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MEMORANDUM (DRAFT)

To: Chaffee County Board of Commissioners
Date: February 4, 2009
From: Jim Culichia
Re: Nestle Waters North America, Inc. 1041 Permit Application

You have requested that I review the Nestle Waters North America, Inc., (NWNA) Application (the Application) to Chaffee County for a 1041 permit for a proposed spring water bottling operation at the Ruby Mountain and Bighorn Springs (the Project) and to provide comments to the County regarding the Application and its conformity with the County's 1041 Regulations. To that end, I have reviewed the following primary documents:

- Title 24, Article 65.1 of the Colorado Revised Statutes;
- Various case law regarding Title 24, Article 65.1 of the Colorado Revised Statutes;
- Chaffee County's 1041 Regulations, primarily Chapters 1-5 and Chapter 9;
- The November, 2008, two volume Application and appendices;
- The Applicant's "Phase I Hydro geologic Report for the Buena Vista Spring Sites;
- Draft reports from Delia G. Malone of the Colorado Natural Heritage Program, Gary B. Thompson, P.E., and Don Gulmond and Brian Duffany of Economic and Planning Systems.

Additional information requested from Applicant. To date, I have requested but not received, copies of documents related to the proposed augmentation water source for the Project, including the proposed augmentation water lease between the City of Aurora and NWNA, any engineering reports prepared by NWNA regarding the water supply for the Project, and any applications for the proposed plan for augmentation or substitute water supply plan for the Project (or drafts of such documents).

Preliminary nature of review and recommendations. Multiple public hearings in this matter are scheduled, including the final Board hearing currently scheduled for Thursday, February 26, 2009. I have prepared this draft memorandum in order to provide the County and NWNA with my preliminary comments so that the County and the NWNA can be apprised of some of the issues prior to the February 5, 2009 work session between the Planning Commission and NWNA. I

understand that there will likely be additional comments received related to the Project during the upcoming weeks, including from the County and its consultants, outside review agencies (AHRA, CDOW, UAWCD), and NWNA and its consultants. To date, I have only been able to briefly review the draft comments received from the County's consultants. Thus, the below comments and recommendations should not be considered final and it is likely that modifications and supplementation to my comments and recommendations will follow as the hearings and public meetings for the Project progress.

Statutory approval and denial criteria.

§24-65.1-501(4) states:

The local government may approve an application for a permit to conduct an activity of state interest if the proposed activity complies with the local government's regulations and guidelines for conduct of such activity. If the proposed activity does not comply with the guidelines and regulations, the permit shall be denied.

§2-303 of the 1041 regulations contains the approval or denial criteria, and it states as follows:

Approval or Denial of Permit Application.

- (1) A permit application for a proposed project may not be approved unless the applicant satisfactorily demonstrates that the proposal, including all mitigation measures proposed by the applicant, complies with the applicable criteria set forth in these Regulations. If the Application does not comply with all of the applicable criteria, the permit shall be denied, unless the Permit Authority determines, in its discretion, that reasonable conditions can be imposed on the permit which will enable the applicant to comply with the criteria.
- (2) If the Permit Authority finds that there is not sufficient information concerning any material feature of a proposed project, the Permit Authority may deny the application or it may continue the hearing until the additional information has been received. However, no such continuance may exceed sixty (60) days unless agreed to by the applicant.
- (3) The burden of proof shall be on the applicant to show compliance with the provisions of the Guidelines and Regulations governing the area or activity of state interest involved.

§3-303 of the 1041 Regulations set forth the criteria for the County's evaluation of the Application and its effects on the enumerated items (i.e., impacts to air quality, wetlands, etc . . .). The general

standard for approval is that the Project cannot significantly impact, degrade or deteriorate any of the listed criteria.

Water supply.

§2-203(4)(c) requires the Applicant to provide a

description of any water to be used by the Project and alternatives, including: the source, amount, the quality of such water; the applicant's right to use the water, including adjudicated decrees, applications for decrees; proposed points of diversion and changes in the points of diversion; and the existing uses of the water If an augmentation plan for the Project has been decreed or an application for such plan has been filed in the court, the applicant must submit a copy of that plan.

§3-302(3)(b)(i)(8) requires the Applicant to provide

Descriptions of the immediate and long-term impact and net effects that the proposed project would have on the quantity and quality of surface water under both average and worst case conditions.

NWNA has provided documentation regarding the physical source of water to the Project - i.e., the Bighorn and Ruby Mountain Springs - and impacts to resources from development of the physical water source. NWNA notes in the Application, however, that "implementation of the Project will require that the net depletions resulting to the Project be replaced in order to avoid injury to senior water rights" which will require a State Engineer approved temporary substitute water supply plan (SWSP) for the short-term and a Water Court approved augmentation plan for the long-term. (Application at 17).

As noted above, neither I nor Gary Thompson, P.E., the County's water resources/hydrology consultant, have reviewed any documentation relative to the proposed augmentation water supply for the Project. We are advised that there is a proposed lease between NWNA and the City of Aurora for augmentation water which has not yet been approved by the Aurora City Council. I have requested a copy of that lease, as well as additional engineering documentation regarding the lease, but have not yet received any such information.

It is not possible to provide meaningful analysis of the proposed water supply without documentation from NWNA as required by §2-203 and §3-302 of the Regulations. Conditioning approval of the Project on NWNA receiving approval of an SWSP or an augmentation plan in water court would not fulfill the County's regulations because the State Engineer or water court criteria for approval are primarily focused on prevention of injury to senior vested water rights. The County's approval criteria include evaluation of the adequacy of the proposed water supply to

prevent impacts not only to water rights, but to other criteria, including water quality, water quantity, aquatic and terrestrial species and habitat, etc. . . . Accordingly, my recommendation to the Board, pursuant to §2-303(2), is to either deny the Application or table it for 60 days as authorized in the Regulations. Evaluation of the water supply is a material feature of the Application and the lack of information on this item from the NWNA warrants and justifies such action.

As noted above, §2-303(2) allows the Board to table the Application for up to 60 days (or longer with the Applicant's consent). I understand the City of Aurora is to consider the lease at its February, 2009 Council meeting. It would seem that a maximum 60 day continuance to give NWNA time to provide documents concerning the water supply should be sufficient. If you choose such an option, I recommend that NWNA provide, at a minimum, the following documents:

Approved lease between the City of Aurora and NWNA (or documentation regarding any other proposed augmentation water supplier if Aurora is not the sole supplier);

Engineering report and documentation regarding the operation of the proposed plan for augmentation, including any proposed SWSP;

Draft of the water court application for approval of plan for augmentation.

With these documents, and access to NWNA's water rights consultants to ask questions, Mr. Thompson and I should be able to provide meaningful comments to the Board regarding the adequacy of the water supply component of the Project.

I have not included any suggested conditions to any permit relative to the water supply component of the Project as I believe consideration of permit conditions would be premature until NWNA provides the documentation necessary to evaluate the water supply component of the Project.

Impacts to 1041 approval criteria.

The County has retained specific consultants in several areas, including hydrology, wetlands and economics. I have reviewed the draft reports of Delia G. Malone, Economic and Planning Systems (EPS) and Gary Thompson, P.E., and, as requested, provide you with some preliminary comments regarding application of the 1041 approval criteria to the issues identified by these consultants.

The Application, and each of the County's consultants who have reviewed the Application, identify detrimental impacts to the 1041 approval criteria. The review standard to be applied by the County is whether the Project will significantly degrade or deteriorate any of the specific criteria.

If the Project will significantly degrade or deteriorate any of the specific criteria, then the County is required to deny the permit. See, C.R.S. §24-65.1-501(4) and Regulation §2-303(1). Or, in the

alternative, the County may accept the impacts to the specific criteria and accept mitigation and impose permit conditions. The County does not have unfettered discretion in applying the approval criteria and the mitigation must be designed to mitigate a harm resulting from or exacerbated by the Project. However, the County is not obligated to accept the Applicant's proposed mitigation if you determine that significant impacts will occur.

For example, the NWNA Application and Delia Malone's January 29, 2009 "draft" report identify impacts to wetlands and terrestrial habitat. Ms. Malone concludes that "NWNA's conclusions regarding "no detrimental impact" to wetland communities, are not supported." (Malone, January 29, 2009 Draft, p. 1). As a "quasi-judicial" agency evaluating the evidence relative to this Application, you will determine which evidence is more credible. NWNA has the obligation and burden to prove that its Project complies with all of the 1041 criteria. §2-303(3). If you accept Ms. Malone's findings that NWNA's consultants have not established "no detrimental impact" to wetland communities, then you may deny the permit application.

NWNA acknowledges impacts to wetlands, though it asserts that the impacts are not significant, and in response, NWNA has proposed a wetland monitoring program. A monitoring program, however, is not mitigation of the documented impacts to the wetlands. Rather, it is a program put in place primarily to assure the County that NWNA's assumptions and projections of anticipated impacts are correct. No mitigation has been proposed except for the speculative Restoration Plan for the Ruby Mountain Springs Area (Appendix M to Application). I say that this "Restoration" plan is speculative because it states that "NWNA would develop a restoration plan for the Ruby Mountain Springs Area, which would describe restoration activities that would be completed in the area." (Appendix M). Though some guidelines for the Restoration plan are outlined, no specific commitment are made.

NWNA notes that "Long-term pumping of the boreholes may result in some drawdown of water levels in the shallow soil horizons of portions of these wetlands, with the resulting potential decrease in size and some transition to upland vegetation." (Exhibit M to Application). NWNA's proposed wetland monitoring plan may help document these projected occurrences but the plan will not negate the detrimental impacts that may occur. For example, a weed-management plan and imposition of permit terms and conditions would be appropriate if the transition to upland vegetation does not occur as anticipated by NWNA. The monitoring program alone is not mitigation unless the plan also includes remedies and actions required to be implemented by NWNA if the monitoring program determines there are impacts.

Similar analyses should be applied by the Board relative to each of the criteria for which detrimental impacts are anticipated by NWNA and/or the County's consultants.

In addition, §3-303(1)(k) states that the "determination of effects of the project shall include the following considerations: . . . (iv) the benefits accruing to the County and its citizens from the

Project outweigh the losses and any natural, agricultural, or recreational resources with the County, or the losses of opportunities to develop such resources.” Thus, part of your analysis should include an analysis of the extent to which the benefits of the Project outweigh the detrimental impacts to the approval criteria from the Project.

As the consultant reports are disseminated and Nwana provides responses to the comments, additional and more specific analysis of the application of the criteria to the Project components, determination of impacts, evaluation of mitigation and recommendations regarding conditions, can be provided if requested.

Hatchery reconstruction. You have asked me to provide comment regarding the issue of whether it is appropriate to condition any approval of the Project by the County on Nwana's reconstruction of the Bighorn Springs Hatchery. The January 30, 2009 e-mail to you from Holly Strablizky, Nwana's attorney, states that Nwana is objecting to inclusion of the hatchery restoration as part of the Project conditions. Ms. Strablizky states that Nwana “thought it was important to include information about the hatchery restoration in these applications for the County to know it intends to conduct this restoration in the future. . .”

I disagree with Nwana that the restoration of the hatchery cannot be included as a condition of the permit, if one is granted. In fact, I believe it would be appropriate to either condition any approval on reconstruction of the hatchery or to require Nwana to revise and resubmit the Application eliminating any reference to the proposed hatchery reconstruction (including obtaining a new Colorado Division of Wildlife review of the Project).

The Application contained at least the following references to the proposed hatchery restoration:

- The higher flows in the Ruby Mountain Springs channel and the predominance of pools associated with the hatchery could provide habitat to a native fish population following its planned dismantling and restoration. (Application at 32-33).
- The planned dismantling and restoration of the hatchery at the Ruby Mountain Springs Site may result in improvements to the associated channel (and downstream portions of the Arkansas River) through a reduction in nutrient loads and BOD. (Application at 33).
- Under low-flow (worst-case scenario) conditions, pumping tests at the Ruby Mountain and Bighorn Springs have demonstrated that withdrawals may cause a reduction in associated spring channel flow of 10% or less. On average, the proposed withdrawal represents only 7% of the combined flow at the two primary flow observation stations. Those surface water features are fed by the same spring-water aquifer that provides water to the Project boreholes. The water quality in

those channels would not be directly altered. Some indirect improvement to water quality may result from the planned dismantling and restoration of the hatchery at Ruby Mountain Spring. (Application at 34-35).

- Additionally, the applicant has chosen to develop the plan to naturalize the Ruby Mountain Springs location (removing hatchery facilities), thus enhancing wildlife habitat for species such as the northern leopard frog, bald eagle, passerine, mule deer and bighorn sheep. (Application at 46).
- On the Ruby Mountain Springs Property, the existing residences and fish hatchery will be removed and naturalized, improving the overall view shed, especially along the banks of the river in the AHRA State Park. The naturalization of the hatchery property will focus on the restoration of the springs, an improved riparian habitat and the creation of wetland to maximize the function of the springs discharging along the river. The restoration will be significant, and conducted under an ACOE Nationwide Restoration permit, and in collaboration with CDOW, TU, AHRA and others. . . (Application at 52-3).
- The Project does not significantly degrade: air quality, wetlands or floodplain, animal or plant habitat, soils or geologic conditions, or visual quality. In fact, the Project will enhance the riparian corridor, preserve agricultural land and sensitive habitat, and significantly improve the visual quality of the hatchery and Truck Loading Facility properties. Other than during a short construction period, the Project does not cause significant noise, vibration or odors.

The Project will not have an adverse effect on any segment of the local economy, and will likely enhance the recreational and tourism experiences through the hatchery site restoration. (Application at 55).

- The Colorado Division of Wildlife letter of June 27, 2008 contains the following comment: "The only species of concern that may occur in the area would be the Northern Leopard frog. . . . The springs are suitable habitat for this species of concern, and the Project plans do provide for opportunity to improve habitat for this sensitive species. Current plans, as understood by our field biologists, would include eventually reclaiming the fish hatchery by filling in the existing ponds and creating a more "natural" wetland. (See Application, appendix G).

Clearly, the hatchery reconstruction was a central component of the proposed Project and Nwana included the claimed benefits of the hatchery reconstruction to offset the impacts to the environment resulting from the Project. The County, as well as the reviewing public, is entitled to rely upon these representations from Nwana and to hold Nwana to its promises. To the extent

the County may wish to condition any approval on the hatchery reconstruction, specific performance criteria should be included in the condition to ensure that Nwana timely performs its obligations and if it fails to do so, the permit can be suspended or revoked.

Thank you for the opportunity to assist you in your review of the Project. Please let me know if I can be of any further assistance or if I can provide you with any additional information relative to review of this Project.

Very Truly Yours,

James W. Culichia

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