

[Second Reprint]

SENATE, No. 2412

STATE OF NEW JERSEY
216th LEGISLATURE

INTRODUCED SEPTEMBER 18, 2014

Sponsored by:

Senator PAUL A. SARLO

District 36 (Bergen and Passaic)

Senator JOSEPH M. KYRILLOS, JR.

District 13 (Monmouth)

SYNOPSIS

“Water Infrastructure Protection Act.”

CURRENT VERSION OF TEXT

As amended by the Senate on December 1, 2014.



(Sponsorship Updated As Of: 9/19/2014)

1 AN ACT concerning certain public water and wastewater assets,
2 supplementing Title 58 of the Revised Statutes, and amending
3 R.S.40:62-3.

4
5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7
8 1. (New section) Sections 1 through 9 of this act shall be
9 known and may be cited as the “Water Infrastructure Protection
10 Act.”

11
12 2. (New section) The Legislature finds and declares that:

13 a. The maintenance ²and operation² of water and wastewater
14 treatment and conveyance systems is vital to ensuring the protection
15 of ²water quality and² clean drinking water in New Jersey;

16 b. There are public water and wastewater systems in the State
17 that present serious risks to the integrity of drinking water and the
18 environment because of issues such as aging ²[combined sanitary
19 and storm sewer overflow] infrastructure² systems, ²[the threat of
20 sodium intrusion,]² the deterioration of the physical assets of the
21 systems, or damage to infrastructure so severe that it is beyond
22 governmental capacity to restore;

23 c. ²[The] Under the appropriate circumstances, the² transfer of
24 these threatened water and wastewater assets to a ²capable² private
25 ²or public² entity with the financial resources and expertise to
26 improve management, operation, and continued maintenance of the
27 assets ²[would protect] could help ensure the protection of²
28 drinking water; and

29 d. It is in the public interest that public entities have the option
30 to transfer, lease, or sell water or wastewater assets if there exists
31 emergent conditions that threaten drinking water or the
32 environment.

33
34 3. (New section) As used in this act,
35 “Board” means the Board of Public Utilities.

36 ²“Capable private or public entity” means any private or public
37 water system owner who, at the time of submitting a proposal to
38 long-term lease or purchase public water or wastewater assets,
39 currently (1) owns a system serving no less that the number of
40 residential and commercial accounts as the system which the entity
41 is proposing to lease or purchase, and (2) is not a significant
42 noncomplier, as defined pursuant to section 3 of P.L.1977, c.7
43 (C.58:10A-3), is not currently the subject of a formal enforcement

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate SBA committee amendments adopted October 9, 2014.

²Senate floor amendments adopted December 1, 2014.

1 action initiated by the New Jersey Department of Environmental
2 Protection to address a material violation by the entity which has
3 not been corrected over a reasonable period of time given the
4 specific situation, or is not substantially out of compliance with an
5 administrative consent order, settlement agreement, stipulation of
6 settlement, or judicial consent order entered into with the
7 department.

8 "Department" means the Department of Environmental
9 Protection.²

10 "Director" means the Director of the Division of Local
11 Government Services in the Department of Community Affairs.

12 "Governing body" means a "governing body" as defined in
13 section 3 of the "New Jersey Wastewater Treatment Public-Private
14 Contracting Act," P.L.1995, c.216 (C.58:27-19 through C.58:27-
15 27).

16 "Licensed engineer" means a professional engineer licensed
17 pursuant to P.L.1938, c.342 (C.45:8-27 et seq.).

18 ²Long-term lease" means a lease of longer than 30 years under
19 which the municipal owner seeks to transfer ownership of the
20 system at the end of the lease term.²

21 ²**["Municipal or county utilities authority" means a "municipal**
22 **authority" as defined in section 3 of the "municipal and county**
23 **utilities authorities law," P.L.1957, c.183 (C.40:14B-1 et seq.).]**²

24 "Owner" means any municipality ²**[or municipal, county, or**
25 **regional utilities authority]** , except a municipality of the first class
26 with a population of 270,000 or more according to the latest federal
27 decennial census,² that owns water or wastewater assets.
28 ²Municipalities constituting a joint meeting, and the joint meeting
29 itself, shall not be considered an owner for the purposes of this
30 definition.²

31 ²**["Regional utilities authorities" means any "regional authority"**
32 **as defined in subsection a. of section 9 of P.L.2011, c.167**
33 **(C.40:56A-4.1).]**²

34 "Registered apprenticeship program" means an apprenticeship
35 program registered with and approved by the United States
36 Department of Labor and which provides to each trainee combined
37 classroom and on-the-job training under the direct and close
38 supervision of a highly skilled worker in an occupation recognized
39 as an apprenticeable trade, and which meets the program
40 performance standards of enrollment and graduation under 29
41 C.F.R. s.29.6.

42 "System" means the plants, structures, and other real and
43 personal property of an owner that is, or is to be, acquired,
44 constructed, or operated for the purpose of processing water or
45 wastewater, including sewage, for distribution or treatment.

46 "Water or wastewater assets" means any system along with any
47 other related buildings, equipment, or other infrastructure.

1 4. (New section) If an owner determines that emergent
 2 conditions exist, the owner may ²long-term² lease or sell its water
 3 or wastewater assets to a ²capable² private ²or public² entity
 4 pursuant to the provisions of sections 5 through 9 of P.L. ,
 5 c. (C.) (pending before the Legislature as this bill). An
 6 owner may so ²long-term² lease or sell its water or wastewater
 7 assets without any referendum except as may be required pursuant
 8 to subsection ²[f.] g.² of section 5 of P.L. , c. (C.)
 9 (pending before the Legislature as this bill).

10

11 5. (New section) a. ²[If the owner is a municipality, the] The²
 12 determination that emergent conditions exist shall be made by
 13 certification of the mayor, or ²[other chief executive officer] the
 14 mayor's designee,² of the municipality, and a licensed engineer.
 15 ²[If the owner is a municipal, county, or regional utilities authority,
 16 the determination that emergent conditions exist shall be made by
 17 certification of the chair and chief operating officer of the authority,
 18 and a licensed engineer.]²

19 b. Emergent conditions shall exist if at least one of the
 20 following conditions is met:

21 (1) ²[The system has a combined sanitary and storm sewer
 22 overflow system;

23 (2)]² The system is located in an area designated by the
 24 Department of Environmental Protection as ²[within] an Area of
 25 Critical² Water Supply ²[Critical Area] Concern² I or II ², or any
 26 future designation or newly added area of critical water supply
 27 concern²;

28 ²[(3) The ground water has the potential for sodium intrusion
 29 that may impact the water supply system according to the New
 30 Jersey Statewide Water Supply Plan adopted pursuant to section 13
 31 of P.L.1981, c.262 (C.58:1A-13) or the potential for any other
 32 intrusion that may negatively impact the system;

33 (4)] (2)² The ²owner of the² system ²[has received an
 34 environmental violation, has an existing unfulfilled] is a significant
 35 noncomplier, as defined pursuant to section 3 of P.L.1977, c.7
 36 (C.58:10A-3), has been the subject of a formal enforcement action
 37 initiated by the department, or is substantially out of compliance
 38 with an² administrative consent order ², settlement agreement,
 39 stipulation of settlement, or judicial consent order entered into²
 40 with the ²[Department of Environmental Protection , or has
 41 previously entered into an administrative consent order with the
 42 Department of Environmental Protection with respect to the
 43 operation of the system] department²; ²or²

44 ²[(5)] (3)² There is a present deficiency ²or violation of
 45 maximum contaminant levels established pursuant to the "Safe
 46 Drinking Water Act," P.L.1977, c.224 (C.58:12A-1 et seq.),²

1 concerning the availability or potability of water, or concerning the
2 provision of water at adequate volume or pressure, ²and the owner
3 lacks the financial or structural capability to immediately and
4 adequately repair or otherwise alleviate the deficiency] or
5 distribution or treatment of wastewater²; ²or

6 (6)] (4)² There is ²a demonstrated lack of historical
7 investment, repair, or sustainable maintenance as determined by the
8 department, or² material damage to the infrastructure of the system
9 ²and the owner lacks the financial or structural capability to
10 immediately and adequately repair or otherwise alleviate the
11 damage] ;² or²

12 (5) The system owner lacks the financial, technical, or
13 managerial capacity to adequately address any of the foregoing on a
14 sustainable basis or own and operate the system in a way that
15 supports economic activity in the municipality on a sustainable
16 basis².

17 c. ²Should the owner determine that one or more emergent
18 conditions contained in subsection b. of this section exists and that
19 it is necessary to take steps to effectuate the sale or long-term lease
20 of its water or wastewater assets to a capable private or public
21 entity pursuant to this act to address these emergent conditions and
22 to operate and maintain the system, the owner shall through the
23 utilization of applicable public procurement laws of the State of
24 New Jersey retain the services of a independent financial advisor to
25 review, analyze and report on the value of the system and the short
26 and long term impacts to rate-payers of the cash-flow structure of
27 the proposed transaction and to provide an estimate as to the
28 financial requirements necessary to address the emergent conditions
29 and to operate and maintain the system. Upon completion of the
30 analysis and review, the independent financial advisor shall
31 transmit its report to the owner. Within 10 days of the approval of
32 the report by the owner, the owner shall transmit copies to the
33 board, the director and the department and shall make the report
34 available for public review.

35 d.² After ²an emergent conditions certification is made] the
36 independent financial advisor has completed its analysis of the
37 financial aspects of the proposed transaction and has presented its
38 report to the owner², a public hearing on the ²proposed emergent
39 condition² certification shall be held. The owner shall provide
40 notice of the public hearing no less than ²[10] 30² days prior to the
41 date of the hearing. The notice shall prominently state ²the findings
42 upon which the certification of emergent conditions is based, a
43 summary of the findings by the independent financial advisor and²
44 that the certification is in anticipation of a ²proposed long-term²
45 lease or sale of water or wastewater assets to a ²capable² private ²or
46 public² entity. ²If the owner is a municipality or municipal

1 utilities authority, notice] Notice² of the public hearing shall be
2 published on the official Internet website of the municipality and at
3 least once in one or more newspapers circulating in the
4 municipality. ²[If the owner is a county utilities authority, notice of
5 the public hearing shall be published on the official Internet website
6 of the county and at least once in one or more newspapers
7 circulating in the county. If the owner is a regional utilities
8 authority, notice of the public hearing shall be published on the
9 official Internet website of the authority and at least once in one or
10 more newspapers circulating in the region.]² If an applicable
11 official website does not exist, notice of the public hearing shall be
12 published on the official Internet website of the Department of
13 Community Affairs.

14 ²[d.] e.² After the public hearing ²and after giving due
15 consideration to the findings of the independent financial advisor²,
16 the governing body of the owner shall, by resolution ²adopted by at
17 least two-thirds of its authorized membership², ²[cause the
18 emergent conditions certification to be submitted to the Department
19 of Environmental Protection for approval. The Department of
20 Environmental Protection shall approve or reject a certification
21 within 30 days of receipt thereof. If no disposition is made within
22 30 days, the certification shall be deemed approved] certify that one
23 or more emergent conditions exist and that the owner intends to sell
24 or long-term lease its water or wastewater assets to a capable
25 private or public entity to address these emergent conditions and to
26 operate and maintain the system. Within five days of the adoption
27 of the resolution, the governing body of the owner shall transmit a
28 true copy of the resolution to the department, the board, and the
29 director. Within 30 days of receipt of the resolution by the
30 department, the department shall approve or reject the owner's
31 emergent conditions certification as contained in the resolution².

32 ²[e.] f.² Upon receipt of the approval of the emergent
33 conditions certification by the Department of Environmental
34 Protection, the owner ²[shall] may² publish notice of the approval.
35 The notice shall prominently state that the certification is in
36 anticipation of a ²long-term² lease or sale of water or wastewater
37 assets to a private entity. ²[If the owner is a municipality or
38 municipal utilities authority, notice] Notice² of the approval shall
39 be published on the official Internet website of the municipality and
40 at least once in one or more newspapers circulating in the
41 municipality, and shall prominently state that a petition may be
42 filed within ²[20] 45² days after the publication of such notice to
43 require a referendum before a resolution authorizing the ²long-
44 term² lease or sale of water or wastewater assets may take effect.
45 ²[If the owner is a county utilities authority, notice of the approval
46 shall be published on the official Internet website of the county and

1 at least once in one or more newspapers circulating in the county.
2 If the owner is a regional utilities authority, notice of the approval
3 shall be published on the official Internet website of the authority
4 and at least once in one or more newspapers circulating in the
5 region.】² If an applicable official website does not exist, notice of
6 the approval shall be published on the official Internet website of
7 the Department of Community Affairs.

8 ²【f. If the owner is a municipality or municipal utilities
9 authority, a】 g. A² petition may be filed with the municipal clerk,
10 no later than ²【20】 45² days after the notice of the approval of the
11 emergent conditions certification is published, protesting the lease
12 or sale of water or wastewater assets without a public referendum.
13 If the petition is signed by a number of legal voters of the
14 municipality equal to at least 15% of the total votes cast in the
15 municipality at the last election at which members of the General
16 Assembly were elected, a resolution to lease or sell water or
17 wastewater assets shall not take effect unless the lease or sale of
18 such assets is approved pursuant to R.S.40:62-4 and R.S.40:62-5. If
19 a petition is not filed pursuant to this subsection, a resolution to
20 lease or sell water or wastewater assets shall not be subject to a
21 public referendum.

22
23 6. (New section) a. A request for qualifications ²from a
24 capable private or public entity wishing to be considered for the
25 long-term lease or sale of the owner's system² shall be advertised
26 ²【pending approval of】 after² the emergent conditions certification
27 pursuant to subsection ²【d.】 e.² of section 5 of P.L. ,
28 c. (C.) (pending before the Legislature as this bill), but no
29 less than 30 days prior to the date on which responses to the request
30 are due. ²【If the owner is a municipality or municipal utilities
31 authority, the】 The² advertisement of the request for qualifications
32 shall be published on the official Internet website of the
33 municipality and at least once in one or more newspapers
34 circulating in the municipality. ²【If the owner is a county utilities
35 authority, the advertisement of the request for qualifications shall
36 be published on the official Internet website of the county and at
37 least once in one or more newspapers circulating in the county. If
38 the owner is a regional utilities authority, the advertisement of the
39 request for qualifications shall be published on the official Internet
40 website of the authority and at least once in one or more
41 newspapers circulating in the region.】² An owner shall also publish
42 the advertisement of the request for qualifications at least once in
43 one or more newspapers with Statewide circulation. If an
44 applicable official website does not exist, the advertisement of the
45 request for qualifications shall be published on the official Internet
46 website of the Department of Community Affairs.

1 b. After an emergent conditions certification is ²[approved]
2 made² pursuant to subsection ²[d.] e.² of section 5 of P.L. ,
3 c. (C.) (pending before the Legislature as this bill), the
4 owner shall determine the qualified respondents. The owner shall
5 issue a request for proposals to each qualified respondent no less
6 than 14 days prior to the date established for submission of the
7 proposals. The request for proposals shall include relevant
8 technical submissions, documents, and criteria including but not
9 limited to a description of the facilities and the debt related thereto
10 and the evaluation criteria to be used in the selection of the
11 designated respondent. ²The proposals shall include and shall be
12 evaluated by, at a minimum, the following:

13 (1) the documented deficiencies of the owner's system upon
14 which the emergent conditions certification is based and a
15 description of the corrective measures to be undertaken by the
16 respondent to address and correct the identified emergent
17 conditions;

18 (2) a description of the financial, managerial, and technical
19 capabilities of the respondent to operate and maintain the system in
20 compliance with all applicable State and federal laws and
21 regulations, as well as a description of all the respondent's
22 outstanding and pending violations of the "Pollution Prevention
23 Act," P.L.1991, c.235 (C.13:1D-35 et seq.); P.L.1942, c.308
24 (C.58:11-9.1 et seq.); "The Realty Improvement Sewerage and
25 Facilities Act (1954)," P.L.1954, c.199, s.1 (C.58:11-23 et seq.);
26 and the "Safe Drinking Water Act," P.L.1977, c. 224, s.1
27 (C.58:12A-1 et seq.);

28 (3) an analysis of the relevant expenditures associated with such
29 activities and the projected impact on customer rates;

30 (4) an analysis of any Internal Revenue Code or other tax code
31 issues that may arise from the long-term lease or sale of a publicly
32 funded water or wastewater asset, as well as any potential short-
33 term or long-term costs arising there from;

34 (5) a long-term capital improvement or asset management plan;
35 and

36 (6) any other pertinent information required of or deemed
37 appropriate by the owner.²

38 c. Upon a review of the proposals submitted by qualified
39 respondents, the governing body of an owner shall, by resolution
40 ²adopted by at least two-thirds of its authorized membership²,
41 designate one qualified respondent, whose proposal the governing
42 body finds to be the most advantageous to the public, taking into
43 consideration the evaluation criteria set forth in the request for
44 proposals ²and as specified under subsection b. of this section².
45 The resolution shall include ²a detailed summary of² the governing
46 body's findings that the proposal of the designated respondent is
47 most advantageous to the public. ²The summary shall be published

1 in accordance with the notification requirements of section 5 of
2 P.L. , c. (C.) (pending before the Legislature as this bill).²
3

4 7. (New section) a. After the designated respondent is
5 selected, negotiations for a contract for the lease or sale of the water
6 or wastewater assets may commence between the owner and the
7 designated respondent.

8 b. ²(1) Every proposed contract shall include a clause stating
9 that the designated respondent shall give first consideration in
10 hiring to any public employees displaced by the long-term lease or
11 sale of the water or wastewater assets for any positions added by the
12 capable private or public entity to serve the new acquired system.

13 ²(2) After an agreement on a proposed contract is reached
14 between the owner and the designated respondent, the governing
15 body of the owner shall, by resolution ²adopted by at least two-
16 thirds of its authorized membership², cause the proposed contract to
17 be submitted to the board for approval and cause the proposed use
18 of proceeds of the ²long-term² lease or sale to be submitted to the
19 director for approval.

20 c. (1) The proposed contract submitted to the board shall
21 include the rent or sale price, any appraisals supporting the rent or
22 sale price, documentation regarding the defeasance of debt, and any
23 other information requested by the board. The board shall approve
24 or reject the proposed contract within ²[30] 90² days of receipt
25 thereof. If no disposition is made within ²[30] 90² days, the
26 proposed contract shall be deemed approved.

27 (2) For the purposes of rate making and recovery, the board
28 shall accept the negotiated sale price between the owner and the
29 designated respondent as the new rate base effective as of the date
30 of the approval of the ²long-term² lease or sale, as may be the case,
31 provided the price is deemed reasonable.

32 The rent or sale price shall be deemed reasonable if it meets the
33 following conditions:

34 (a) The rent or sale price is sufficient to defease the debt of the
35 owner; and either

36 (b) (i) The rent or sale price is within the range of any appraisals
37 obtained with respect to the ²long-term² lease or sale of the water or
38 wastewater assets; or

39 (ii) If there is little or no established rate base for the water or
40 wastewater assets, the rent or sale price is reasonably comparable to
41 a proxy rate base equivalent to the rate base of the designated
42 respondent.

43 (3) In valuing the water or wastewater assets, appraisers shall
44 comply with the Uniform Standards of Professional Appraisal
45 Practice promulgated by the Appraisal Standards Board of the
46 Appraisal Foundation.

1 (4) In valuing the water or wastewater assets and for the
2 purposes of rate making, the original source of funding for any part
3 of the water or wastewater assets shall not be relevant.

4 (5) Reasonable and prudent transaction, closing, and transition
5 costs incurred by the designated respondent shall be recoverable in
6 rates.

7 (6) The proposed use of proceeds submitted to the director shall
8 include the rent or sale price, the total ²amount required to defease²
9 debt ²[payment amount] , any costs associated with compliance
10 with the Internal Revenue Code or other tax code that may arise
11 from the long-term lease or sale of a publicly funded water or
12 wastewater asset², the remaining proceeds after the ²defeasance of²
13 debt ²[payment, the amount dedicated to] and Internal Revenue
14 Service compliance costs, the amount dedicated to the following, in
15 order of priority: compliance with the provisions of the "Pollution
16 Prevention Act," P.L.1991, c.235 (C.13:1D-35 et seq.); P.L.1942,
17 c.308 (C.58:11-9.1 et seq.); "The Realty Improvement Sewerage
18 and Facilities Act (1954)," P.L.1954, c.199, s.1 (C.58:11-23 et
19 seq.); and the "Safe Drinking Water Act," P.L.1977, c. 224, s.1
20 (C.58:12A-1 et seq.), any outstanding fees or fines owed by the
21 entity to any federal, State, county, or local governmental units,
22 capital improvements,² community ²[and capital]² improvements,
23 and ²[the amount dedicated for]² general purposes of the owner.
24 The amount dedicated to ¹[community and]¹ capital improvements
25 ²shall comply with a previously adopted long-term capital
26 improvement plan or asset management plan, and² must represent at
27 least 50 percent of the remaining proceeds once the debt is
28 defeased. The director shall approve or reject the proposed use of
29 proceeds within 30 days of receipt thereof. If no disposition is
30 made within 30 days, the proposed use of proceeds shall be deemed
31 approved.

32
33 8. (New section) After the proposed contract and proposed use
34 of proceeds have been approved pursuant to subsection c. of section
35 7 of P.L. , c. (C.) (pending before the Legislature as this
36 bill), the governing body of the owner may, by resolution ²adopted
37 by at least two-thirds of its authorized membership², enter into a
38 contract for the ²long-term² lease or sale of the water or wastewater
39 assets with the designated respondent.

40
41 9. (New section) Any contractor or subcontractor hired by the
42 designated respondent, in the performance of a contract entered into
43 pursuant to section 8 of P.L. , c. (C.) (pending before the
44 Legislature as this bill), shall¹:

45 a. be paid, or pay any worker employed by the contractor or
46 subcontractor, not less than the wage rate for their craft or trade as
47 determined by the Commissioner of Labor and Workforce

1 Development pursuant to the provisions of the “New Jersey
2 Prevailing Wage Act,” P.L.1963, c.150 (C.34:11-56.25 et seq.) and;

3 b.¹ only employ a worker from an apprenticeable trade who is
4 either an apprentice participating in a registered apprenticeship
5 program or who has completed a registered apprenticeship program,
6 unless the contractor or subcontractor certifies that each such
7 worker shall be paid no less than the journeyman rate established
8 for the apprenticeable trade performed pursuant to P.L.1963, c.150
9 (C.34:11-56.25 et seq.)¹ and;

10 c. all contractors and subcontractors shall comply with the
11 provisions of “The Public Works Contractor Registration Act,”
12 P.L.1999, c.238 (C.34:11-56.48 et seq.)¹.

13

14 10. R.S.40:62-3 is amended to read as follows:

15 40:62-3. Any municipality owning a sewer plant, water plant,
16 heat, light or power plant, system of transportation, or other public
17 utility plant or system, may ²long-term² lease or sell such plant or
18 system. Such a ²long-term² lease or sale to another municipality, a
19 sanitary sewerage authority, a sewerage authority or any other
20 authority, commission or public body shall be authorized by
21 ordinance and may be made upon such terms as said ordinance shall
22 provide and the provisions of R.S.40:62-4 and R.S.40:62-5 shall not
23 apply thereto. Such a ²long-term² lease or sale to any person except
24 another municipality, a sanitary sewerage authority, a sewerage
25 authority or any other authority, commission or public body shall,
26 except as otherwise provided by law, be made only upon
27 compliance with the provisions of R.S.40:62-4 and R.S.40:62-5 and
28 after the same is authorized by the legal voters of the municipality
29 in accordance with said sections , or upon compliance with the
30 provisions of section 2 of P.L.1981, c.16 (C.40:62-3.1) or the
31 “Water Infrastructure Protection Act,” sections 1 through 9 of
32 P.L. , c. (C.) (pending before the Legislature as this bill).
33 (cf: P.L.1981, c.16, s.1)

34

35 11. This act shall take effect immediately.