

## KKW proposed water contract with Nestlé

# Too Close for Comfort

By signing the proposed water contract with Nestlé Waters North America Inc., the Kennebunk, Kennebunkport and Wells (KKW) Water District would be entering into an unbalanced relationship that would likely have harmful consequences.

### If adopted, the contract would ...

- **undermine the independence and focus of the Water District**

The proposed contract would be between two vastly diverse entities -- a modest-sized water district (\$5 million revenues) having a public interest mandate, and a huge for-profit multinational corporation (NWN has 9,000 employees and \$3.8 billion in sales). This asymmetry of power between the two parties could be expected to influence the future direction and focus of the water district. Indeed, already the proposed contract contains clauses that appear to diverge from what local citizens have come to expect from its respected public entity.

- *District to automatically join Nestlé in opposing public interest challenges to the contract?*

The draft contract specifies (p. 9, Sec. 5(j)) that in the event of a legal challenge of either party's "authority to enter into and perform its respective obligations" under the contract, "the District and Poland Spring agree to cooperate with one another in opposing such a challenge", with Nestlé paying the legal costs. Under this clause, concerned citizens who mounted a legal challenge of the contract on public interest grounds would face the opposition not only of Nestlé alone, but by their own public water district, whose costs would be paid by the company.

- *District to abandon tradition of trial by jury?*

If Nestlé failed to live up to its obligations under the contract, the District could not pursue a legal trial by jury. The draft contract states that both parties would agree to "waive trial by jury in any action, proceeding or counterclaim brought by either of the parties against the other on any matter whatsoever arising out of or in any way connected with this agreement."

- **increase pressure to keep bulk water prices—and hence citizens' revenues—low**

- *Nestlé to be treated just like a local on price?*

The draft contract stipulates that the District could not charge Nestlé—a uniquely large, non-local company, which would be permanently removing

water from the district—a unique price. The contract stipulates (Sec. 5(h)(ii)) that the District would agree to charge Nestlé only the same price as a class of the largest 19 other non-residential water users in the district. This would make it much more difficult in the future for the District to adjust its water rates to meet environmental or other priorities. It would blunt or preclude such pricing initiatives as: charging proportionately more for highest volume non-residential extraction; charging more for water that permanently leaves the watershed; charging more for bottled water in order to recoup some of the cost to citizens of recycling plastic bottles and maintaining landfills. In each of these cases, the district would be hobbled by the contracted requirement to charge Nestlé the same as 19 other local largest non-residential water users.

- ***Nestlé to gain local allies to hold water prices low?***

The stipulation that Nestlé be charged the same price as 19 or more of the largest local users would have an important practical effect. It would generate a powerful coalition consisting of Nestlé and the largest local non-residential water users united by their mutual vested interest in keeping their water rates—and hence district revenues from these users—low. According to the KKW 2006 annual report (<http://www.kkw.org/aboutkkw/pdf/2006AnnualReport.pdf>), revenues from non-residential users are about \$1.2 million, or ¼ of the District's total operating revenue.

- **expose taxpayers to the threat of international investment treaty challenges**

The potential impacts of NAFTA-style international investment treaties on the actions of state and local governments are often overlooked. Unfortunately, these treaties contain special rules which enable individual foreign corporations and investors to effectively bypass domestic courts and established domestic law. Specifically, the investor-to-state dispute settlement process allows foreign investors to directly challenge national, state or local government actions under investment treaty rules. It provides investors a powerful means to apply pressure on governments at all levels and grants appointed trade dispute panelists the ability to second-guess the decisions of elected representatives on the most sensitive issues of governance ... including water policy. Under most investment treaties, a water contract such as that being contemplated by KKW with Nestlé, would constitute an “investment” and be subject to investor-to-state disputes. The United States is party to NAFTA, many bilateral investment treaties (see <http://icsid.worldbank.org/ICSID/FrontServlet>), and recently announced its intention to conclude a bilateral investment treaty with China.

- ***District to expose taxpayers to costly investor-to-state litigation under international investment treaties?***

The adoption by the District of a water contract with Nestlé (or another international water company that purchased the contract from Nestlé) would bring with it the unavoidable risk of costly and time-consuming investor-to-state litigation should there ever be a dispute over the operation of the contract in the future.