

LAW OFFICE OF  
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July 16, 2021

**By email**

Chaffee County Board of County Commissioners  
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Keith Baker ([kbaker@chaffeecounty.org](mailto:kbaker@chaffeecounty.org))  
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P.O. Box 699  
Salida, CO 81201

Dan Swallow ([dswallow@chaffeecounty.org](mailto:dswallow@chaffeecounty.org))  
Chaffee County Director of Development Services  
P.O. Box 125  
Salida, CO 81201

Re: Nestle Waters North America Chaffee County Spring Water Project: 1041 permit.

Dear Commissioners and Mr. Swallow:

I am writing on behalf of my client Unbottle & Protect Chaffee County Water (“UPCCW”), a Colorado non-profit corporation. UPCCW’s non-profit membership includes residents of Chaffee County opposed to the issuance of a 1041 permit for the Nestle Waters Chaffee County Spring Water Project.

On April 5, 2021 we sent a letter notifying you that the County was not following the required permitting procedures for the requested 1041 permit extension and ownership transfer. The County has not corrected the permitting deficiencies we identified in our April 5, 2021 letter. Since the date of our letter, UPCCW and its members also provided public comment in various hearings related to the 1041 permitting process related to the Project. As noted in our previous comments, the Land Use Code (“Code”) does not allow the Board to administratively extend the 1041 permit. Accordingly, we believe the permit has expired. All operations at the facility should immediately cease until such time that a legal 1041 permit has been issued by the Board, if any.

At approximately 6:30 pm in the June 1, 2021 hearing, the Board formally closed public comment on the 1041 permit application for the Project. As of that date, a draft or proposed 1041 permit had *not* been issued by the County for review by the Board or the public. On July 6, 2021 the Board voted 2-1 to approve issuance of a 1041 despite the fact that a draft 1041 Permit

has still *not* been issued by the County for review and comment by the public, nor had any conditions of the permit been subject to public notice and comment.

It is our understanding that the Board intends to present, for the first time, a draft or proposed 1041 permit at the upcoming July 20, 2021 Board meeting at which time the Board will consider placing conditions in the permit to ensure it will comply with Code requirements. To date, the County has not released a draft or proposed 1041 permit to the public, nor has the County formally re-opened public comment nor otherwise sought public comment on a draft or proposed 1041 permit and/or any conditions of the permit.

For the reasons stated below, the County has again failed to follow the required permitting procedure for issuance of a 1041 permit. More specifically, the Board has violated the law by approving the issuance of a 1041 permit for the Project before considering a draft or proposed 1041 permit and its associated conditions. Further, the Board has also violated the law by failing to provide for public notice and comment on a draft or proposed 1041 permit and any conditions of the permit.

The County's Land Use Code recognizes that its 1041 regulations were adopted pursuant to C.R.S. § 24-65.1-101 et seq. Code § 1-103 & 2-102. Issuance of a 1041 permit "is a matter of public interest." C.R.S. § 24-65.1-101(1)(a). The Code provides that the "[t]he Permit Authority (the Board) shall conduct the public hearing in a manner affording procedural due process to...any person who opposes issuance of *the permit*." Code § 2-302(1). This language, both explicitly and implicitly, requires that a draft or proposed permit be the subject of the 1041 permit hearing. Further, the focus of a 1041 public hearing is on the "*permit*" as proposed by the County. C.R.S. § 24-65.1-501(2)(b) & (c); C.R.S. § 24-65.1-501(3). When a Board hearing results in the issuance of a 1041 permit, the administrative record for the hearing must include "*a copy of the permit*." Code 2-302(5)(h). Further, the Board may not approve a 1041 permit unless the "conditions" are "imposed *on the permit* which enable the applicant to comply with the criteria." Code § 2-303(1).

The Board has failed to follow the required procedures for approval of a 1041 permit. The Board approved the issuance of a 1041 permit before reviewing a draft or proposed permit. As such, the Board arbitrarily approved the issuance of a 1041 permit before it could ensure that permit mitigation measures and conditions would result in compliance with Code criteria. Code § 2-303(1). A copy of the permit did not exist at the Board's July 6, 2021 hearing approving the issuance of a 1041 permit. It is impossible to include "a copy of the permit" in the administrative record for the July 6, 2021 hearing because no such "permit" was before the Board for review or in existence at the time of the hearing. Further, to date, the Board has not stated in writing its reasons for its July 6, 2021 decision approving the permit application, nor its findings and conclusions as is required in Code Section § 2-303(4). The Board approved issuance of a 1041 permit before providing for public notice and comment on a draft or proposed permit, including any conditions of the permit. Public comment on the permit application has been closed since June 1, 2021 and the Board has not re-opened public comment on any proposed permit or conditions that the Board may consider on July 20, 2021.

For the reasons stated above, we ask that you formally rescind your July 6, 2021 approval of the issuance of a 1041 permit for the Project, issue public notice of any draft or proposed 1041 permit, re-open written public comment on any draft or proposed 1041 permit, and schedule a new public hearing on the 1041 permit application and proposed or draft permit.

Although the County has not provided a formally re-opened public comment opportunity on a proposed 1041 permit for the Project, attached hereto as Exhibit 1 is a list of conditions that UPCCW believes must be included in any 1041 permit issued by the County.

Further, as noted in previous public comments, we believe Commissioner Felt has a conflict of interest with regard to this matter. Commissioner Felt has a conflict of interest as a co-owner of ArkAnglers Fly Shop and Guide Service and as Vice-Chairman of the Upper Arkansas Water Conservation District. Exhibit 2 hereto. UAWCD receives 20 percent of the organization's profit from selling augmentation water to Nestle/BlueTriton, according to a recent economic analysis by Ed Harvey. At the hearing on July 6, 2021, commissioners referenced a financial mitigation proposal from Nestle/BlueTriton to contribute \$100,000 this year to water sustainability projects, which would primarily benefit UAWCD. The conservation easement promised by Nestle in 2009 is now being proposed as a conservation/access easement, with plans to develop a road and parking lot for fishing access, which would benefit ArkAnglers. We ask that the July 6, 2021 action be rescinded and that Mr. Felt recuse himself from any further proceedings on this matter.

Finally, please have your County attorney confirm with me in writing that the Board intends to adopt a written resolution related to its actions on the 1041 permit application and a written 1041 permit for the project. Please have your County attorney also confirm with me in writing that the issuance of the written Board resolution and written 1041 permit will trigger the statute of limitations for challenging the Board's actions under Colorado Rule of Civil Procedure 106.

Please feel free to have your County Attorney contact me if there are any questions.  
Thank you.

Sincerely,

s/ John Barth

cc: Unbottle & Protect Chaffee County Water