-unit project proposal, two of which were reduced-scale alternatives); Sequoiah Hills Homeowners Ass'n v. City of Oakland, 23 Cal. App. 4th 704, 713 (1993) (EIR's consideration of alternatives was reasonable, where both alternatives analyzed provided some relief from the project's visual impacts by reducing the size and density of the proposed development project). See also Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir. 1972) (finding that it is not appropriate to disregard alternatives merely because they do not fulfill a project's objectives completely, and stating that "[i]f an alternative would result in supplying only part of the energy that the lease sale would yield, then its use might possibly reduce the scope of the lease sale program and thus alleviate a significant portion of the environmental harm attendant on offshore drilling."); Town of Matthews v. United States Dept. of Transp., 527 F. Supp. 1055, 1057-58 (W.D.N.C. 1981) (ordering agency to analyze bypass alternative, even though agency asserted that alternative would not achieve stated project goals."); Bowman v. City of Berkeley, 122 Cal. App. 4th 572, 591 (2004) ("CEQA was patterned on NEPA, and NEPA cases can be persuasive authority for interpreting CEQA." (citations omitted)).

Unfortunately, the DEIR here included no such environmentally superior option. None of the alternatives that were considered but rejected during the screening period consisted of a scaled-down version of the Project. See DEIR at 4.0-31 - 4.0-36. Thus, instead of informing the public and decision-makers about alternatives that could potentially avoid or reduce the Project's impacts on the environment, the DEIR simply offered "alternatives" that served to justify its endorsement of the Nestle Project, as originally proposed. In other words, the EIR's treatment of alternatives simply reinforced the document's false premise that the environmentally destructive impacts associated with the Project are the only viable option. Yet, CEQA requires more. See CEQA Guidelines § 15126.6(c) ("[t]he range of potential alternatives to the proposed project *shall* include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects") (emphasis added). The County must circulate a revised DEIR that analyzes a reasonable range of alternatives, including environmentally superior alternatives, as demanded by CEQA.

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 34

#### **IV. THE FOREST SERVICE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT BY FAILING TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE PROJECT.**

The Forest Service violated the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (“NEPA”) by artificially limiting the scope of the Nestle Project in order to avoid preparation of an Environmental Impact Statement (“EIS”). Rather than considering the whole of the project in an EIS, the Service determined that only a shorter Environmental Assessment (“EA”) was necessary to consider the specific federal permits, including (1) a Special Use Permit to allow the construction of the Intake Spring Pipeline, and (2) a temporary permit for access roads and use of federal lands for the construction of the Upper Elk and Lower Elk pipelines. DEIR at S.0-1; Appendix 2.1-1 (Notice of Preparation). Remarkably, this EA does not address all other components of the Project, components which the County has determined could cause significant environmental impacts, thus requiring full environmental review. *See, e.g.*, DEIR, Appendix 2.1-1 (Notice of Preparation, stating that “the [Siskiyou] County has determined that an Environmental Impact Report is required for this project.”). As explained below, the Service’s approach – of “segmenting” environmental review so as to minimize impacts – violates federal law.

NEPA requires federal agencies to prepare an Environmental Impact Statement for all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Issuance of a Special Use Permit constitutes a “major Federal action.” High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630, 645 (9th Cir. 2004). The Forest Service was required, as an initial step, to prepare an EA to determine whether the Project might have any significant environmental effects. National Parks and Conservation Ass’n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001); 40 C.F.R. § 1501.3. A far more detailed EIS is required if this EA raises “substantial questions” as to whether the project “*may* have a significant effect upon the human environment.” Foundation for North American Wild Sheep v. USDA, 681 F.2d 1172, 1178 (9th Cir. 1982); 40 C.F.R. § 1501.4. If an agency decides that a project may not have a significant effect on the human environment, it may issue a Finding of No Significant Impact (“FONSI”) accompanied by a “convincing statement of reasons” explaining why the project’s impacts are insignificant. Save the Yaak Comm. v. Block, 840 F.2d 714, 717 (9th Cir. 1988) (“The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.”).

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 35

Agencies may not improperly “segment” projects in order to avoid preparing an EIS; instead, they must consider related actions in a single EIS. Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985). “Not to require this would permit dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” Id. The Council on Environmental Quality’s NEPA regulations thus require agencies to consider “connected,” “cumulative,” and “similar” actions within a single EA or EIS. 40 C.F.R. § 1508.25; Thomas, 753 F.2d at 758-59. The use of the word “shall” in these regulations makes consideration of these three types of actions mandatory. These implementing regulations are mandatory and binding on federal agencies. The Steamboaters v. FERC, 759 F.2d 1382, 1393 n.4 (9th Cir. 1985).

As discussed below, the components of the Nestle Project meet the requirements for connected and cumulative actions. Accordingly, NEPA requires the analysis of the Project’s pipelines, bottling facility and the taking of the water from the area’s spring and aquifers to be presented together in a single EIS, and precludes the use of an EA to analyze only the pipelines. The Forest Service’s approach, in which the EA avoids analysis of major Project elements, is a classic example of the kind of “segmentation” the law prohibits.

**A. The Pipelines Are “Connected” to the Bottling Facility.**

For purposes of NEPA, actions are “connected” if they (i) “[a]utomatically trigger” other actions which may require an EIS; (ii) “[c]annot or will not proceed unless other actions are taken previously or simultaneously”; or (iii) are “interdependent parts of a larger action and depend on the larger action for their justification.” 40 C.F.R. § 1508.25(a)(1). Where it would be “irrational, or at least unwise” to undertake one action without other actions, the actions are connected. Save the Yaak, 840 F.2d at 720 (holding that road construction and timber sales had “clear nexus” and were thus “connected actions,” requiring expanded scope of review); Thomas, 753 F.2d at 759 (road and timber sales were “inextricably intertwined” where “[i]t is clear that the timber sales cannot proceed without a road, and the road would not be built but for the contemplated timber sales.”).

Importantly here, “connected actions” need not be other federal actions. See Morgan v. Walter, 728 F. Supp. 1483, 1493 (D. Idaho 1989) (U.S. Army Corps of Engineers was required to consider impacts of private fish propagation facility prior to

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 36

issuing 404 permit for water diversion project because the projects were “links in the same bit of chain”). See also Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 480 (9th Cir.1979) (agency’s EIS had to consider both the supply of federal power and the construction of a private magnesium plant that was to use the power); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985) (agency’s EIS had to consider both the federal action of stabilizing a river bank and the private housing to be built as a result).

Only where courts have found “independent utility” of the specific permitted activity and an absence of federal involvement and control have they held that a federal agency need not include the larger project in its scope of review. See Sylvester v. U.S. Army Corps of Engineers, 884 F.2d 394, 400 (9th Cir. 1989) (upholding Corps’ limited NEPA review to a golf course, without consideration of entire resort complex because “each could exist without the other,” and they were not “links in the same bit of chain”). “Independent utility” means “utility such that the agency might reasonably consider constructing only the segment in question.” Thomas, 753 F.2d at 760 (finding that timber access road did not have utility independent of timber sales). See, e.g., Wetlands Action Network v. U.S. Army Corps, 222 F.3d 1105, 1118 (9th Cir. 2000) (finding limited NEPA review was appropriate where three phases of a project had independent utility and therefore were not connected actions).

Here, because the Project’s pipelines are integral to the proposed water bottling plant and instrumental to the taking of the water, their construction cannot reasonably be separated from the rest of the Project. Indeed, the DEIR itself acknowledges the close connection between the pipelines and the bottling facility, stating that “[t]he proposed project involves construction of the bottling facility in McCloud of up to one million square feet in several phases, and installation of pipelines *for the transmission of spring water to the proposed bottling facility* from Intake Spring, Upper Elk and Lower Elk Springs.” DEIR at S.0-2 (emphasis added). See also DEIR at 2.0-1 (“the proposed project . . . has two primary components. The first component involves construction of a bottling facility . . . . The second component involves the construction of new pipelines *to the bottling facility*. . .”) (emphasis added). In other words, these are dedicated pipelines, whose sole use will be to carry spring water from the springs to the bottling facility. DEIR at 2.0-19.

Accordingly, there is a clear analogy between the Project elements in this case and the logging roads discussed by the Ninth Circuit in Thomas and Save the Yaak. As in

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 37

Thomas, where it was “clear that the timber sales cannot proceed without a road, and the road would not be built but for the contemplated timber sales” (753 F.2d at 759), here the water bottling cannot proceed without the pipelines, and the pipelines would not be built but for the contemplated water bottling. Like the roads in Thomas and Save the Yaak, which the Forest Service characterized as “logging road[s],” the pipelines here have been characterized by the relevant federal agency in direct relation to the water bottling facility. Thomas, 753 F.2d at 758; Save the Yaak, 840 F.2d at 719; DEIR, Appendix 2.1-1 (“Forest Service Requests Public Comment on Proposed Water Lines on National Forest Lands to Support the Proposed Nestle Waters North America Bottling Plant in the Community of McCloud”) (emphasis added). Further, like the agencies in those cases, here the Forest Service does not claim that any other use or benefit will be derived from the pipelines – indeed, there can be none, since the pipelines would be exclusively dedicated to transporting water to the bottling facility. Thomas, 753 F.2d at 758-59; Save the Yaak, 840 F.2d at 720; DEIR at 2.0-19. See also Alpine Lakes Protection Soc’y v. Forest Serv., 838 F. Supp. 478, 482-83 (W.D. Wash. 1993) (holding that because there was “no dispute that the sole purpose of [building an] access road is to facilitate . . . timber management activities” the two actions were connected actions under NEPA, and had to be considered together). Because the pipelines here are thus directly connected to the bottling facility, this case is distinguishable from Sylvester, where the court found that a golf course had independent utility vis a vis a proposed resort. See Sylvester, 884 F.2d 394, 400.

In conclusion, because the pipelines are connected to Nestle’s bottling facility (in a legal as well as a literal sense), these two project components must be analyzed together in a single EIS. The Forest Service violated NEPA when it artificially segmented the Project scope so that the environmental review document analyzed only the permits required to build the pipelines.

**B. The Pipelines and the Bottling Facility Are “Cumulative Actions” Whose “Cumulative Impacts” Must Be Considered Together.**

Even if the pipelines and the bottling facility were not part of the same Project, the federal agency must analyze all cumulative actions together in a single EIS. Cumulative actions are those “which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.” 40 C.F.R. § 1508.25(a)(2). See, e.g., Thomas, 753 F.2d at 759 (access road and timber sales would have cumulatively significant impacts and therefore had to be assessed in a single

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 38

EIS); Shoshone-Paiute Tribe v. United States, 889 F. Supp. 1297, 1310 (D. Idaho 1994) (proposals by Air Force to establish “composite wing” type aircraft fleet and new training range were “cumulative actions” that had to be assessed in one EIS); Sierra Club v. Bosworth, 199 F. Supp.2d 971, 990 (N.D. Cal. 2002) (several logging projects were “cumulative actions” because plaintiffs sufficiently raised “substantial questions” about whether the projects would result in cumulative impacts).

NEPA defines a cumulative impact as

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7. Under NEPA, both connected actions and unrelated, but reasonable foreseeable future actions may result in cumulative impacts. Save the Yaak, 840 F.2d at 721. Thus, even if the Nestle bottling facility were not an action “connected” to the Project’s pipelines (as discussed in the preceding section), still the facility is a “reasonably foreseeable future action” whose impacts must be analyzed together with the impacts of the pipelines. In fact, as discussed above, there is an inextricable nexus between construction of the pipelines and the purpose of the bottling facility.

Under these circumstances, the Forest Service’s decision *not* to analyze the cumulative impacts of the bottling facility and the pipelines is a plain violation of NEPA, providing an independent basis to set aside the EA. Thomas, 753 F.2d at 759. The agency should prepare an EIS to address the full range of impacts resulting from each of these actions.

**C. The Forest Service Cannot Rely on the County’s EIR to Avoid Preparing an EIS.**

While the Forest Service can utilize and potentially incorporate by reference an EIR in appropriate circumstances (see, e.g., Laguna Greenbelt, Inc. v. U.S. Dep’t of Transp., 42 F.3d 517, 524, n.6 (9th Cir. 1994)), it has an independent obligation to

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 39

comply with NEPA. 42 U.S.C. § 4332(2)(C) (“all agencies of the Federal Government *shall*” prepare an EIS when they undertake “actions significantly affecting the quality of the human environment”). Here, the County found that the Project would potentially have significant impacts, requiring preparation of an EIR. DEIR, Appendix 2.1-1 (Notice of Preparation). The Forest Service cannot rely upon the County’s determination under CEQA to skirt its obligations under NEPA to complete an EIS. Foundation for North American Wild Sheep, 681 F.2d at 1178 (“If substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared”).

**D. Even Assuming, Arguendo, That the Forest Service Could Limit Its Environmental Review Only to the Pipelines, an EIS Would Still Be Required.**

Even if the Forest Service could limit its environmental review of the Project only to the construction, operation and maintenance of the pipelines in the Shasta-Trinity National Forest, the evidence before the agency raises “substantial questions” as to whether this action alone may have significant environmental impacts, necessitating the preparation of an EIS. As explained below, the area where the pipelines will be built includes protected riparian areas, which by law should be preserved and maintained in a natural condition, as well as multiple protected plant and animal species.

The DEIR acknowledges that three sensitive natural communities are located on federal lands within the pipeline area, including the Mouth Shasta Late Successional Reserve, the Mount Shasta Mudflow Research Natural Area (“MSMRNA”), and two riparian reserves (Squaw Valley Creek and Mud Creek). DEIR at 3.5-10, 3.5-11. The document explains that Research Natural Areas, such as Mount Shasta Mudflow, are lands within the National Forest System Lands that “have unique ecologies and are to be preserved in their natural state in perpetuity.” DEIR at 3.5-10. Further, it states that “Shasta-Trinity National Forest management guidelines prohibit the development of roads or other construction activities in the MSMRNA unless they would ‘contribute to the objectives or the protection of the area.’” Id. Among the objectives listed are “preservation of the soils and vegetation in as natural a state as possible” and “the management of public access and presence so that they do not interfere with these objectives.” Id.

Regarding the Squaw Valley Creek and Mud Creek riparian reserves, the DEIR specifies that they “are a federal land designation applied to buffer zones of varying

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 40

widths where federal land occurs along the margins of standing and flowing waters.” Id. at 3.5-11. “[M]anagement activities that preclude or do not promote the maintenance or restoration of riparian systems are prohibited within the buffer zones.” Id. Specific objectives to be attained in riparian reserves include, among others, “[to] maintain and restore the distribution, diversity, and complexity of the watershed to ensure protection of the aquatic systems to which species, populations, and communities are uniquely adapted;” “[to] maintain and restore spacial and temporal connectivity within and between the watersheds;” and “[to] maintain and restore water quality necessary to support healthy riparian, aquatic, and wetland ecosystems.” Id. at 12.

The DEIR further recognizes that in the areas where the pipelines will be built a total of 15 special-status plant species, along with 30 wildlife species, have a moderate or high potential of occurring. DEIR at 3.5-27, 3.5-32. Indeed, the document acknowledges that the Intake Spring alignment crosses designated critical habitat for the northern spotted owl. DEIR at 3.5-13.

Despite acknowledging the presence in the area of these protected reserves and species, the DEIR reaches the startling conclusion that the environmental impacts of constructing the pipelines will be insignificant due to purported mitigation measures. For example, the document states that “special-status plant species adjacent to the water pipeline could be impacted by ground disturbance caused by construction-related equipment. This will result in a *potentially significant impact subject to mitigation.*” DEIR at 3.5-53. The document proposes, as mitigation, to limit project-related equipment to roads and, if work were to result in ground-disturbing activities off roads, to conduct surveys to confirm that no special-status plants would be disturbed. Id. If any such plant is discovered, the document states that a botanist will mark it, in order to avoid it, and if it cannot be avoided, “a botanist from the agency with jurisdiction shall be contacted to determine appropriate measures.” Id.

Even a layperson can detect the flaws in such proposed mitigation. Specifically, the DEIR unrealistically assumes that just because no special-status plant species were observed within the water pipeline study area during the 2001 and 2004 surveys, that none occur in the area. Given the undisputed fact that the pipeline study area contains habitat for special-status plant species, pre-construction surveys must be undertaken in the pipeline study area. If special-status species are detected, follow-up protective measures must be identified in order to ensure sufficient protection for these species.



Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 41

As for impacts to plant species occurring adjacent to the pipeline study area, the DEIR cannot assume that construction-related equipment will not destroy sensitive plant habitat. Indeed, the Intake Spring, Upper Elk and Lower Elk pipeline construction will traverse almost 70,000 linear feet of land. Ground disturbing activities will undoubtedly occur along this entire stretch. Once construction begins on these pipelines, construction workers could not be expected to notify the County each and every time their construction vehicles travel outside of the “study area.” Moreover, even if this notification were to occur, it is simply inconceivable that this amount of land could be sufficiently surveyed and specific plants “marked” to ensure that there would be no impact to special-status plants.

Similarly, the DEIR recognizes that removal of hazard trees along the Upper Elk and Lower Elk Springs pipeline alignment would reduce the amount of nesting and foraging habitat for the northern spotted owl and northern goshawk, resulting in a significant impact. DEIR at 3.5-58. However, assuming the implementation of mitigation, which would consist of avoiding the nesting season and limiting the removal to only those trees deemed hazardous, the document concludes that these impacts would be less than significant. *Id.* at 3.5-60. Again, this approach appears highly suspect. The DEIR nowhere explains how a *significant* effect on the habitat of the northern spotted owl and the northern goshawk will be reduced to *less than significant*, merely by avoiding the nesting season and limiting removal to only those trees deemed to be hazardous to worker safety. DEIR at 3.5-59. The DEIR follows a similar approach with respect to other impacts, which it qualifies as significant or potentially significant, but which, after proposed mitigation, it deems insignificant. *See, e.g.*, 3.5-54 (impacts to protected species by increased access to project area by off-highway vehicles); 3.5-57 (impacts to habitat caused by increased human visitation to the area).

While courts permit an agency to issue an EA rather than an EIS where potentially adverse effects will be reduced to a less-than-significant level as a result of effective mitigation (Tillamook County v. U.S. Army Corps of Engineers, 288 F.3d 1140, 1144 (9th Cir. 2002)), this approach is possible only in circumstances where the specific mitigation measures would “completely compensate for any possible adverse environmental consequences stemming from the original proposal.” Friends of the Earth v. Hintz, 800 F.2d 822, 838 (9th Cir. 1986) (citations omitted). In this case, however, the effectiveness of the proposed mitigation measures is, at best, uncertain. Because the DEIR fails to explain how admittedly significant impacts on sensitive species can be reduced to a level of insignificance, it cannot fulfill the central mandate of NEPA, which

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 42

provides that “[i]f substantial questions are raised whether a project may have a significant effect upon the human environment, an EIS must be prepared.” Foundation for North American Wild Sheep, 681 F.2d at 1178. Here, the DEIR’s own analysis raises substantial questions that construction of the pipelines may have a significant effect on the environment. The Forest Service should have conducted full environmental review in an EIS, and cannot rest on an EA.

**V. A REVISED DRAFT EIR/EIS MUST BE PREPARED AND RECIRCULATED.**

Based on the inadequacies discussed above, the DEIR cannot form the basis of a final EIR. CEQA requires preparation and re-circulation of a supplemental draft “[w]hen significant new information is added to an environmental impact report” after public review and comment on the earlier draft EIR. Pub. Res. Code § 21092.1. The opportunity for meaningful public review of significant new information is essential “to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.” Sutter Sensible Planning, Inc. v. Sutter County Board of Supervisors, 122 Cal. App. 3d 813, 822 (1981), superseded by statute on other grounds by Roberts v. City of Palmdale, 7 Cal. App. 4th 1130 (1992); City of San Jose v. Great Oaks Water Co., 192 Cal. App. 3d 1005, 1017 (1987). An agency cannot simply release a draft report “that hedges on important environmental issues while deferring a more detailed analysis to the final [EIR] that is insulated from public review.” Mountain Lion Coalition v. California Fish and Game Comm’n, 214 Cal. App. 3d 1043, 1052 (1989).

Similarly, as explained in detail above, the Forest Service violated NEPA when it decided to limit the scope of its environmental review to a mere segment of the Project, in circumstances that clearly show it should have considered the whole Project. Had the Forest Service followed the law’s mandates in reviewing the Project, it would have conducted a full-blown EIS, instead of an abbreviated EA.

In order to cure the panoply of defects identified in this letter, the County must fully and accurately describe all components of the proposed Project, starting with the amount of water that it will take. It must then obtain substantial new information to adequately assess the environmental impacts of the Project, and to identify effective mitigation and alternatives capable of alleviating these impacts. The Forest Service must revise its decision to limit the scope of its review to the federal permits required to build

Ms. Terry Barber  
Mr. Mike Hupp  
January 4, 2007  
Page 43

the pipelines, and consider the environmental impacts of the whole Project. Both CEQA and NEPA require that the public have a meaningful opportunity to review and comment upon this significant new information in the form of a re-circulated draft EIR/EIS.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP

Rachel B. Hooper  
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Exhibits:

- Exhibit A: Letter from David G. Palais, Natural Resources Manager, Nestle Waters North America, Inc. to Terry Barber
- Exhibit B: Press Release – Nestle Waters North America Aids Local Firefighting Efforts by Providing a Reliable Source of Water on its McCloud Property
- Exhibit C: Phil Williams Associates Report (Hydrology)
- Exhibit D: Spring Rivers Ecological Services LLC (Biological Resources)
- Exhibit E: “Atmospheric Deposition and Water Quality,” United States Environmental Protection Agency
- Exhibit F: “Study Pinpoints Diesel Soot Range: Trucks Called Predominant Source of Cancer-Causing Air Pollution . . .” (Contra Costa Times, 10/23/06); “A Study Links Trucks’ Exhaust to Bronx Schoolchildren’s Asthma” (New York Times, 10/29/06)

cc: Bruce Webb, California Department of Fish & Game  
James G. Smith, U.S. Fish & Wildlife Service  
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David G. Palais, Nestle Waters North America, Inc.  
Brian J. Johnson, Trout Unlimited  
Curtis Knight, California Trout  
Brian Stanko, California Trout

Ms. Terry Barber

Mr. Mike Hupp

January 4, 2007

Page 44

bcc: Debra Anderson, McCloud Watershed Council  
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plus RBH, LLI, ARE + CCP (need 5 more)

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