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July 23, 2010

Joint Funding Agreement To Address Proposed Nutrient Criteria

This is an agreement for funding by a coalition of parties for legal and scientific services by and through John C. Hall and Tad S. Foster. The coalition is called the Colorado Nutrient Coalition (Coalition). The present list of Coalition members, which will be supplemented as others may join this Coalition, is attachment A. The client is the Coalition. This agreement defines the rules of the Coalition and its relationship to the attorneys.

The purpose of the Coalition is to respond to emerging issues as the state of Colorado develops proposed nutrient water quality criteria for lakes and streams. A "White Paper" called an Evaluation of Nutrient Criteria Adoption on Colorado Municipal and Commercial Interests" has been provided to the parties constituting this Coalition and identifies numerous technical and regulatory issues associated with the Division's preliminary proposal. The issues to be addressed and intended work products, as currently selected, are contained in the scope of work, Attachment B. That scope of work

is estimated to be \$150,000 to \$200,000 over an 18 month time period. The Coalition has verbally requested that we proceed with the above scope of work. The current estimated initial budget is \$80,000 (which amount has been pledged); it is to address issues of concern through mid-August 2010, as shown in the Time Line Addendum of Tasks (Attachment C) and Cost Estimate of Colorado Nutrient WQS Project (Attachment D). As additional funding is received, the remaining tasks after August 20 will be performed. The Steering Committee may determine additional tasks to be added, as funding allows. The members understand that this is not a lump sum contract and that the scope and costs may change over the next two to six months as the Division modifies its proposals and concepts. These activities will be billed on a level of effort basis using our normal hourly rates (Attachment D). Funding pledges or actual contributions have been made and others are expected. A minimum of \$1000 is required to be a member of the Coalition. There is no financial obligation by the members beyond the initial contribution. Additional contributions will be sought through expansion of the number of members. These additional resources will be used to address the current scope of work and new issues as they arise. Each of the pledging members will provide confirmation in writing of its participation in this Coalition, the operational terms for this Coalition, and that these contractors are to proceed immediately.

General Understanding of Group Operations

Based upon a June 25, 2010 meeting of the interested parties, we understand that group decision making will operate in the following fashion. Each party contributing funding shall be entitled to be a member of the Steering Committee to oversee the conduct of this contract. Should the Steering Committee become too large to assure rapid decisions, if and when necessary, that Steering Committee will establish an Executive Committee to make timely decisions for the larger Steering Committee.

Decisions of the Steering Committee, and Executive Committee if one, shall be by a 2/3 vote. Because of multiple interests involved, i.e., stormwater, wastewater, planning, water development and potentially agricultural, effort for consensus decisions shall be made. Votes by the Steering Committee shall be by the single representative of each member. Each member shall be entitled to one vote, despite the amount paid. Each representative shall have the authority to make decisions without the necessity of seeking their organization's approval first. This is necessary to enable rapid decision making when necessary. In any event, any decision of the Steering Committee or Executive Committee shall not be considered binding on any individual member who shall have the right to express their individual interest as the entity deems fit. Minority Reports may be made by one or more members.

Status of Work Products

Documents prepared by the attorneys for the Steering Committee shall be denominated "Lawyer-Client Communication; Privileged and Confidential" and shall not be distributed to others by any Steering Committee members until the Committee agrees to do so, or any final document is provided to the WQCD or state as intended by the

Steering Committee. Litigation is a potential consideration, so members of this Coalition signing this agreement are in agreement that the documents prepared by these attorneys or their scientific experts are confidential, until the Steering Committee determines that they are not confidential.

Payment of Invoices

Pledges by the contributors shall be paid as soon as invoiced to the Colorado Water Congress – Nutrient Criteria Fund.

The Colorado Water Congress (CWC) is acting as the Facilitator for this Coalition. As such Facilitator, CWC shall provide its meeting room, conference calling system, Executive Director and staff to support organizational activities including invoicing and accounting of expenses and disbursements. Nutrient Criteria Funds shall be deposited and disbursed from CWC’s separate bank account for the Colorado Nutrient Coalition. Funds received, disbursed, and CWC-related expenses shall be assigned a unique code in CWC’s accounting system. CWC shall provide monthly detailed accounting. CWC shall retain 5% of the funds received and any accrued interest for its expenses. Invoices containing all work performed on the identified work products will be provided to each Steering Committee member, monthly. Disbursements shall be approved by the Steering Committee or at its election by the Executive Committee. Should any surplus funds remain at the end of the contract, reimbursements to the contributors shall be made based on their pro-rata contributions as approved by the Steering Committee.

Please sign and return a copy of this document indicating your organization’s confirmation of its pledge and concurrence to the above terms for proceeding or provide email confirmation to tadfoster@tsfosterlaw.com and jhall@hall-associates.com

Enclosures

Name of Entity

ATTACHMENT A

COLORADO NUTRIENT COALITION MEMBERS (In Alphabetical Order)

Battlement Mesa Metropolitan District/Town of Parachute
Bear Creek Watershed Association
City of Aurora
City of Fort Collins
City of Pueblo
Centennial Water & Sanitation District
Clifton Sanitation District
Colorado River Water Conservation District
Colorado Springs Utilities
Colorado Stormwater Council
Colorado Wastewater Utility Council
Littleton/Englewood Wastewater Treatment Plant
Lower Fountain Water Quality Management Association
Metro Wastewater Reclamation District
North Front Range Water Quality Planning Association
Northern Colorado Water Conservancy District
Nucla Sanitation District
Plum Creek Wastewater Authority
Pueblo West Metropolitan District
Southwestern Water Conservation District
Town of DeBeque
Tri-Lakes Wastewater Treatment Facility

ATTACHMENT B
Scope of Services to Address
Proposed Adoption of Nutrient Criteria for Lakes and Streams
by
Hall and Associates
Tad S. Foster

June 1, 2010

The Water Quality Control Division has indicated that it plans to adopt statewide nutrient criteria for lakes and streams in mid-2011. Draft criteria that establish stringent requirements on both nitrogen and phosphorus have been released to the public for consideration. Hall and Associates, in conjunction with Tad S. Foster completed a detailed assessment of the legal, regulatory and technical impacts of adopting the criteria entitled "*Evaluation of Nutrient Criteria Adoption on Colorado Municipal and Commercial Interests*". On May 25, 2010, the results of the report were presented at the Colorado Water Congress to a group of municipal, stormwater, water supply and commercial interests. As currently proposed, the draft criteria will result in severe socio-economic impacts across the state. Such impacts, however, could be greatly reduced with (1) improved technical and regulatory approaches that focused resources only in areas where excessive nutrients are causing adverse impacts and (2) development of a structured approach to prioritize regulatory actions on impaired waters. The consensus of the group in attendance was that prompt action was necessary to ensure that the nutrient criteria are based on sound scientific methods and to ensure that anticipated expenditures would be properly directed.

Proposed Services

Ensuring proper adoption and application of lake and stream nutrient standards will require a multi-year effort. The following actions are necessary to address immediate technical/regulatory concerns with the draft criteria and to establish a framework to guide regulatory action (e.g., permitting, TMDL development, BMP implementation, schedules of compliance, etc.) once waters are identified as impaired and the need for remedial actions triggered.

1. Technical Activities

- a. Prepare a detailed scientific assessment of the draft criteria focusing on the need for nitrogen objective, consistency of stream WQS with the Science Advisory Board report, uncertainties in use of MMI as a stream/nutrient impairment indicator and endpoint selection for lakes.
- b. Draft a menu of alternative criteria approaches (e.g., narrative, numeric-narrative, method of implementation, etc.) that would allow for flexible application and selection of the limiting nutrient and to ensure criteria are tied to demonstrated nutrient impairments.

- c. Complete an executive summary of the White Paper report addressing the adverse social, energy and environmental impacts of adopting the current draft criteria.
- d. Draft strategy paper explaining the benefits of prioritizing reservoir restoration activities in lieu of implementing stream nutrient objective.
- e. Develop a guidance document for balancing reservoir use objectives for the purpose of identifying reasonable and attainable clarity and chlorophyll 'a' objectives.
- f. Develop a stream nutrient impairment assessment protocol that can be used to ensure regulatory decisions are tied to nutrient-induced impairments.

2. Regulatory Activities

- a. Develop a pre-TMDL permitting policy so that planned growth may be integrated with long-term pollution reduction goals. This policy would allow for increased flows and new permits to be issued so long as an overall decrease in the pollutant of concern occurs upstream of the impaired water.
- b. Clarify, via guidance and/or regulation, that temporary modification, discharger specific variance and long-term schedules of compliance will be used in implementing the nutrient objectives in NPDES permits. Such measures will (a) allow for the collection of additional data to refine criteria application in lakes, (b) study whether nutrient impairment in streams is occurring and is controllable, and (c) provide for the most cost-effective and sustainable approach to reducing nutrient loads from a wide range of point and non-point sources.
- c. Clarify use of pollution trading programs to implement more cost-effective nutrient reduction measures (both short and long term). Clarify how such procedures may be used to allow long-term growth to occur pending completion of TMDL activities.
- d. Establish procedures that will be used for management of nutrient impairments associated with water transfer needs so that water resource opportunities are not impaired.
- e. Establish the regulatory basis for prioritizing various federal environmental mandates so that the activities presenting the greatest benefits to public health and environment in Colorado undertaken first and those with limited benefits are deferred.

Estimated Costs

The projected cost to complete these activities, including meeting with the Division is expected to range \$150,000 to \$200,000 and take 18 months to complete. The initial activities should focus on the scientific/technical aspects of the proposed criteria and the development of pre-TMDL permitting policies. The cost of travel and meetings is anticipated to be about one third of this budget. Six meetings are anticipated with the Division and at least that many with the group. The actual costs will depend, in great measure to the Division's response to these initiatives.

For further information regarding this proposal contact John C. Hall @ 202-463-1166 or Tad S. Foster @ 719-632-5240.

ATTACHMENT C

Time Line Addendum to PROPOSAL TO COLORADO WATER CONGRESS
The Tasks listed above will be implemented on a time line as follows:

1. **June 11-15**, complete Executive Summary of White Paper.
2. Foster attends **June 29 Work Group** meeting on Aquatic Life assessment methodologies and thresholds. Prepare for meeting on MMI, by reviewing written comments in April from Metro, Northern, Boulder and EPA. Support participation by Risk Sciences, if under contract with CWWUC. Foster to make oral comments on irrelevance of MMI to setting TP and TN. Hall and Associates is by **mid June** to conduct statistical analysis of MMI score with associated Total Phosphorus to document no mechanistic relationship between MMI score and Total Phosphorus/Total Nitrogen concentrations. Photo reconnaissance of sites with low MMI scores to document habitat impacts. Recommendations to be made by others will be to use MMI in monitoring for 303d use only, until 5 years of experience with it.
3. By **June 30**, for August Work Group meeting on mechanisms of nutrient influence on aquatic life uses, prepare science report to clients on scientific deficiencies in: Total Nitrogen standard, generally and for lakes and reservoirs, specifically; uniform chlorophyll a standard for lakes and reservoirs; current WQCD proposals for rivers and streams in light of the SAB Report to EPA on assuming impacts to macroinvertebrates without demonstrating linkage between nutrients concentrations and macroinvertebrate indices.
4. By **mid July** prepare menu of alternative criteria approaches to be considered and recommend one or more strategy approaches to Division.
5. Foster attends **July 13** Work Group meeting on environmental tradeoffs/sustainability issues. No deliverables or coordination.

6. In mid **July (15th-16th)**, meet with CWC et al work group (Hall to attend) to prepare strategy for meeting with Division. *Schedule meeting with Division for week of July 26.*
7. Attend **August 10** Work Group meeting on nutrient influences on aquatic life. Coordinate preparation and presentations. Based on week of **July 26** meeting with Division, and potential follow up meeting on August 9, Hall gives presentation as appropriate.
8. Based upon the July and August meetings with the Division, finalize, amend, reject and start anew proposal. Coordinate preparation for **September 8** Work Group meeting to revisit status of WQCD criteria proposals.
9. Attend **September 8** Work Group meeting on WQCD criteria proposals.
10. If new CWC et al proposals are necessary, seek Oct 13 meeting for our agenda.
11. **October 13** Work Group meeting is TBD.
12. By **October 30**, report for client of legal and policy issues in preparation for **November 9** Work Group meeting on legal and policy issues regarding interrelationship of standards setting factors: what is “necessary to protect uses” per CWA; CRS 25-8-204 criteria; evidence necessary for temporary modification to develop site-specific standards; evidence necessary to obtain discharger specific variance and highest treatment technology necessary as interim effluent limits; pre-TMDL permitting policy to avoid 122.4i and 122.44d limitations; policies on funding and financing issues potentially created by Initiative 61.
13. Conduct meeting with CWC et al on **November 8** on policy issues.
14. Coordinate preparation and attendance at November 9 work group meeting.
15. Coordinate preparation and attendance of proposal to submit to WQCC by end of November for consideration December or January by WQCC.
16. December prepare new strategy and budget in preparation for June 2011 rulemaking hearing.
17. January, develop guidance documents not completed in 2010, if funded in 2011.
18. January and February 2011, begin compilation of evidence necessary to support Proposals or Alternative Proposals, if necessary.
19. Early March, provide summary of stream survey steps to be initiated by dischargers and others at their costs and using own staff or contractors. Survey data to be used in 2012 Basin hearings.

ATTACHMENT D

Cost Estimate for Colorado Nutrient WQS Project

Project Duration – June 1 – August 20, 2010

Cost based on assumed blended rate of \$230/hour

Category	Estimated Costs
Administrative (CWC)	\$2K
Project Management (14 hours)	\$3K
Specific Project Tasks	
1. White paper executive summary (15 hrs)	\$3.5K
2. Technical evaluation of draft WQS (100 hrs)	\$23K
<ul style="list-style-type: none"> • Alternative statistical evaluation of MMI • Evaluation of MMI/Nutrient Correlation and Identification of Confounding Factors • Evaluation of lake correlation database • Lake endpoint considerations • SAB applicability analysis • TN-Limiting nutrient issues/prior TMDL determinations 	
3. Evaluation of Photographic Reconnaissance (30 hrs)	\$6.9K
4. Fact sheet on MMI deficiencies for Sustainability Mtg (8 hrs)	\$1.8K
5. Development of alternative WQS rule options (40 hrs)	\$9.2K
<ul style="list-style-type: none"> • Evaluation of prior state program • Evaluation of approved programs • Stream alternatives • Lake options for limiting nutrient 	
6. Meeting associated with group coordination (4 -TF) – (40 hrs)	\$9.2K
7. Meetings associated with WQCD (2 - JCH) (60 hrs)	\$13.8K
8. Development of Presentation Materials –Aug 10th (15hrs)	\$3.5K
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Total Hrs ~ 320 hrs	~\$76K
Expenses	~\$4K
Total Cost Estimate	~\$80K