


US Water Alliance

Regional Water Solutions from Across the Country

July 17th, 2018
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About the US Water Alliance

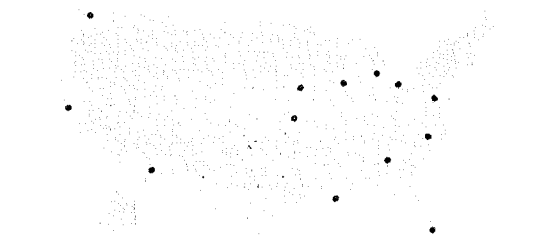

Educate

Accelerate

Celebrate



One Water for America Listening Sessions





ONE WATER BIG IDEA 1.

U.S. Water Utilities

Advance regional collaboration on water management.



WATER COOPERATIVE, INC.



Vision for overcoming industry fragmentation




How do we get there?

5 Principles for overcoming industry fragmentation

Proactive & Locally Determined

Proactive, locally tailored, locally determined process and institutional arrangements.

Full Suite of Options

State regulatory agencies; full suite of intervention options to address conditions that put public health at risk.

Community Value

Community value proposition as driver; clearly and fully articulate potential costs and benefits of all options.

Governance Neutral Information

Provide balanced information on the full range of governance models that could be considered.

Comprehensive Authorizing Environment

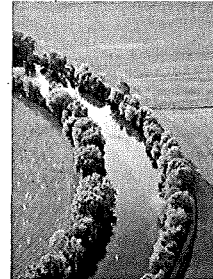
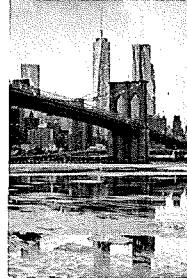
Create a complete and cohesive authorizing environment; streamlined transactions, low up-front costs, range of governance options.



www.uswateralliance.org

Proactive & Locally Determined

Proactive, locally tailored, locally determined process and institutional arrangements.



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Example

Borough of Haddonfield (New Jersey)

Consolidation model:

- Private acquisition, voter approved

Drivers:

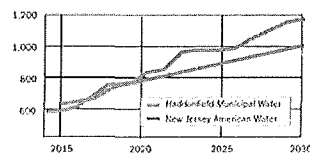
- \$50M in needs over 30 years
- >5,000 in population

Outcomes:

- Access to capital quickly
- More stable, predictable rates
- Less likely to fall behind on maintenance in the future

Projected Annual Water Bills

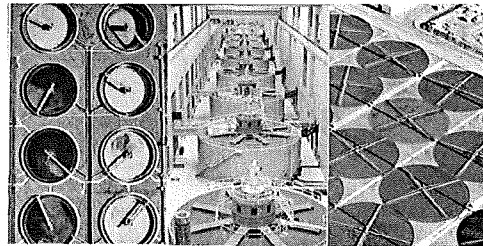
(based on an average household use of 58,000 gallons/year)



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Full Suite of Options

State regulatory agencies; full suite of intervention options to address conditions that put public health at risk.



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Example

Walnut Ranch with City of Colusa (California)

Consolidation model:

- State mandated consolidation

Drivers:

- Arsenic contamination in drinking water

Outcomes:

- Access to capital
- Stable, predictable rates
- Less likely to fall behind on maintenance in the future

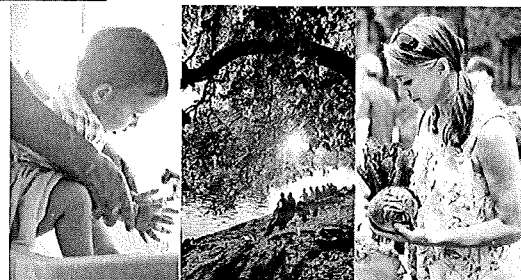
California Town's Water Tainted With Arsenic For Decades



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Community Value

Community value proposition as driver; clearly and fully articulate potential costs and benefits of all options.



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Example Hampton Roads Sanitation District (Virginia)

Consolidation model:

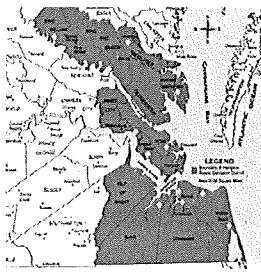
- o Large wet weather program under one entity serving 8 communities, other entities still exist (hybrid)

Drivers:

- o Cost of regulatory compliance
- o Regional goal greater than any 1 jurisdiction's authority


Outcomes:

- o Maintain local asset ownership
- o Realize majority of savings possible



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Governance Neutral Information Provide balanced information on the full range of utility governance models that could be considered.



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Example Iowa Regional Utilities Association (Iowa)

Consolidation model:

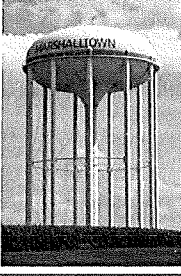
- o Nonprofit regional water authority

Drivers:

- o Need to spread out/reduce capital costs
- o Water supply issues


Outcomes:

- o Rural communities access more skilled utility staff
- o Stabilize water quality and supply
- o Promote economic development in rural areas



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Comprehensive Authorizing Environment Create a complete and cohesive authorizing environment: streamlined transactions, low up-front costs, range of governance options.



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Example Logan Todd Regional Water Commission (Kentucky)

Consolidation model:

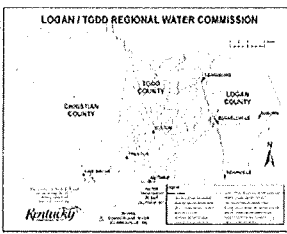
- o Joint Powers Agency (nonprofit), 12 communities

Drivers:

- o Unable to attract development
- o Need for reliable water supply
- o Water quality concerns

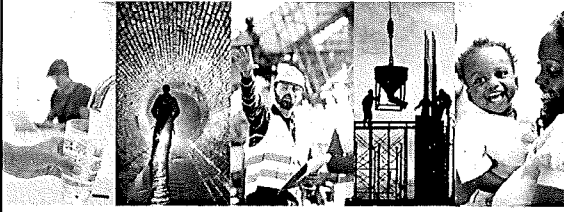
Outcomes:

- o Attracted \$800M in econ. activity
- o Reliable, safe water supply
- o Maintain local distribution



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Summary



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Coming soon from the US Water Alliance!

- **Principles: Overcoming Water Industry Fragmentation**
- **Benefits / Barriers Report: "Strength in Numbers: Utility Strengthening through Consolidation"**
- **Economic Field Scan and Case Studies: Finance and Water Utility Consolidation**
- **Comparative Assessment: Enabling State Policy Frameworks on Water Utility Consolidation**



Thank you!

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One Water for America
Policy Framework



ONE WATER **BIG IDEA** 1.

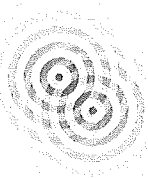
**Advance regional collaboration
on water management.**

This is one in a series of policy briefs that comprise the One Water for America Policy Framework.

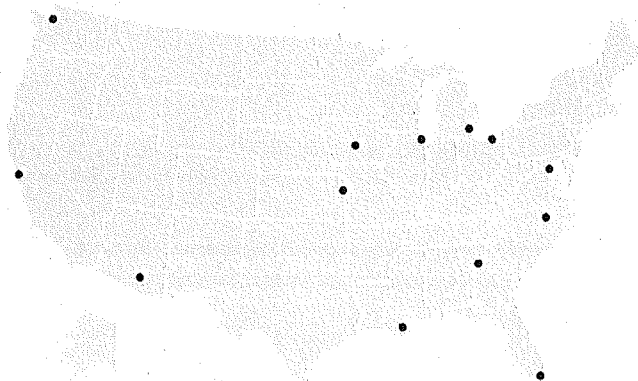
To download an Executive Summary, additional policy briefs, or learn how you can get involved, please visit: www.uswateralliance.org/initiatives/listening-sessions.

America's water supplies and services are at risk. Climate change, growing income disparities, and the threats posed by our aging water infrastructure call into question the continued availability of safe water supplies and reliable, affordable water service. In light of these challenges, we must come together and create a new era of water management in America—one that secures economic, environmental, and community wellbeing.

To that end, the US Water Alliance worked with more than 40 partner organizations to host 15 One Water for America Listening Sessions across the country. These discussions engaged more than 500 leaders, including water utility managers, public officials, business executives, farmers, environmental and watershed advocates, community leaders, philanthropic organizations, planners, and researchers.



One Water for America Listening Sessions

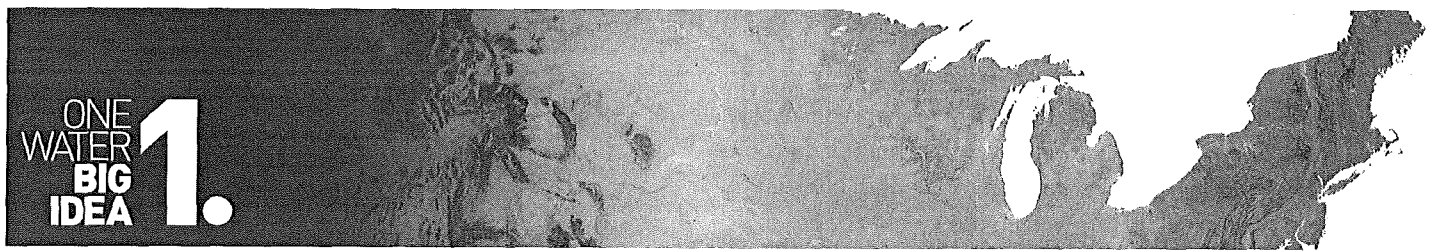


What we heard from these stakeholders was truly inspiring. Across the nation, people from all walks of life are collaborating and innovating to advance sustainable water management solutions. Now is the time to spread and scale up these successes to benefit more communities across the country. In these seven policy briefs, we have compiled the strongest, most consistent themes from the One Water for America Listening Sessions into **seven big ideas for the sustainable management of water in the United States**:

1. **Advance regional collaboration on water management**
2. **Accelerate agriculture-utility partnerships to improve water quality**
3. **Sustain adequate funding for water infrastructure**
4. **Blend public and private expertise and investment to address water infrastructure needs**
5. **Redefine affordability for the 21st century**
6. **Reduce lead risks, and embrace the mission of protecting public health**
7. **Accelerate technology adoption to build efficiency and improve water service**

Each of these policy briefs digs further into one of these *big ideas*—exploring the key issues behind it; presenting policy solutions that are working at the local, regional, state, and national levels; and providing real world examples of how these solutions *are* being implemented and *do* produce positive results.

The One Water for America Policy Framework is a clarion call to action to accelerate solutions for the water management problems of our age. In doing so, we secure a brighter future for all.



Advance regional collaboration on water management.

Context

While water knows no boundaries, the system of how we manage water is siloed. As the United States grew, local governments arose in varying forms, sizes, and authorities, alongside evolving state and federal government structures. One result of this organic, unsystematic development of government structures is the high level of fragmentation in our water systems. Across the nation, there are more than 51,000 community water systems¹ and nearly 15,000 wastewater treatment plants.² More than 80 percent of our water systems serve fewer than 3,330 people, and 55 percent serve fewer than 500.³ By contrast, there are approximately 3,000 electricity providers. Thousands of distinct municipalities, authorities, private businesses, and regulatory agencies have narrow slices of authority over some aspect of water—drinking water, wastewater, stormwater, groundwater, irrigation, and more. Our regulatory frameworks at the local, state, and federal levels reflect and reinforce this fragmentation.

One of the most robust and urgent threads of discussion across the One Water for America Listening Sessions was how this fragmentation can be overcome. There was a shared desire to drive toward better outcomes in water service, protection of natural resources, economic prosperity, and social equity.

This section of the brief describes some of the key issues related to regional collaboration, followed by a section that presents solutions that can be advanced at the local, regional, state, and national levels. What we heard was truly inspiring—innovative leaders are advancing more collaborative approaches such as watershed-scale planning, coordinating services to better operate and maintain infrastructure assets, consolidating utility service, and much more.

Key Issue:

Supporting coordination and shared services

Despite the hyper-fragmentation of our water systems in the United States, necessity is driving communities to collaborate with their neighbors on water management. Resource coordination and solution sharing provide significant benefits for utilities within a region in areas as diverse as workforce training, water resource management, disaster preparedness, and purchasing (where a group of utilities can enjoy greater buying power than one utility alone). Some regions are leveraging excess utility capacity to serve neighboring communities versus building more infrastructure. Policymakers at all levels of government can encourage collaboration by creating an enabling environment for dialogue and problem solving.

Key Issue:

Reforming governance structures of utilities

Solving today's complex water challenges requires breaking away from established practices and exploring new business and governance models that can help utilities improve service and efficiency. In some communities, existing governance models may present barriers to regional collaboration and efficient, effective utility operations. For example, complex municipal employment and procurement practices can build inefficiency into utility operations. Large governing boards can make decision-making a challenge, injecting political priorities that are sometimes at odds with effective utility management.

Attempts to change utility governance models can involve drawn-out, politically charged struggles, but the outcomes can be worth the effort. In some communities, alternative governance structures have been designed to better suit the specific needs of water utilities, and they have helped to professionalize workforces, improve bond ratings, and enhance stakeholder collaboration. It is critically important to keep safeguards in place to ensure appropriate representation for all stakeholders, including vulnerable populations.

Key Issue:

Expanding watershed-scale thinking and action

The One Water approach recognizes that water is best managed in ways that respect and respond to watersheds and natural ecosystems, geology, and hydrology. It is within the context of a watershed that communities either have too much water, too little water, or poor quality water. It is within the watershed context that communities must reconcile their water demands with the need to sustain the resource for future generations. Watershed-level management brings together regional partners from within and beyond the water sector in joint planning and collaborative action to protect the shared natural resource that is essential for health, agriculture, industry, aquatic species, forests, wildlife, recreation, and life itself.

In some cases, communities are reluctant to pursue watershed-level planning because it calls for engaging a broad range of stakeholders who may have different expertise, priorities, and ways of working. It can be difficult to bring together all who influence water resources, but in the long run, it can lead to more sustainable outcomes.

Key Issue:

Meeting the needs of the most challenged systems

Some US cities have shrunk dramatically from historic population levels. Between 1980 and 2010, more than 20 cities in the Midwest, Northeast, and South—from Niagara Falls, NY to Gary, IN to Birmingham, AL—lost at least 20 percent of their population.⁴ In October 2016, the US General Accounting Office released a report highlighting the challenges that shrinking cities face in meeting water infrastructure needs.⁵ Many have high spending needs to address aging infrastructure, combined sewer overflows, and a high concentration of lead service lines. Some face the additional challenge of downsizing systems to fit lower demands. Yet, with declining tax bases, these cities—some with unemployment rates over 12 percent, poverty rates over 30 percent, and water and sewer bill collection rates as low as 69 percent—are simply unable to fund many needed improvements.⁶ Federal and state funding programs provide some relief, but these cities compete with other, less challenged communities for the same funds. For cities with acute challenges, more support is needed. In shrinking cities, the potential for efficiency gains from regionalization and consolidation is significant, yet even these measures may not fully address the challenges.

Policy Solutions

Local Level	Regional & State Level	National Level
<ul style="list-style-type: none"> • Embrace watershed-scale planning • Adopt governance structures that enable effective, efficient utility management • Develop regional partnerships to address common needs • Consider regionalization and consolidation of services 	<ul style="list-style-type: none"> • Use state authority to drive regional cooperation and consolidation • Use state funding programs to encourage regional cooperation and consolidation 	<ul style="list-style-type: none"> • Enact policies that promote regionalization • Provide regulatory flexibility to encourage partnerships • Expand federal programs that encourage adoption of watershed and integrated planning

Solutions: Local Level

Solution:

Embrace watershed-scale planning

Communities and utilities within a watershed can collaborate to develop inclusive, watershed-based plans, leverage resources, and create durable solutions that provide multiple benefits for the region as a whole. While watershed planning is often driven by local water utilities or a regional planning entity, it should include active engagement from diverse stakeholders within in a watershed. Many local water utilities are not fully in control of activity in their watersheds, and many share jurisdiction for public works with other city agencies. Local elected officials can set a tone of cooperation and provide positive reinforcement for regional cooperation.

In Action:

- **Bay Area Clean Water Agencies (BACWA).** BACWA is a regional collaboration among 54 wastewater agencies, aimed at long-term stewardship of the San Francisco Bay Estuary. The joint powers agency comprises 40 publicly owned treatment works and more than 100 collection systems that discharge to the San Francisco Bay Area, serving more than seven million people in the nine-county area. BACWA was formed as a united front to find and advocate for science-based solutions for water resource management. The group collaborates on nutrient management, compliance, regulatory advocacy, and research. Among its major efforts, BACWA members are working together to comply with a regional Nutrient Watershed Permit that has specific requirements regarding monitoring and reporting, studies of nutrient

management strategies, and identification of solutions for improved nutrient removal.

- **Great Lakes Protection Fund.** In 1989, the governors of the Great Lakes states created the Great Lakes Protection Fund as the world's first permanent ecosystem endowment after creating a series of regional agreements to help them better manage their shared watershed. The fund is a private, not-for-profit corporation. Seven member states provided one-time contributions to the fund's endowment totaling \$81 million. The governors' purpose in creating the fund was to ensure that "a continuous stream of innovation" was available to reduce the cost of, and increase the effectiveness of, Great Lakes protection and restoration efforts. Since inception, the fund has committed over \$81 million to 271 regional innovation projects. Those efforts created the first ballast water treatment technologies, launching that industry; developed techniques to restore natural flows in more than 1,500 miles of basin rivers; created new drainage technologies to restore natural flows and riparian cover in agricultural landscapes; designed and deployed the first statewide water quality trading system to accelerate nutrient removal, leading to the current national policy; developed criteria for and systems to certify sustainably managed forestlands leading to over 21 million acres of sustainable managed timber land in basin states; and created the legal, technical and practical basis to prevent diversion of water outside of the Great Lakes basin. Further, an additional \$49 million in dividends has been provided to member states for their individual Great Lakes priorities. The fund currently has assets of approximately \$130 million.

Solution:

Adopt governance structures that enable effective, efficient utility management

Local governance of water management can impose barriers to regional solutions and operating efficiency. Utility organizations that are embedded into municipal governments must comply with processes for purchasing and human resources management that can be cumbersome and fail to meet the particular needs of water management. In addition, many local governments transfer ratepayer-supported utility funds to general revenue funds to take care of other municipal needs. By restructuring utility governance, communities can help ensure that utilities are focused on their missions, have the freedom to make responsible regional decisions, and can operate with greater efficiency.

In Action:

- **Sewerage and Water Board of New Orleans.** In 2012, the Sewerage and Water Board of New Orleans advocated for a change to its state-granted charter to reduce its board of directors from 13 to 11 members and to limit members' terms from nine years to two consecutive four-year terms. State lawmakers agreed to eliminate three seats reserved for sitting City Council members and add an eighth mayoral appointment. All sitting board members had terms sunsetted, and the state legislature formalized the process of finding new board members when vacancies occur. The new law created a 10-member selection committee, which offers the mayor three names to choose from for each opening. In conjunction with the governance change, the utility has been able to tackle important management issues, including approval of a rate schedule that supports critically needed improvements to infrastructure and operations, improved bond ratings, and renewal of a special tax millage to fund operation of the city's extensive drainage system.
- **Louisville Water Company.** Louisville Water Company was chartered as a private company in 1854, and today, Louisville Metro government is its sole shareholder. Under this arrangement, Louisville Metro receives a quarterly dividend from the company, and the Louisville mayor appoints the members of the Board of Water Works. Louisville Water Company serves all of Jefferson County, along with parts of Bullitt, Hardin, Nelson, Oldham, Shelby, and Spencer counties. While Louisville Water Company provides drinking water service in the

region, the Louisville/Jefferson County Metropolitan Sewer District (MSD) operates the wastewater and stormwater components of Louisville Metro's infrastructure. Recognizing the potential benefits of stronger collaboration, the Louisville mayor created an advisory group that recommended the two entities, Louisville Water Company and Louisville MSD, look at a comprehensive interlocal agreement to improve efficiency and service quality. While the agreement is in its early phases, the two utilities have joined their information technology and fleet service groups to establish more robust management systems and are continuing to work toward reducing costs and increasing efficiency.

Solution:

Develop regional partnerships to address common needs

Water systems within a region often share similar geographic, demographic, and socioeconomic characteristics. Beyond watershed planning, utilities within a region can collaborate in areas like workforce development, disaster preparedness and response planning, and drought response. Local officials can collaborate with their counterparts in neighboring jurisdictions to identify incentives for win-win approaches to solving local water-related challenges. Public-public partnerships (PUPs) are an emerging model, in which two or more public water utilities or nongovernmental organizations join forces and leverage their shared capacities in not-for-profit agreements. Under these arrangements, multiple public utilities can pool resources, buying power, and technical expertise for economies of scale and potentially lower costs.

In Action:

- **Hampton Roads Public Works Academy (HRPWA).** The Hampton Roads Public Works Academy is a nonprofit regional coalition in southeastern Virginia that promotes cooperative training in public works and utilities disciplines. With 11 member cities, counties, and utility authorities, working in conjunction with the American Public Works Association, the program coordinates lower cost workforce development training for current employees, and it educates high school students to build the potential workforce for utilities throughout the region. In 2016, the academy trained approximately 400 existing employees in 17 subject areas. For the high school program, students are selected through a

competitive process and participate in a two-year learning program, with subjects ranging from field inspections to customer service to water system operation. Students are required to complete a paid summer internship with participating organizations. Completing the program makes students strong candidates for local public works and utility jobs, and the academy also offers college scholarships to seniors. Between the 2009–2010 and 2015–2016 school years, HRPWA trained nearly 400 high school students and offered 183 internships. Some student participants find long-term employment in member organizations; for example, between 2014 and 2017, 15 percent of Hampton Roads Sanitation District’s public works interns were hired into year-round positions.

- **Lehigh County Authority (LCA) and City of Allentown.**

In Pennsylvania, the City of Allentown entered into a public-public partnership (PUP) with the LCA—a concession agreement for LCA to operate Allentown’s water and wastewater system. The agreement allowed Allentown to tap into water system equity and future customer revenues to help cover other essential, non-utility costs, such as pension liabilities. At the same time, the deal created a larger, consolidated utility system that is able to achieve operating savings through increased efficiency and economies of scale. LCA relied on the tax-exempt bond market to raise funds for the initial concession payment and seed reserve funds. For the citizens of Allentown, this arrangement resulted in converting a very sizable general government pension liability to long-term LCA debt that will be repaid by water revenue collected from utility customers. For LCA, a predictable future revenue stream provided the ability to pay the initial concession payment, assure high quality service, and make planned capital investments.

Solution:

Consider regionalization and consolidation of services

In many places, regionalization can improve cost efficiency by consolidating duplicate utility organizations or consolidating common services like purchasing. In other areas, regionalization may help ensure sustainable service in the face of aging assets, dwindling resources, or increasing technical and regulatory requirements. Regionalization is sometimes undertaken to improve representation, providing a voice at the table for more of the jurisdictions served, as opposed to having region-wide water services controlled by one jurisdiction alone.

In Action:

- **Great Lakes Water Authority (GLWA).** In the wake of the City of Detroit’s bankruptcy, GLWA was formed in 2015 as a regional authority serving nearly 40 percent of the water customers in Michigan. The creation of GLWA converted the former service area of the Detroit Water and Sewerage Department into a regional authority. GLWA’s board of directors comprises two representatives from the City of Detroit and one each from Wayne, Oakland, and Macomb counties and the State of Michigan. This structure ensures that the city and member counties all have a voice in the direction of one of nation’s largest water and wastewater utilities. GLWA operates and manages the regional water and sewage treatment plants, major water transmission mains and sewage interceptors, and related facilities, which are leased from the City of Detroit for \$50 million per year. The lease payment provides needed funds for the Detroit Water and Sewerage Department to maintain the city’s water and sewer lines. The new authority was given a stronger credit rating than Detroit, enabling debt refinancing that will save the region more than \$300 million over the bond term.

- **Tacoma Water.** In Washington State, Tacoma Water creates special use districts to support small rural utilities that are unable to make needed investments in their local water infrastructure. As a wholesale provider to communities in the region, Tacoma Water can provide infrastructure upgrades to smaller utilities, in some cases without necessitating rate increases. In this way, consolidation of services benefits both the smaller utility and its ratepayers. Recently, Tacoma Water and the Curran Road Mutual Water Association completed

an agreement that will result in Tacoma Water making system improvements and consolidating the system in its direct service area. Curran Road found it difficult to expand services to the extent needed, and much of the system required upgrades that the utility could not afford. By consolidating with Tacoma Water, from whom Curran Road had been buying water since the 1940s, the community gained access to a higher quality of service than it would have achieved on its own.

Solutions: Regional & State Level

Solution:

Use state authority to drive regional cooperation and consolidation

State governments have an important role to play in encouraging, incentivizing, and sometimes requiring regional cooperation. States can set the framework and menu of options for structural and nonstructural regionalization options, ranging from informal agreements to area-wide special districts or authorities. States can also identify and remove internal barriers and artificial conflicts across watersheds and regions of the state, as well as with neighboring states that share a watershed, through approaches such as interstate compacts and basin commissions. States can also provide funding; the **North Carolina Department of Environmental Quality** provides funding for studies to evaluate the potential consolidation of water or wastewater systems within a region. In addition, some states have created agencies dedicated to regional or watershed-based water resources planning or to the consolidation of water systems that are not operating sustainably.

In Action:

- **California State Water Resources Control Board.** The California Water Board has authority to incent and mandate physical or managerial consolidation of water systems that are unable to provide safe drinking water. While the board also encourages voluntary consolidation, mandatory consolidation is a valuable tool in bringing water service to vulnerable communities that lack a strong political voice. For example, the unincorporated area of East Porterville experienced persistent drought that dried up local wells. About 500 households in the

low-income, majority Latino community went without running water for several years, relying instead on water delivery, public taps, and mobile showers. Through the board, a state-funded project was implemented to connect residents to the water system in the neighboring town of Porterville.

- **Metropolitan North Georgia Water Planning District.**

Responding to water resource issues in the growing Metro Atlanta region, the Georgia legislature created the Metropolitan North Georgia Water Planning District, which governs water planning for the 15-county region including and surrounding the City of Atlanta. The state followed up with passage of the *Comprehensive State-Wide Water Management Planning Act* and the *Georgia State Water Plan*, mandating watershed-based planning for water resources statewide. With 15 counties and 95 cities, the district is the only major metropolitan area in the country where more than 100 jurisdictions are collaborating to implement a long-term water, wastewater, and stormwater management program that is required and enforced by law. Through conservation and efficiency programs implemented across the district, total water withdrawals in the region have dropped by 10 percent since 2001 even though the population has increased by one million. Additionally, per capita water use has dropped by over 30 percent over that same period.

Solution:

Use state funding programs to encourage regional cooperation and consolidation

State agencies with primary grantmaking authority or lending authority can incentivize projects that foster regional cooperation and consolidation—for example, by incorporating regional collaboration into their criteria for awarding subsidized loans and grants. States can also incorporate incentives for watershed-level planning into grant and loan programs. States should also make sure that their State Revolving Fund (SRF) loan programs are not biased toward “building new things”—funding should be directed toward regional solutions, like purchasing capacity from a neighboring utility, rather than constrained to infrastructure development projects.

In Action:

- **State of Kentucky.** The State of Kentucky has been a leader in water system consolidation, going from more than 3,000 public water systems and treatment plants in the 1970s to fewer than 800 total water systems today. In 2000, the Kentucky General Assembly passed Senate Bill 409, creating a structured planning process for water services throughout the state. Regionalizing water systems is one goal of the legislation, and another is making potable water available to more Kentucky residents. SB 409 designated the Kentucky Infrastructure Authority as the state agency responsible for developing programs to achieve these goals. Under this program, 15 area development districts across the state prioritize local water projects for state funding based on their alignment to SB 409's goals. Between 2000 and 2017, the state provided more than \$800 million in funding for water projects through this program, effectively incentivizing expansion of water service and regionalization of water systems through merging, consolidating, or sharing resources. In addition, Kentucky state law enables municipalities to expand their water service areas to contiguous areas without annexation, which addresses one of the common barriers to regionalization. At the same time, through water and wastewater training offerings, organizations such as the Kentucky Rural Water Association have made strides in professionalizing utility staff across the state. Not only has the state's water management framework enabled great progress on utility consolidation, it has also extended potable water service; 95 percent of Kentucky households are now connected to community water systems.

Solutions: National Level

- **Enact policies that promote regionalization.** EPA has programs that encourage integrated infrastructure planning and consolidation of water infrastructure investments. EPA should remove regulatory obstacles to regionalization and help communities better understand the options available to them for providing sustainable water service. The federal government can encourage consolidation where appropriate, supporting a broad range of institutional forms. Because every utility faces different political and institutional conditions, developing a portfolio of consolidation options will give local officials

more latitude. Options include public-public partnerships, public-private partnerships, the development of regional clusters centered around large "anchor" utilities, and consolidation into multi-municipal cooperatives. Regional solutions also can be extremely effective for water quality improvement, as the **Chesapeake Bay Program** illustrates. Since its formation in 1983, this program has pulled together local governments, federal and state agencies, nonprofit organizations, and academic institutions to define and implement one of the nation's largest collaborative ecosystem restoration efforts across a 64,000 square-mile watershed.

- **Provide regulatory flexibility to encourage partnerships.** Regulatory flexibility can be incorporated to encourage regionalization for utilities that are having problems with compliance. Communities with water or wastewater systems that are chronically out of compliance with the Clean Water Act can be encouraged to partner with a larger neighboring water system or private water utility to help bring them into compliance and mitigate costly enforcement actions. When a public or private water utility acquires a troubled system, so-called "good neighbor" provisions can help so that the acquiring entity is not held liable for violations that occurred prior to acquisition.
- **Expand federal programs that encourage adoption of watershed and integrated planning.** EPA should consider reactivating Section 208 of the Clean Water Act as a cornerstone of watershed-based infrastructure planning; continue providing technical assistance grants for integrated planning efforts; and refresh its guidance, education, and outreach materials with a stronger focus on watershed planning. EPA should also continue to embrace integrated planning to help utilities make informed decisions about optimizing their overall water investments for the long run; balancing water, wastewater, and stormwater needs; and incorporating integrated solutions like green infrastructure.⁷

Conclusion

Although our water systems are highly fragmented, the challenges we face today are driving communities to adopt regional solutions for greater efficiency, improved water quality, sustained regulatory compliance, and better service. This policy brief illustrates that there are a wide variety of collaborative approaches that can work and many promising policy levers to help expand their adoption. Partnering with neighbor communities to meet common needs makes sense, and we expect regional collaboration to take greater hold as more communities demonstrate their power to improve water management for all.

Endnotes

- 1 "Clean Watersheds Needs Survey 2012 Report to Congress," *Environmental Protection Agency*, 2015, https://www.epa.gov/sites/production/files/2015-12/documents/cwns_2012_report_to_congress-508-opt.pdf
- 2 "Drinking Water Infrastructure Needs Survey and Assessment Fifth Report to Congress," *Environmental Protection Agency*, 2015, <https://www.epa.gov/sites/production/files/2015-07/documents/epa816r13006.pdf>
- 3 "Factoids: Drinking Water and Groundwater Statistics for 2005," *US Environmental Protection Agency*, 2005, https://hero.epa.gov/hero/index.cfm/reference/download/reference_id/91194
- 4 "Water Infrastructure: Information on Selected Midsize and Large Cities with Declining Populations," *United States Government Accountability Office*, 2016, <https://www.gao.gov/assets/680/679783.pdf>
- 5 Ibid.
- 6 Ibid.
- 7 "Performance of Green Infrastructure," *U.S. Environmental Protection Agency*, 2012, www.epa.gov/green-infrastructure/performance-green-infrastructure

Thank you to the One Water for America Collaborating Partners

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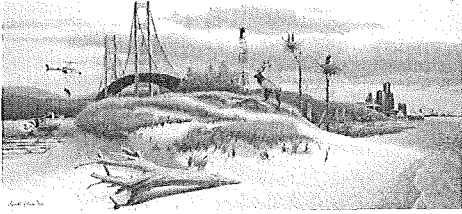
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**The Detroit Water & Sewerage Department—On the Eve of a
New Day**

R. Craig Hupp, R.C. Hupp Law PLLC

The Detroit Water & Sewerage Department—On the Eve of a New Day

R. Craig Hupp, R.C. Hupp Law PLLC[†]

This article supplements Nicholas Kyriakopoulos' comprehensive article about the Detroit Water & Sewerage Department (DWSD) and possible options for its restructuring.² Because of the change underway in DWSD since January 1, 2011, change not necessarily apparent to those not involved in the 1977 Sewer Case, *United States v. Detroit*, 77-71100 (E.D. Mich.), that article does not reflect all of the recent developments and describes the "old" DWSD. In addition, this article provides more background on several of the issues central to any debate over creating a water and sewer authority autonomous from Detroit.³

[†] The author represented Macomb County in the 1977 Sewer Case until 2015. The views expressed in this article are his alone.

² N. Kyriakopoulos, *Should the Detroit Water & Sewerage Department be privatized?*, 31 *Michigan Environmental Law Journal* 3 (Spring 2013), p. 17.

³ Although not related to the subject of this article, I must correct part of Kyriakopoulos' article—its repetition of a *Detroit News* article that my partner Tom Lewand was "fired" as Special Master by Judge Cox when he took over the case. Kyriakopoulos, *supra* note 1, at footnote 14. Although that was the headline, nothing was further from the truth. Judge Cox's letter to Mr. Lewand, attached to his Order Vacating February 8, 2002 Order Appointing F. Thomas Lewand as Special Master, makes that clear. "On behalf of the Court, I would like to thank you very much for your outstanding service as Special Master." *United States v. City of Detroit*, Case No 77-71100 (Docket Entry No 2329, Feb 3, 2011).

Overview

DWSD is in a period of transition. Gone for certain is the “old” DWSD of the Judge Feikens era. The “old” DWSD was a department tied tightly to the City of Detroit. That era ended in 2011 when the City and Wayne, Oakland, and Macomb Counties agreed to reforms in DWSD’s governance and Judge Cox ordered that DWSD sever ties with most of the supporting departments within the City of Detroit and become a largely stand-alone department. This “new” DWSD is now establishing its own finance, purchasing, information technology, law, and human resources departments under a new director and top management, guided by a reorganized and reenergized Board of Water Commissioners (BOWC). However, even as the “new” DWSD is getting underway, the “next” DWSD, an entity completely separated from the City, is poised to emerge. Emergency Manager Kevyn Orr has made it clear that the revenue stream that an independent DWSD may generate is a key piece in his plan for a sustainable fiscal future.⁴

This article begins by discussing DWSD’s governance and the core of the city-suburb dispute. It then reviews why, after 40 years, a federal judge concluded DWSD must be operationally and financially separated from Detroit, even if the City still retained ownership and some authority to govern. The article closes with a preview of the present proposal for the “next” DWSD as an independent regional authority and discussion of a number of issues that are posed by regionalization.

Regional Governance

Two themes in the public debate over DWSD’s future concern its governance: (1) whether or not the suburbs should have a say in running DWSD; and (2) whether the BOWC should be responsive to elected officials. In fact, contrary to accepted wisdom, the suburbs have had a say in governing DWSD for many years through the appointment of one commissioner for each of Wayne, Oakland, and Macomb Counties. But until the BOWC reforms of 2011, the appointment process and basic Board function largely prevented suburban views from being effectively expressed.

For many years the Detroit City Charter has provided for a seven-commissioner BOWC to oversee DWSD.⁵ The Charter provides that four commissioners must reside in Detroit, leaving three commissioners who by tradition are intended to represent the interests of Wayne, Oakland, and Macomb Counties. The suburban commissioners were appointed by Detroit’s

⁴ Emergency Manager Kevyn Orr, *City of Detroit Proposal for Creditors* (Jun 14, 2013), at pages 83-86.

⁵ The Charter of the City of Detroit, § 7.1202 (2012), at page 90 (formerly Sec. 7-1501).

Mayor who again by tradition considered and usually but not always accepted the list of candidates recommended by an elected official in each county—the Wayne County Executive, the Oakland County Water Resources Commissioner, and the Macomb County Public Works Commissioner. However, in practice, these commissioners were not always responsive to county concerns⁶ and on occasion a county’s request for a change in its representative went unheeded.

But the real issue was overall Board function. For decades its primary role was contract and budget approval in part because other city departments were not answerable to the BOWC. Strategic planning, risk management, and managerial oversight were largely ignored. Additionally, commissioners were not necessarily qualified to oversee an organization as large and complex as DWSD. DWSD management was principally answerable to the Mayor, not the BOWC. The commissioners had no staff to provide independent advice to counter what DWSD or City management might propose—a major problem during the Kilpatrick administration. Nor did the commissioners have the resources to explore issues of concern to them. And, as of 2010 the then-existing Board was tarnished by DWSD’s problems over the previous five years. Finally, DWSD as a department had lacked strong leadership since Victor Mercado’s resignation in June 2008. Although there were several directors and acting directors after Mercado, none had the strong support they needed from the Mayor, the BOWC, or the counties.

In 2005 Oakland County began to advocate for changes in DWSD governance to improve BOWC performance. Some of its recommendations were based on experience in Boston where the water board is supported by independent staff. With the appointment of Judge Cox and his determination to bring the 1977 Sewer Case to an end, all three counties renewed efforts to reform the BOWC, building on Oakland County’s original suggestions. To his great credit Mayor Bing agreed with the sense of their recommendations. The City and the counties agreed to reforms to restructure the Board of Water Commissioners, as memorialized in the “Stipulated Order.”⁷

The restructuring that the Stipulated Order requires was not in the number of commissioners or the distribution of votes—it remained seven commissioners, four City and three county. The county elected officials who had the authority to nominate commissioners remained unchanged. The restructuring consisted of appointing mostly new commissioners and giving the counties real power to appoint their representatives. Recognizing the level of commitment required to competently oversee a complex \$900 million utility, the Stipulated Order sets minimum qualifications for the commissioners and provides that they will be paid. The Stipulated Order provides that the Board will have three staff members with legal, finance, and technical expertise. Approval of rates and the capital program now requires a majority of five commissioners, requiring both city and suburban support on major financial decisions.

⁶ In fairness to all of the former commissioners, the BOWC’s ability to effectively oversee the old DWSD was limited.

⁷ Stipulated Order, Dkt. 2334 (Feb 11, 2011). All docket references are to *United States v. City of Detroit*, Case No 77-71100 (the 1977 Sewer Case).

Additionally and perhaps most importantly, the Board's authority to recruit and hire a new DWSD leader was legitimized by the Court. Although the Charter grants the Board this power, it had ceded power to the Mayor's office long ago.

Once in place, the new Board instituted a final reform—a committee structure to permit more detailed review and consideration of matters before coming to the Board for action.

In summary, DWSD has long had a board with regional representation, all of whom were at least somewhat answerable to elected officials. Now the county appointed commissioners are more directly responsive to suburban concerns and, much more importantly, all of the commissioners have the qualifications and the resources to competently perform their responsibilities.

While the new BOWC organization has led to greatly improved leadership, direction, and decision-making, DWSD's difficulties in achieving long term compliance with its NPDES permit stem from the much larger problems within the government of the City of Detroit and within DWSD.

The Real City-Suburb Conflict

In newspaper articles, political rhetoric, and occasionally in Judge Feikens' opinions, disputes between the City and the suburbs involving DWSD are cast in terms of rates and control. Neither was or is the real issue. The real issue has been mismanagement of DWSD by the City, mismanagement within DWSD, and, depending on the era, corruption affecting DWSD. Because the suburbs have had little effective voice at the BOWC and because the BOWC was not structured or empowered to effectively manage DWSD, the suburbs had no real voice or leverage to effect changes in how DWSD was managed. They were left to complain about the rates, a matter over which they had a little control. And, during the Feikens era, Judge Feikens exercised jurisdiction over any significant challenge to the rates, turning rates disputes into federal litigation.

However, it should be self-evident that a well-managed utility will cost its ratepayers less over the medium and long-term, that all ratepayers are penalized by and pay for a mismanaged system, and that Detroiters, because of their lower incomes on average, are penalized proportionately more. Thus the concerns of suburban and Detroit ratepayers were and are the same.

Further, the sad truth is that it has long been the three counties, not the Mayor or City Council, who have challenged the City's and DWSD's mismanagement. No city politician has campaigned to streamline DWSD in order to reduce rates until Mayor Bing and Council Persons Charles Pugh and Gary Brown supported the recent reform efforts. To the contrary, City Council's recent refusal to support DWSD's streamlining efforts demonstrates that it has been part of the problem, not part of the solution.

DWSD's Finances

About 80% of DWSD's water revenue and about 50% of its sewer revenue comes from suburban customers.

DWSD now has a total annual budget well over \$1 billion, consisting of a budget for operating expenses and debt service of \$900 million plus an annual capital budget that averages over \$250 million.⁸ Few businesses in the region have larger total budgets and fewer companies have invested more in plant and equipment in the last 10 years.

DWSD is highly leveraged from a debt perspective. Almost half of DWSD's revenue goes to debt service. DWSD now has over \$6 billion in long-term water and sewer debt, structured such that annual debt service payments will be generally level at about \$400 million each year for the next 20 years and declining amounts for the following 10 years, assuming no more borrowing occurs.⁹ But DWSD's current five-year capital improvement program projects another \$1.2 billion in debt.¹⁰

Essentially all of DWSD's debt is secured by DWSD's water and sewer rate revenue, largely as revenue bonds issued under the Revenue Bond Act of 1933.¹¹ Accordingly, DWSD has generally enjoyed good access to capital markets. Unfortunately, even though the source of repayment of the water and sewer bonds is backed by rate revenue, in the last year DWSD bonds have been downgraded to junk bond status because of the City's general financial crisis and, more recently, uncertainty over Emergency Manager Orr's potential actions.

DWSD is essentially a fixed-cost system. That is, most of DWSD's costs are not very sensitive to the amount of service (water supplied or wastewater treated) that DWSD provides. That truth is masked by the fact that DWSD has traditionally set its rates on a commodity basis (*i.e.*, it charges per unit of water or wastewater), giving the false impression that DWSD's costs vary with volume. They do not. For example DWSD's \$400 million annual debt service must be paid regardless of water sales or wastewater flow. On the operating side, equipment maintenance and repair costs are not strongly correlated with water sales or wastewater flow either. The best opportunity to reduce operating costs—streamlining DWSD's labor force—was not pursued by the old DWSD for political reasons and organized labor pressure. However, in 2012 after Judge Cox's order, the "new" BOWC has used its new authority to pursue streamlining as discussed below. This offers the promise of annual savings of \$100 million per year.

⁸ City of Detroit, Basic Financial Statements, Water and Sewer Funds.

⁹ *Id.*

¹⁰ DWSD, Water & Sewer Capital Improvement Programs (Jan 2013). Kyriakopoulos, *supra* note 1, at page 21 repeats an estimate that DWSD needs to spend \$20 billion to achieve wastewater compliance with regard to phosphorous. That estimate grossly exceeds any estimate of compliance costs in the foreseeable future

¹¹ MCL 141.101 et seq.

DWSD's History of Noncompliance With the Clean Water Act and the Extraordinary Measures Required to Cure

The benefit of an independent DWSD is best appreciated when viewed against the background of the last 40 years of DWSD operations. Opinions in the 1977 Sewer Case tell the history of Detroit's inability to maintain sustained compliance at the wastewater treatment plant (WWTP).¹² Throughout, it is clear that many of DWSD's problems stemmed from a dysfunctional city government.

In response to Detroit's inability to comply with a Consent Judgment entered at the beginning of the 1977 Sewer Case, Judge Feikens commissioned an investigation. Based on that investigation, he found "extraordinary remedies" were required to achieve compliance—notably appointing Mayor Young as a special administrator of DWSD with "all of the functions, duties, power, and authority" of the Board of Water Commissioners, DWSD, all departments, and boards of the City "without necessity of action" by City Council if the Council might impede or interfere with the actions to bring DWSD into sustained compliance.¹³ Further the BOWC, Council, and city departments and employees were enjoined from failing to immediately comply with or from interfering with the court's order.

Even with these extraordinary measures it was four years before DWSD achieved compliance. In the meantime, the Vista sludge hauling scandal demonstrated how the extraordinary powers granted by the court could be abused.¹⁴

In August of 1997, the WWTP again began violating its NPDES permit. Detroit and the Michigan Department of Environmental Quality (MDEQ) negotiated an Administrative Consent Order to resolve the violation but Judge Feikens stepped in, finding the ACO "did not address causes of non-compliance." Feikens appointed a Committee to Investigate the Causes of the Violations. This committee found that many of the immediate causes of non-compliance had been identified by DWSD as early as 1995. Although DWSD had come into compliance by April 1999, it had taken "extraordinary efforts" to do so, which were "not long-term solutions, do not address the causes of non-compliance, and cannot be sustained to provide reliable, compliant operation of the WWTP."¹⁵ "The nearly two-year period of non-compliance as well as the prospect of renewed non-compliance, unless the causes of non-compliance are corrected,

¹² A thorough review is provided in Opinion & Order Denying Without Prejudice the City of Detroit's Motion to Dismiss, Dkt. 2399, (Sep 9, 2011). I emphasize this inability as being Detroit's and not DWSD's because the history shows that, notwithstanding failings within DWSD, most of the root causes behind DWSD's noncompliance lay within city government and other city departments.

¹³ Order Appointing Administrator of City of Detroit Wastewater Treatment Plant, 476 F Supp 512 (ED Mich 1979).

¹⁴ *United States v. Bowers*, 828 F2d 1169 (6th Cir 1987) (affirming RICO convictions of a DWSD official and a vendor in a case where a DWSD sludge hauling contract was approved by the mayor exercising his powers as special administrator.)

¹⁵ Order Appointing Special Administrator for the Detroit Wastewater Treatment Plant of the Detroit Water and Sewerage Department, Dkt. 1651, (Feb 7, 2000).

presents a serious health, safety, and environmental risk to the people of Southeast Michigan.”¹⁶

Once again Judge Feikens gave unprecedented powers to the Mayor of Detroit Dennis Archer including:

[F]ull power and authority to control, manage, and operate the WWTP, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD, and any other departments, boards, or division of the City . . . to the extent they affect the ability of the special administrator to meet the requirements of sustained compliance with the NPDES permit¹⁷

The order further provided: “The special administrator must provide for long-term, sustained, reliable compliance,” and went on to specifically require:

- That WWTP dewatering equipment be supplemented, upgraded, and maintained;
- Action on equipment maintenance;
- A capital improvement program;
- Improvements in budgeting and finance, reforms to the purchasing and materials management processes;
- Reforms in human resources related to hiring, training, compensation, and revision of job descriptions, and a chief operations officer to oversee the performance of DWSD’s director and assistant directors.

This effort culminated in a \$500 plus million dollar overhaul of the WWTP.¹⁸

The Special Administrator order stayed in place well into Kilpatrick’s term.¹⁹ However, after contractors and sewer customers began to allege Kilpatrick was abusing his authority under the order, Judge Feikens terminated that authority in January 2006.²⁰

Reviewing the 27 years between the first order appointing a special administrator and the end of the second order, it is fair to say that not one of the three mayors used his extraordinary powers to ensure DWSD was capable of “long-term, sustained, reliable compliance.”

Moving the clock forward to 2010, MDEQ was prompted to undertake a comprehensive review of DWSD’s operations after several permit violations that began in the fall of 2009. MDEQ found DWSD’s biosolids handling and disposal operation limping along. DWSD’s difficulties in

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Order Continuing Special Administratorship for the Detroit Water and Sewerage Department, Dkt. 1728 (Dec 4, 2001).

²⁰ Opinion and Order Denying Oakland County’s Motion to Replace DWSD’s Court Appointed Special Administrator for Lack of Justiciability, Dkt. 1872 (Jan 6, 2006).

handling biosolids had caused and promised to continue to cause permit violations. MDEQ began discussions with DWSD with regard to steps to be taken to address the situation. Such was the state of affairs when Judge Feikens retired and Judge Cox began with the expressed goal of closing the case within six months. It appeared that the MDEQ/DWSD negotiations would produce an Administrative Consent Order that would cure Detroit's immediate compliance problems, but would not and could not correct the long term issues impacting sustainability. However, Judge Cox also required a comprehensive review of the causes of DWSD's noncompliance and the changes needed to insure long-term, sustained, reliable compliance. The reports he received from several independent efforts were "déjà vu all over again."²¹

In this same period, Detroit having negotiated an ACO with MDEQ, moved to dismiss the 1977 Sewer Case, arguing it had achieved compliance. Macomb and Oakland Counties objected strongly on the grounds that the inherent problems underlying DWSD's compliance problems had not been addressed. Judge Cox reached the same conclusion. Fate provided the final nail in the coffin—several permit violations occurred during the pendency of Detroit's motion. Needless to say, the motion to dismiss the case was denied.

In denying the motion, Judge Cox provided a comprehensive history of Detroit's compliance problems and their repeated causes.²² His summary of the "root causes" of noncompliance are worth quoting in full to give a sense of the scope of management and political failure:

These experts that have studied the DWSD have consistently, over many years, opined that the same root causes are an obstacle to compliance with the DWSD's NPDES permit, the remedial orders agreed to in this case, and the Clean Water Act: (1) the DWSD having an insufficient number of qualified personnel at the WWTP; (2) excessive and unnecessary delays in hiring qualified personnel across all job positions at the DWSD; (3) the DWSD's required use of the City's Human Resources Department, resulting in significant delays in filling critical positions at the DWSD; (4) the City's personnel policies, civil service rules, and union rules and agreements, restricting the compensation, recruitment and prompt hiring of necessary personnel at the WWTP; (5) insufficient training of personnel at the DWSD and WWTP; (6) lack of a succession plan at the DWSD; (7) obsolete job descriptions and qualifications for various positions within the DWSD; (8) untimely and inadequate purchasing of necessary equipment and supplies for the WWTP; (9) excessive delays in the processing of purchase requisitions for critical repair and/or replacement parts; (10) the City's flawed purchasing practices and procedures; (11) the City's ineffective procurement system; (12) the approval process for purchases over \$25,000, created by the City's Charter and/or ordinances, unnecessarily delaying contracts for essential

²¹The expression is generally attributed to Yogi Berra.

²²Opinion & Order Denying Without Prejudice the City of Detroit's Motion to Dismiss, Dkt. 2397 (Sep 9, 2011).

parts, equipment, and services at the DWSD; (13) the City's bidding and certification requirements, delaying contract approvals; and (14) the DWSD's repeated failure to replace aged and deteriorated capital equipment and to maintain solids dewatering facilities at WWTP.

The EPA and the DEQ have also identified many of these same root causes as impeding compliance. Notably, from the inception of this case in 1977, the EPA voiced its concerns regarding these very same issues. (See, e.g., D.E. No. 1 at ¶ 26) ("the number of personnel employed [at the WWTP] has not been sufficient, personnel are not adequately trained, and purchasing of necessary and required supplies and equipment has not been timely or at an acceptable level. . ."). The DEQ has also identified these same root causes of noncompliance. See, e.g., DEQ's 10/13/10 Response to CAP) (Stating that CAP "failed to adequately address the issues that are critical to ensuring long term compliance such as staffing, purchasing, long term solids disposal and maintenance planning."). The Court agrees that these are root causes behind the DWSD's inability to sustain compliance with its NPDES permit, the remedial orders in this case, and the Clean Water Act.

While the DWSD has achieved short-term compliance with its NPDES permits at various times during the course of this action, it has only been able to do so because Judge Feikens used the Court's equitable powers to take actions to temporarily suspend institutional barriers. But even those measures have resulted in what experts have accurately characterized as a 'sine curve of compliance and violations.' (Consensus Action Report at 6). This is demonstrated by the most recent events in this action.

In summary, Judge Cox concluded that

[U]nless more fundamental corrective measures are taken to address the institutional and bureaucratic barriers to sustained compliance . . . the DWSD will remain in this recurring cycle and will never achieve sustained compliance."

....

The Court further concludes . . . that an effective equitable remedy to achieve sustained compliance will require this Court to order structural changes regarding the DWSD that will likely override the City of Detroit's Charter, its local ordinance, and/or some existing contracts. (Emphasis in the original.)

Judge Cox then gave City politicians one more chance to turn the DWSD ship about. He ordered the Mayor, the City Council president, the City Council president pro tem, and a current Water commissioner to meet and confer and within 60 days "propose a plan that addresses the root cause of non-compliance" In making their recommendations the so-called Root Cause Committee "*shall not* be constrained by any local Charter or ordinance provisions or by the

provisions of any existing contract [*i.e.* labor contracts].” (Emphasis in the original.) Judge Cox meant business, warning:

If local officials fail to devise and propose a workable solution to remedy the underlying causes of the recurrent violations of the Clean Water Act in this case, this Court will order a more intrusive remedy of its own.

The Root Cause Report

On November 2, 2011, the DWSD Root Cause Committee (Chris Brown, Detroit COO; Commissioner James Fausone, BOWC; Council President Charles Pugh; President Pro-Tem Gary Brown) tendered its report. Dkt. 2410-1 (Nov. 4, 2011). In concise terms the Committee reported that to ensure long-term, sustained compliance with the Clean Water Act, DWSD needed to become independent of other city departments and city requirements with regard to human resources, contracts and procurement, law, finance, and rates. With Judge Cox’s strong encouragement and the leadership of the Committee’s members, finally the obvious had been stated: without severing DWSD from the mismanagement and dysfunction within the rest of city government, sustained compliance could never be achieved.²³

Judge Cox adopted the Root Cause Committee’s report and Plan of Action.²⁴ However, both the Root Cause Report and Judge Cox’ order made clear that even as DWSD achieved essentially complete operational separation from the rest of city government, DWSD would remain a department of the City of Detroit.

For perhaps understandable reasons, although the Committee identified a variety of root cause impediments presented by existing labor contracts, the Committee “could not agree if the solution to these challenges could/should be left to negotiations or if Court ordered implementation was required.” Judge Cox did not duck the issue. He enjoined all current collective bargaining agreement provisions and work rules that threatened short-term compliance, directed DWSD to negotiate its own labor agreements, and prohibited future labor agreements from containing provisions that threaten long-term compliance.²⁵

The “New” DWSD

While the implications of Judge Cox’s November 4, 2011, order are still being worked out, the ultimate effect of his order is manifest. DWSD has made great progress in establishing its own Finance, Law, Information Technology, and Human Resources departments. The Board “celebrated” the New Year in 2012 by hiring a new director, Sue McCormick, the first director

²³ The reader is encouraged to read Emergency Manager Orr’s Proposal to Creditors, *supra* note 3, and Detroit’s petition for bankruptcy, filed in U.S. Bankruptcy Court on July 18, 2013, to get fuller flavor of the dysfunction. See also Report of the Detroit Financial Review Team [to Governor Snyder](Feb 19, 2013) (“The City Charter contains numerous restrictions and structural details which make it extremely difficult for City officials to restructure the City’s operations in any meaningful and timely manner. These restrictions . . . make it all but impossible to restructure municipal services).”

²⁴ Order, Dkt. 2410 (Nov 4, 2011).

²⁵ *Id.*

actually hired and directed by the Board. Formerly the director of Public Services for Ann Arbor, she has filled the positions of corporate counsel, chief financial officer, chief operating officer, and chief IT officer—all accomplished in close consultation with the Board. DWSD has negotiated its own collective bargaining agreements with about half of its bargaining units. As noted above, the BOWC now has new commissioners, a committee structure, and financial and technical staff for assistance.

In the spring of 2012, DWSD engaged EMA, Inc. to recommend how to streamline DWSD's operations. EMA's initial assessment presented in August 2012 drew headlines when EMA estimated that over 5 years, the DWSD's work force could be reduced from 2,000 employees to fewer than 400. (Note: EMA's report also called for outsourcing non-core functions consisting of hundreds of jobs.) Job classifications could be reduced from 257 to 31. EMA estimated that streamlining could save over \$100 million per year with cumulative savings over 10 years of nearly \$1 billion.²⁶ Although City Council refused to approve a follow up contract to implement the proposed streamlining project in order to protect 1,500 union jobs, the BOWC used its authority to approve contracts involving less than \$2 million to continue the work.

Preliminary results from EMA's ongoing work are encouraging. EMA uses a group-facilitated process involving employee volunteers to review current job descriptions and duties and to help rewrite job classifications, duties, and activities. In the case of the WWTP, the employees' initial evaluation was that daily operations could be accomplished by about 140 employees, down from the 650 at the plant today. The streamlining relies on supporting investments in software and automation. Although only time will tell whether EMA's predicted reductions in workforce can be achieved, it is clear that very large reductions are possible. It is particularly notable that this streamlining is in large part a product of the input of DWSD's employees—clearly a long untapped resource.

The “Next” DWSD

Judge Cox directed the Root Cause Committee to continue to work on implementation of the recommendations in its report. Their efforts continued into 2013.

The Root Cause Report had identified a need for some of the savings resulting from a new DWSD to flow back to the City. In its final report to the Court, the Committee returned to the question of DWSD's autonomy from Detroit and the creation of a revenue stream.²⁷ The Committee reported that the State treasurer was of the opinion that DWSD was a valuable asset that could be used to generate income for Detroit, thereby addressing the city's financial problems. Further, the report noted that the City had retained various investment advisors, indicating the City's interest in generating a revenue stream from DWSD. Sensing what was in the wind, the Committee concluded that:

²⁶ DWSD, Report to EMA (Aug 8, 2012).

²⁷ DWSD, Root Cause Committee Final Report (Mar 13, 2013); Dkt. 2526-7.

In light of the current dialog about the City obtaining value for DWSD, and the ongoing barriers to achieving long-term compliance, the Root Cause Committee supports as the best option . . . the exploration of a more autonomous DWSD operational model that would be designed to provide a recurring revenue stream to the City of Detroit, enhance DWSD's operational and legal independence from city, better insure compliance and preserve the City of Detroit's long- term ownership of the system.

The Committee recommended that two independent authorities be established, one to hold the assets of DWSD as, in effect, a trustee for Detroit, and a second operating authority to operate the system. The proposal contemplated that the operating authority would have control over and operate the assets to provide water and sewer services and would pay the holding authority for the use of the assets. Several theories have been suggested as supporting such payments including a payment in lieu of taxes (commonly referred to as a "PILOT" charge)²⁸ or a capital lease. As a separate entity, the operating authority would not necessarily be bound by *Bolt v. City of Lansing* (see discussion below). The holding authority would pass those payments to Detroit. The proposal further contemplated that the operating authority would look like the current BOWC. The Committee estimated the revenue stream could vary from \$15 million to \$70 million per year, financed by operating savings and reduced borrowing costs.

At the same time, Judge Cox was evaluating DWSD's progress in separating administratively from Detroit while achieving compliance with its permit. No doubt, he also considered the implications of the appointment of an emergency manager for Detroit. At the end of March 2013 he concluded the DWSD was in substantial compliance with its permit and that sufficient progress on separating DWSD had occurred. He dismissed and closed the case on March 27.²⁹ However, the case continues. An order by Judge Cox had been subject to an interlocutory appeal and shortly after Judge Cox closed the case, the Sixth Circuit reversed the appealed order and remanded the underlying issue (the right of a union to intervene in the case) for further consideration. In addition, the City Law Department filed an appeal of a number of rulings which, with the closing of the case, had become final and ripe for appeal. There are now interesting questions as to whether jurisdiction in the case lies in the district court or court of appeals. Regardless, it is likely that Emergency Manager Orr and not a federal judge will control any further reorganization of DWSD.

Emergency Manager Orr is giving the Committee's proposal for a separate DWSD authority careful consideration and, at least for now, has made a "Metropolitan Area Water & Sewer Authority" (Authority) part of his Proposal to Creditors where the Committee's concept is

²⁸The ability of a municipality to charge a tax exempt utility for services that would otherwise be supported by property tax payments is recognized in *Chocolay Twp. v. Marquette*, Michigan Court of Appeals Case No 90424 (Aug 12, 1988); *County of Oakland v. City of Detroit*, 81 Mich App 308, 312 (1978); OAG 1975-76, No. 5050, p 624.

²⁹ Opinion & Order Terminating Second Amended Consent Judgment and Closing This Case, Dkt. 2528 (Mar 27, 2013).

fleshed out in more detail.³⁰ The Proposal to Creditors cautions that “Any transaction would be contingent upon the City and relevant third parties reaching agreement on many matters, including, but not limited to, governance, amounts to be paid to the City, and the terms and conditions of such transaction.” The payment stream resulting from concession or lease payments by the Authority would be unrestricted and could be encumbered or otherwise monetized. The Proposal to Creditors does not estimate the amount of a possible revenue stream.

A new revenue stream from a new Authority could make a substantial difference to creditors. The Proposal to Creditors estimates that after streamlining, the City may have a cumulative budget surplus of \$800 million over 10 years that could be used to pay current creditors, not counting any revenue stream from the Authority. That is all the City would have to pay estimated unsecured claims of \$11.5 billion.³¹ That is less than the 10 cents on the dollar frequently bandied about in the press. Against this background, the additional revenue stream from a regional water and sewer authority could make a relatively big difference to unsecured creditors.

Kyriakopoulos provided a good summary of one of the current legislative proposals that have been made.³² Those proposals may not be necessary. There is already a statute under which a regional water and sewer authority could be established, Municipal Sewage and Water Supply Systems.³³ This statute is flexible as to bylaws and organizing documents. Further, unlike the recent legislative proposals, the Root Cause Committee’s concept preserves the present balance of power and leaves the suburban power of appointment with the elected officials who have exercised that power for many years. Their staffs are most familiar with DWSD and its operating and financial challenges. These elected officials led the recent reform of the BOWC and can rightfully claim substantial credit for DWSD’s about face. The foregoing does not denigrate in any way Mayor Bing and Judge Cox’s indispensable roles in the change that has occurred.

Objections to an Independent Regional Authority

As postulated in the Proposal to Creditors, a regional authority would look much like the new DWSD, but would be completely independent of Detroit. Complete separation would eliminate all remaining administrative and operational inefficiencies inherent in status as a department of Detroit. It is expected that an independent metropolitan authority would also enjoy significantly improved bond ratings so its debt could be refinanced at more attractive interest rates, reducing overall debt service.

³⁰ Proposal to Creditors, *supra* note 3, at pages 83-86.

³¹ *Id.* at pages 98-99.

³² Kyriakopoulos, *supra* note 1, at page 23.

³³ 1955 PA 233, MCL 124.281 *et seq.*

DWSD as an Income Producing Asset of the City

A variety of concerns have been raised related to separating DWSD into an independent regional authority. First and foremost is that DWSD is a valuable asset of Detroit and that regionalization of DWSD would deprive DWSD of that value. Although there are divergent views about who has made the investment in DWSD's assets, it is clear that DWSD in its present form as a city department is not an asset that produces income to support other municipal services. There are two ways to view Detroit's investment in DWSD. In the conventional view, Detroit is akin to a landlord of a building who uses rent revenue to improve his building. Regardless of the fact that improvements to the building were paid for with the tenant's rent, the landlord, not the tenant, owns the improvements. Thus, although rates from suburban ratepayers have paid for a substantial part of DWSD's capital assets, they are nonetheless owned by Detroit and the suburbs have no right or interest in their disposition.

But at least some of the public debate has been about whether the transfer of ownership or control of the water and sewer system will deprive "Detroiters" of something that they invested in. When viewed from the equitable perspective of "Who has paid?" one can reach a different answer to the question whether the suburbs have some interest in DWSD. In the case of the sewer system, the City's general fund investment (*i.e.*, funds generated from tax revenues) in the sewer system was repaid by DWSD to the City in installments between 1970 and 1975 at the City's initiative and in an amount (\$15,279,000) determined by its auditors.³⁴ Thus, starting in 1976, Detroit has not supported the sewer system with tax revenues and, from this viewpoint, Detroit taxpayers have no investment in the sewer system. Since then, all of the sewer assets have been paid for by government grants or by the ratepayers. And, as noted above, 50% of the ratepayers live outside Detroit. For all intents and purposes, the story on the water side is the same. Although the City's early investment from tax revenues in the water system has never been paid back, the billions spent since the mid-1970s to expand, upgrade, and improve the water system came from grants and the ratepayers as well. Further, most of the water assets paid for with tax revenues have been fully depreciated and most have been replaced. Thus, the Detroit taxpayer investment in the water system is now negligible. In recent years, most of the water revenue and, hence, most of the investment in water assets, has come from ratepayers outside of Detroit.

In deciding DWSD's future, if Emergency Manager Orr must consider the interests of those "who paid for the DWSD system," he must attend to the concerns of suburban as well as city ratepayers.

But the real question is not who paid for the system, but whether DWSD as a city department is of financial value to the City.

As a matter of law, DWSD as a city department may not use rate-generated revenue to supplement the City's general fund. Under Michigan statutory law governing governmental

³⁴ Correspondence, Charles Scales, Deputy Director, DWSD to BOWC (Aug 18, 1975).

accounting³⁵ and Michigan's common law of taxation,³⁶ government-operated utilities such as DWSD must maintain their funds on a "utility" or "enterprise fund" basis separate from the municipality's general funds, just as if the municipal utility were a stand-alone private company, and rates must correspond to the cost of the services provided. Revenue generated from rates and charges in excess of expenses (what might be described as profit in a private entity) may *not* be distributed to the municipality for use as general revenue because if such excess rates were used in that fashion they would be deemed taxes as a matter of law.³⁷ However, to the extent the municipality provides services to its utility (e.g., the legal services, human resources services, etc.), it may charge the "utility" for associated costs,³⁸ and vice versa, if the "utility" provides services to the municipality (e.g., provides water or sewer services), it must charge the municipality the associated cost.

Further on the sewer side of DWSD, under longstanding rate settlements DWSD has a "Look Back" procedure in which, conceptually, any excess revenue from any customer from one rate year is offset by a corresponding credit to that customer in a subsequent rate year. Likewise revenue shortfalls in one year are offset by a compensating charge in a later year. While the Look Back process is complicated in application, it has the effect of preventing DWSD from keeping any "profit" it might make on sewer services.

There is a temptation, acute in times of shortfalls in general tax revenues, to shift municipal expenses inappropriately to the "utility." This tension is experienced to a greater or lesser degree in most municipalities that provide utility services. During the Kilpatrick era, the BOWC was ill-equipped to detect or prevent the Mayor's unlawful manipulation of DWSD procurement practices, which practically amounted to a raid on DWSD's revenues. Additionally, Detroit's suburban customers successfully challenged a number of instances in which City government attempted to improperly shift millions of City costs to DWSD.

In summary, DWSD as a city department does not and may not generate excess revenues to be used by the City as part of its general revenue. Like a Zen koan, DWSD can be of financial value to the City only if the City transfers it away.

Other Concerns Raised by Regionalization

There also is the concern that a regional authority would not be subject to local political control. The past 40 years in DWSD's history show that local political control is no guarantee of a well-run, environmentally sound, or cost effective water and sewer system. City Council's

³⁵ Uniform Budgeting & Accounting Act, MCL 141.421 and the Revenue Bond Act, *supra* note 32.

³⁶ See generally *Merrelli v. St. Clair Shores*, 325 Mich 575 (1959), *Bolt v. City of Lansing*, 459 Mich 152 (1998), and their progeny.

³⁷ *Id.*

³⁸ It is true that DWSD's reimbursement to the City's general fund for services provided covers not only the direct and indirect payroll costs of the employees providing the services but also a portion of the general administrative overhead of the City. While in the short term, separation of DWSD could mean some loss of ability to recover that overhead (absent an agreement otherwise) in the medium term, Detroit's administrative overhead will shrink correspondingly.

recent refusal to approve the EMA streamlining process due to union pressure demonstrates a continuing weakness with the current local political control. In any case, the Proposal to Creditors would not change control of DWSD or its governance. A seven-member board would continue with commissioners appointed as they are today.

Another concern is that the creation of a separate authority would prompt rate hikes. This concern is legitimate regardless who controls DWSD. Over the past 10 years the “old” DWSD raised city and suburban water and sewer rates much faster than inflation. Rates more than doubled while average household income in Detroit plummeted. Four years ago Detroit’s retail sewer rates were so high compared to Detroiters’ average household income that USEPA’s financial hardship policy was triggered and a number of pollution control projects were indefinitely deferred because Detroiters cannot afford their cost. One goal of any restructuring should be to ensure that there is no materially adverse impact on rates. That means there should be an affordability limit on any revenue stream that a DWSD restructuring is expected to generate.

Some suspect that talk of a separate authority is cover for a plan to sell the system to private ownership. All that can be said at this point is that is not the proposal presently put forward by the Emergency Manager.

Water quality concerns have also been raised. There is no evidence that establishing a regional authority will or will not have an adverse impact on water quality. Whoever operates the system, whether a new public authority or a private company, must comply with Detroit’s NPDES permit. The City’s performance running DWSD set so low a benchmark for sustained environmental compliance that any future operator is likely to do a better job. An independent authority, divorced from the root causes of noncompliance, will have a much easier time staying in compliance. Noncompliance is likely to weigh more heavily on a private operator because it is unlikely that USEPA and MDEQ would be as lenient on a private operator with regard to penalties as they have been with the City of Detroit.

The real economic difference to ratepayers between public and private ownership of a water and sewer utility is that under private ownership, a return on investment must be achieved in addition to covering operating and capital costs. A typical business model for a private company is to generate return on investment by taking over inefficiently run publicly owned utilities, streamlining their operations, and generating a return on investment from the operating savings. When the new DWSD has completed its streamlining process, there may be little inefficiency remaining that could be squeezed out by a private operator to fund return on investment. Thus return on investment may need to come through additional rate increases. With Detroit’s bankruptcy filing on July 18, 2013, future developments regarding a regional authority will play out in bankruptcy court. Like a good mystery novel, there will be confusion and false leads along the way. We will have to wait to the final chapter (one after Chapter 9) to see how it actually turns out.

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A New Constitutive Commitment to Water

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A NEW CONSTITUTIVE COMMITMENT TO WATER

SHARMILA L. MURTHY*

Abstract: Cass Sunstein coined the term “constitutive commitment” to refer to an idea that falls short of a constitutional right but that has attained near-constitutional significance. This Article argues that access to safe and affordable water for drinking, hygiene, and sanitation has attained this status and that national legislation is needed to realize this new constitutive commitment. Following the termination of water to thousands of households in Detroit, residents and community organizations filed an adversary complaint in Detroit’s bankruptcy proceedings seeking a six-month moratorium on the disconnections. The bankruptcy court dismissed the case, accurately finding that “there is no constitutional or fundamental right either to affordable water service or to an affordable payment plan for account arrearages.” The widespread protests and outrage at the Detroit water shutoffs suggest, however, that people perceive access to water as a right. Although affordable access to water for essential needs falls short of a constitutional right, it *could* implicate substantive due process, which reflects its near-constitutional status. An analysis of American history, culture, and law demonstrates how access to water for drinking, hygiene, and sanitation could be protected under the right to life. This Article argues that legislation is needed to implement a new constitutive commitment to water and proposes numerous policy options that would not only make moral and economic sense, but also would ensure that all Americans have affordable access to safe water for drinking, hygiene, and sanitation.

INTRODUCTION

Does the United States Constitution limit a city’s ability to terminate its citizens’ access to water for essential needs? As long as some minimal procedures are in place, the answer is no. A constitutional right to affordable water

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