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## SUPPLEMENTAL MEMORANDUM

To: Don Reimer, Chaffee County Development Director  
Date: February 24, 2009  
From: Jim Culichia  
Re: Nestle Waters North America, Inc. 1041 Permit Application

I am providing this Supplemental Memorandum regarding my review of the Nestle Waters North America, Inc., (Nwana) 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). This Supplemental Memorandum is in addition to my February 4, 2009 Memorandum. Since completion of the February 4<sup>th</sup> Memorandum, I have reviewed additional documents provided to me by Nwana regarding the proposed water supply for the Project as well as a supplemental review of the information previously supplied to me. I have reviewed the following additional documents provided to me by Nwana and the County:

- February 5, 2009 Comments of the Upper Arkansas Water Conservancy District;
- Draft Water Lease Agreement between Nwana and the City of Aurora (the Aurora Lease);
- Draft Substitute Water Supply Plan dated February 4, 2009 from the Applegate Group (the SWSP);
- The Intergovernmental Agreement between the City of Aurora and the Southeastern Water Conservancy District dated October 3, 2003;
- Chaffee County Recreational In-Channel Diversion (the RICD) decree in Case No. 04CW129, District Court, Water Division No. 2 and the accompanying Memorandum of Understanding between Chaffee County and multiple parties.

### Review of economic impacts.

I preface this section of the Supplemental Memorandum with the comment that I am not an economist and that the following comments are based upon a common sense review and evaluation of the Nwana economics report. If the County staff feels that these comments warrant further evaluation, then Nwana and/or the County's consultants can be requested to conduct additional analyses.

First, NWNA's assumption that nearly \$493,500.00 in additional County sales tax revenue will be generated over 30 years of the Project through the sale of diesel fuel because 30% of the NWNA tanker trucks will refuel in Johnson Village (Appendix K, p. 2) appears to be based on speculation.<sup>1</sup>

My quick research showed that the average tractor trailer gets approximately 6 miles per gallon, has in excess of a 100 gallon fuel tank capacity, and that it is approximately 340 miles between Denver, CO and Buena Vista. Thus, it appears that the NWNA trucks will have more than adequate fuel tank capacity to not fill up their vehicles in Johnson Village and will fill up wherever diesel is cheapest (not likely Johnson Village).

Second, I did not see an evaluation of the job-loss impacts resulting from the transition from the existing liquor store to the NWNA truck loading facility. Presumably, the liquor store employed one or more Chaffee County citizens, and I believe that the NWNA loading facility will be an unmanned facility. If these assumptions are correct, further evaluation of the job loss impacts by NWNA may be warranted.

Third, the Bighorn and Ruby Mountain Springs are unique water resources in Chaffee County in terms of flow, location, water quality, etc. . . . , which is why NWNA seeks to develop them. In this regard, the springs are similar to the hot springs facilities in Chaffee County which are major area attractions, including those developed facilities at Mt. Princeton, City of Salida, Cottonwood, Antero and Lloyds Hot Springs Lodge.

While the hot springs resource development projects using these unique water resources create jobs and draw people to the County, the NWNA Project is an extractive plan where the County's water resource is developed and is exported outside of the County. I recognize that the NWNA springs are not in the same category as the County's hot springs, however, cold mineral springs have been developed for centuries for a variety of local purposes (i.e., the town of Manitou Springs, or as in this case, the prior operation of a fish hatchery). The development of these springs - i.e., for a local bottling plant or another fish hatchery, would bring local benefits to the County that are not present in the current

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<sup>1</sup> We note that the Aurora Lease is for a ten year primary term with a 10 year NWNA option to extend. Some of NWNA's economic analyses are based on 30 year projections. As provided below, we recommend that any permit approved by the County for the Project expire with termination of the Aurora Lease. NWNA's analysis of projected benefits from the Project should not be based upon assumptions continuing beyond the known term of the Aurora Lease.

extraction and export proposal.<sup>2</sup>

I did not see any evaluation in the NWNA application of the potential development options of the springs for purely local purposes and any resulting lost economic opportunity analysis. If the County staff feel additional evaluation of the lost economic opportunity to the County from the Project is warranted, then the County may want to request additional analyses from NWNA and/or County's consultants.

#### Water supply components of the Project.

NWNA recently supplied the County with drafts of the proposed augmentation water supply for the Project, which is a lease with the City of Aurora for a ten year term, with an option by NWNA to continue the lease for an additional 10 year term. As NWNA's evaluation of the Project extended beyond a 10 or 20 year term (i.e., some of the purported economic benefits were projected out over 30 years - See, Appendix K), any approval of a permit for the Project should be conditioned on there being no change to the augmentation water source.

The water rights of the Bighorn and Ruby Mountain Springs are very junior priority water rights and due to the overappropriation of water on the Arkansas River, in order for NWNA to divert the springs when they are out of priority, it must obtain a water court approved plan for augmentation or a State Engineer approved substitute water supply plan.<sup>3</sup>

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<sup>2</sup> The Colorado Division of Wildlife currently operates a fish hatchery at Salida that is whirling disease free and the water source for the hatchery does not derive from the native river flows, but rather from springs that surface near the river like the Project springs. Past management problems for the prior hatchery at the Bighorn and Ruby Mountain Springs should not be used to simply assume that a hatchery is not a viable business option for the Project springs. The DOW's Salida hatchery in fact shows that springs such as Bighorn and Ruby Mountain Springs can be used to successfully operate a hatchery.

<sup>3</sup> The draft SWSP submitted by NWNA is pursuant to C.R.S. 37-92-308(4) which authorizes the State Engineer to approve a temporary water supply plan if the proponent of the plan has already filed an application in the water court to adjudicate an augmentation plan. No such application has been submitted by NWNA in this case. NWNA should be required to submit to the County a copy of the Water Court application prior to approval of any permit for this Project. C.R.S. 37-92-308(5) does allow a proponent of a plan to file an SWSP with the State Engineer without having filed a water court application, but the duration of any plan approved under §308(5) is limited in duration to five years.

An augmentation plan is a “detailed program, which may be either temporary or perpetual in duration, to increase the supply of water available for beneficial use in a division or portion thereof by. . . providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means.” (C.R.S. 37-92-103(9)). Here, NWNA proposes to provide a substitute supply of water via the Aurora Lease to offset the depletions caused by the Project pumping.

Generally, NWNA’s obligation and burden in water court in adjudicating approval of its plan for augmentation is to establish that the new diversions at the Project springs can be made without injury to vested water rights and that the substitute supply replaces the out of priority depletions in time, place and amount. See, C.R.S. 37-92-305(8).

The County, however, is not limited in its review of Project impacts to simply determining compliance with the augmentation plan statutes. The jurisdiction and scope of the water court case (i.e., prevention of injury to water rights) is different than the County’s jurisdiction which is to determine whether the plan will significantly impact any of the County’s 1041 criteria.

For purposes of our analyses, we highlight the following provisions from the Aurora Lease:

¶ 3.1 which allows Aurora to interrupt water deliveries to NWNA in the event Aurora invokes a Stage III Water Availability determination.

¶ 3.2 which establishes the annual amount of water leased - 200 acre feet - and the delivery schedule of a maximum of 16.66 acre feet per month (See also, ¶ 3.7 for the monthly delivery maximum rate).

¶ 3.6 which establishes that the location for delivery of the water by Aurora (the Aurora Release Point) is the confluence of the Arkansas River and Lake Creek in Lake County;

¶ 3.9 which provides Aurora with the discretion to supply the leased water from any of Aurora’s “fully consumable Arkansas River Basin sources or any of its transbasin sources that are delivered to the Arkansas River Basin as the source of supply of water.”

As noted in ¶ 3.9, the Aurora Lease allows Aurora the discretion to supply the leased augmentation water from any of Aurora’s water sources. I have suggested a term and condition be imposed that requires that all augmentation water releases must not be done by exchange and that actual physical water be released to the Arkansas River from Lake County storage (or upstream consumptive use credits as discussed in ¶ 5 below).

An issue that does not appear to have been studied by Nwana is the extent to which the Aurora Lease would increase the frequency, amount and timing of Aurora's upstream exchanges through Chaffee County either to the Otero Pump Station or to Lake County storage. For example, Aurora owns or leases substantial water rights on the Arkansas mainstem below Pueblo Reservoir, including the Rocky Ford Ditch I (8,100 AF), Rocky Ford Ditch II (5,100 AF projected), Colorado Canal (7,900 AF), plus 8,200 AF of interruptible and short-term leases, some of which originate below Pueblo Reservoir (See, ¶III.B.1.h of the IGA between Aurora and Southeastern). The Rocky Ford and Colorado Canal rights alone total approximately 21,000 AF per year. In order to divert these water rights at the Otero Pump Station in Chaffee County or to store them in the Lake County storage, Aurora must exchange them from their downstream points of diversion (or from "if and when" storage space in Pueblo Reservoir) upstream through Chaffee County, including through Chaffee County's RICD reach. An exchange operates by diverting water at an upstream location in an amount or flow rate equal to the amount of water released or credited at the downstream location (minus transit losses). Nwana has added 200 acre feet per year of new demand on the Aurora water system and regardless of whether the Nwana augmentation water will come from Aurora's transbasin water portfolio or the consumptive use from Aurora's Lake County Ranches, Aurora's non-Nwana demand will not change and it appears to us that Aurora will necessarily increase its exchanges of the downstream water rights portfolio by 200 acre feet per year to make up for the water lost to the Nwana lease.<sup>4</sup>

We recommend that Nwana be required to provide the County with operational details of the Aurora exchange scenario(s), including the timing and amounts of the exchanges, and to document any impacts from the exchanges prior to the hearings being conducted in this matter.

In addition, Nwana has analyzed only the impacts related to the 200 acre feet of water leased from Aurora and not the impacts from the Project as a whole, including the impacts from all of the Aurora exchanges through Chaffee County. The extent to which the County may wish to include the above analyses may warrant further discussions between Nwana and possibly the City of Aurora.

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<sup>4</sup> The County is aware that there are pending objections and lawsuits by other parties regarding the legality of Aurora's proposed use of Pueblo Reservoir and other Fry-Ark project facilities. Nothing in this review or the recommendations set forth herein are intended to indicate that the County's review of the Project and any approval of the Project that may occur could be used as evidence against the County on the issue of Aurora's use of the Fry-Ark project facilities.

Potential terms and conditions on a permit. In addition to the above issues, I have identified several issues with respect to the proposed source of augmentation water and we recommend that the following terms and conditions be imposed upon operation of any Project that may be approved by the Board:

1. §2-203(4)(c) requires Nwana to provide full details of its proposed water supply for the Project. Because no water court plan for augmentation or State Engineer SWSP applications have been either filed or approved as of this date, any permit that may be approved should be conditioned upon Nwana providing the County with copies of the submitted applications. In addition, at such time as Nwana obtains a water court decree and/or approved SWSP, such approved plans should be submitted to the County for review to ensure that the approved water supply plan conforms to the approval criteria and are consistent with the assumptions and terms of the Application. The County should have a period of no less than 30 days from the date of receipt by the County to review any final and unappealable decree of the water court and/or State Engineer approved SWSP. If the County determines upon such review that the approved plan is consistent with the Application and complies with the C.R.S. 37-90-305(8), the County's 1041 criteria, including the criteria set forth in §§ 2-203(4), 3-302(3)(b), and 3-303 (1)(d)(e), then the permit condition would be deemed to have been met. If the approved water supply plan contains terms and conditions that are different than represented by Nwana in its Application or cause the County concern about impacts to the County's 1041 criteria, then the permit condition should allow for the permit to be re-opened to address these additional concerns. No diversions by Nwana should occur during the County's review period, including any period of re-opening of the permit.
2. Any permit approved by the County should contain a condition that requires Nwana to operate in accordance with its approved water supply plan and to cease diversions upon any temporary or permanent inability to comply with any and all conditions of an approved water supply plan. Any amendment or revision to a plan should be submitted to the County for approval and any modification to a plan that the County deems material should allow for re-opening of the permit as provided in ¶ 1 above. Material changes may include, but not be limited to: any change of the source of augmentation water, any change in the manner of operation of the plan, including a change of timing of replacement of depletions or the location of replacement of the depletions (i.e., the Aurora Release Point).
3. The Aurora Lease is for a 10 year term, plus a ten year Nwana option. The augmentation water supplied through the Aurora Lease is the only water supply

provided for the Project and all Project impacts were evaluated based upon the assumption that the Aurora Lease would be in place. Thus, any permit granted to Nwana should expire upon the termination or expiration of the Aurora Lease. Nwana should be required to provide the County with advance written notice of any change or revision to the Aurora Lease and the permit may be re-opened to evaluate any impacts from any change or revision to the Aurora Lease, or a different source of any water.

4. Project impacts were evaluated based upon the assumption that augmentation water would be physically delivered to the Arkansas River upstream of the Project. Accordingly, it is appropriate to condition any permit with the requirement that all augmentation water must be delivered to the mainstem of the Arkansas River upstream of the location of Project depletions. The Aurora Release Point as described in the Lease meets this requirement.
5. As discussed above, C.R.S. 37-92-305(8) requires that an augmentation plan replace out-of-priority depletions in time, place and amount. Thus, any approved plan must meet this criteria. In addition, §§ 2-203(4), 3-302(3)(b) and 3-303 (1)(d)(e) of the 1041 Regulations set forth additional criteria for evaluation of the Nwana water supply plan.

Project impacts, including compliance with the cited augmentation plan statute and 1041 criteria, were evaluated by Nwana on the assumption that augmentation water deliveries would be accomplished through the physical release of water at the Aurora Release Point. Consistent with the Application, augmentation water should not be made by a paper or instantaneous exchange from Aurora's downstream Arkansas River water rights (i.e., by exchange of Rocky Ford consumptive use credits to the point of depletion without a physical exchange of the Rocky Ford consumptive use credits into storage in Lake County and then subsequent releases of that water from storage by Aurora to offset the Project depletions). Augmentation water deliveries by Aurora should be either releases of fully consumable water physically in storage above the Aurora Release Point or fully consumable in-priority water from Aurora's Lake County water sources. Aurora's Lake County water rights are historic irrigation rights converted by Aurora to municipal and augmentation uses, thus absent storage of those rights in Lake County, they would be available as an augmentation water source only during the irrigation season.

6. The exchange by Aurora of all or part of the 200 AF of replacement water and the operation of the Nwana augmentation plan must not reduce the flows of the Arkansas River to the detriment of the County's RICD decree. As the owner of an

adjudicated instream flow water right, the County may wish to appear as an opposer in any application filed by NWNNA for approval of its water supply plan. Any approval of the permit pursuant to these proceedings should not impair the County's right and ability to be a party to NWNNA's water supply plan adjudications.

7. NWNNA evaluated impacts to the surface and ground water resources based upon certain assumptions regarding pumping rates, replacement water timing, etc . . . Those assumptions are set forth in the draft SWSP and in the water resource Appendices to the Application. Because the Project impacts were based upon these assumptions, to ensure compliance with C.R.S. 37-92-305(8) and §§ 2-203(4), 3-302(3)(b) and 3-303 (1)(d)(e) of the 1041 Regulations, any permit for the Project should incorporate those assumptions and should include the following pumping limitations at the Project location:

Pumping (from all sources) at the Bighorn Spring should not exceed 130.7 AF in any single year, 10.892 AF in any month, 0.36 AF in any day, or a diversion rate of 82 gallons per minute (combined from all structures).

Pumping (from all sources) at the Ruby Mountain Spring should not exceed 65.3 AF in any single year, 5.44 AF in any month, 0.18 AF in any day, or a diversion rate of 41 gallons per minute (combined from all structures).

8. The Lease with Aurora limits augmentation water deliveries to 16.66 AF per month. To ensure compliance with C.R.S. 37-92-305(8) and §§ 2-203(4), 3-302(3)(b) and 3-303 (1)(d)(e) of the 1041 Regulations, NWNNA's withdrawals from the springs should be limited to the net amount of replacement water provided by Aurora which equals the gross amount of replacement water, minus transit losses (estimated in the SWSP at 0.33 AF per month) and minus any lagged depletion replacement owed for any previous month.
9. The Applegate Engineering report identified lagged depletions to the Arkansas River from pumping of the Project wells to be located at the Bighorn and Ruby Mountain Springs. To ensure compliance with C.R.S. 37-92-305(8) and §§ 2-203(4), 3-302(3)(b) and 3-303 (1)(d)(e) of the 1041 Regulations that all depletions are adequately replaced, lagged depletions must continue to be replaced even after cessation of production by NWNNA from the springs, whether the cessation of pumping is temporary or permanent.
10. To ensure compliance with C.R.S. 37-92-305(8) and §§ 2-203(4), 3-302(3)(b) and 3-303 (1)(d)(e) of the 1041 Regulations, augmentation water should be delivered to the

Arkansas River continuously to match the Project depletion schedule to ensure replacement of depletions in time, place and amount. If the Applicant proposes that slug or bulk releases of augmentation water be made, NWNA should provide details of the proposed release schedules so that the impacts can be evaluated by the County.

If we can provide you with any additional information or assistance in this matter, please do not hesitate to contact me.

Very Truly Yours,

*James W. Cullchia*

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