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BOROUGH OF MADISON AND BOROUGH OF CHATHAM Petitioners, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND NEW JERSEY INFRASTRUCTURE BANK, Respondents.	)	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT. NOs.: EER 03753-21, BIB 03757-21 AGENCY DKT. NOs.: 20-01/S340715-07A & S340715-07B

This Order addresses the appeal of the October 2, 2020, letter from the New Jersey Department of Environmental Protection (Department or DEP) and the New Jersey Infrastructure Bank (I-Bank) (collectively, Respondents) indicating the applicable operative date for and the long-term funding ratio of any future long-term loans received by the Borough of Madison (Madison) and Borough of Chatham (Chatham) (collectively, Petitioners), which together make up the Madison-Chatham Joint Meeting (Joint Meeting),[1] for capital upgrades to the Joint Meeting's Molitor Water Pollution Control Facility (Molitor Facility).

[1] The Joint Meeting is a public entity organized pursuant to N.J.S.A. 40:63-68 et seq. to provide, maintain, and operate a sewerage system and treatment facility for Madison and Chatham. Each Borough owns and maintains its

On March 17, 2022, Administrative Law Judge (ALJ) Gail M. Cookson issued an initial decision denying Petitioners' motion for summary decision and granting Respondents' cross motion for the same. ALJ Cookson found that Respondents' October 20, 2020, decision letter correctly set forth the long-term funding ratio for Petitioners' future long-term loans. The governing laws and pertinent program documents clearly established that Petitioners were entitled to 50 percent zero-interest DEP loans and 50 percent interest-bearing I-Bank loans for their long-term loans.

For the reasons set forth below, the Initial Decision granting summary decision in favor of Respondents and denying summary decision in favor of Petitioners is ADOPTED as MODIFIED below.

FACTUAL AND PROCEDURAL BACKGROUND

I ADOPT the ALJ's recitation of the facts as MODIFIED below and recount only those facts necessary for this decision.

The Federal Clean Water Act (CWA) at 33 U.S.C. § 1381 permits the U.S. Environmental Protection Agency (USEPA) to provide capitalization grants to states to accomplish the objectives, goals, and policies of the CWA. Pursuant to the New Jersey Water Pollution Control Act at N.J.S.A. 58:10A-5(e), DEP is authorized to administer the State Revolving Fund (SRF) Program, with respect to the application, receipt, and management of the capitalization grants from USEPA. New Jersey receives and distributes these grant funds through the New Jersey Environmental Infrastructure Financing Program (Water Bank Financing Program). The Water Bank Financing Program is administered collaboratively by Respondents to provide low-cost financing for projects that help protect and improve water quality and help ensure safe and adequate drinking water. The

respective sewer collection facilities, while the Joint Meeting owns, operates and maintains the Molitor Water Pollution Control Facility.

Water Bank Financing Program finances projects by utilizing two funding sources: (1) I-Bank issues revenue bonds which are used in combination with zero percent interest funds to provide low interest loans for water infrastructure improvements; and (2) DEP administers a combination of SRF capitalization grants, as well as the State's matching funds, loan repayments, State appropriations and interest earned on such funds.

Each year, in accordance with the CWA, DEP is required to develop and later submit to USEPA for approval: (1) an Intended Use Plan (IUP) documenting how the State will use the funds from USEPA; (2) a Proposed Priority System establishing a ranking methodology to evaluate the impact of potential projects on water use and quality; and (3) a Project Priority List enumerating projects eligible for funding based on their Proposed Priority System scores. 33 U.S.C. § 1386(c). The Proposed Priority System, IUP, and Project Priority List are the subject of at least one public hearing and one public comment period. N.J.A.C. 7:22-3.7(b) and 4.7(b). DEP publishes them, after which it submits the IUP, containing the final Priority System and the Project Priority List, to the USEPA for approval. N.J.A.C. 7:22-3.7(a); 33 U.S.C. § 1386(c).

To accomplish this, the New Jersey Infrastructure Trust Act (Trust Act), N.J.S.A. 58:11B-1 et seq., requires that DEP set forth a Clean Water Project Priority List (Priority List) for funding of wastewater projects in particular by the Water Bank Financing Program each ensuing fiscal year. The Priority List includes the aggregate amount of funds of the Water Bank Financing Program to be authorized for these projects. On or before January 15 of each year, DEP must submit the Priority List to the State Legislature (January Report). N.J.S.A. 58:11B-20(a)(1).

DEP is also required by the Trust Act to set forth a Clean Water Project Eligibility List (Eligibility List) for long-term funding by the Water Bank Financing Program for wastewater projects. N.J.S.A. 58:11B-20(a)(2). The Eligibility List consists of projects from the Priority List

that have (1) construction contract certification from DEP; (2) commenced construction; and (3) demonstrated a high likelihood of construction completion on or before the end of the ensuing fiscal year. Ibid.

In addition to the January Report, the Trust Act requires that DEP and I-Bank submit the Eligibility List and a financial plan (Financial Plan) to the State Legislature on or before May 15 for the ensuing fiscal year. N.J.S.A. 58:11B-20 and 21. The Financial Plan must set forth, among other things, the terms and conditions of short- and long-term financing by which qualifying Water Bank Financing Program projects, as set forth in the January Report, will be financed. N.J.S.A. 58:11B-21. The Financial Plan is designed to implement financing of projects on (1) the Priority List, which may be identified for a short- or long-term loan in the future; and (2) the Eligibility List, which have been identified for a long-term loan. The annual Financial Plan establishes the obligations of the Water Bank Financing Program for the coming year, including "a list of loans to be made to local government units or private persons," which in turn includes "the terms and conditions thereof and the anticipated rate of interest per annum." Ibid..

After a project is listed on the Priority List, DEP must certify a project as eligible before an applicant may receive a short-term loan from the Water Bank Financing Program. N.J.S.A. 58:11B-9(d). The Water Bank Financing Program's short-term loan program is structured as a note purchase program whereby the borrower issues, and the I-Bank purchases, a promissory note, which establishes and secures the borrower's loan repayment obligation to I-Bank (Short-Term Program). A borrower is not required to pay principal or interest, if applicable, until the short-term loans are converted to long-term loans. The amounts of the short-term loans are generally rolled into the borrower's long-term loans. The long-term financing is structured as two long-term loans,

memorialized in two, separate loan agreements: a zero-interest DEP-sourced loan (DEP Loan) and an interest-bearing I-Bank-sourced loan (I-Bank Loan).

In October 2018, Petitioners sought loans from the Water Bank Financing Program to fund upgrades to the Molitor Facility[2] to address infrastructure, compliance, and reliability concerns (the Project). On March 29, 2019, DEP certified the engineering contract relating to the planning and design of the Project. Petitioners each obtained short-term loans in the form of promissory notes (short-term Notes)[3] after the Project received its engineering contract certification. The short-term Notes represented the contemplated planning, design, and construction costs of the Project. Petitioners' short-term Notes were sourced 100 percent from DEP Loans and thus charged zero interest until July 2021, at which point the I-Bank began sourcing funds from interest-bearing I-Bank Loans. The short-term Notes for both Petitioners contained identical terms in the Definitions Section.

At the time the short-term Notes were issued, long-term loans from the Water Bank Financing Program were typically granted at a ratio of 75 percent zero-interest DEP Loans to 25 percent interest-bearing I-Bank Loans under the existing terms of the 2019 Financial Plan,[4] but the ratio was changed in the 2020 Financial Plan. Public notice of the proposed 2020 change to the funding ratio (from 75 percent zero-interest DEP Loans and 25 percent interest-bearing I-Bank Loans to 50 percent zero-interest DEP Loans and 50 percent interest-bearing I-Bank Loans) was first provided in the IUP dated November 13, 2017. Respondents noticed and held a public hearing

[2] Because the Joint Meeting is not authorized to incur debt in accordance with N.J.S.A. 40-63-68 et seq., and in order that each borough could contribute its respective share, both Madison and Chatham sought loans.
[3] On April 5, 2019, Madison executed a note in the amount of $4,770,000, and Chatham executed a note in the amount of $2,730,000. These Notes represented the contemplated planning, design, and construction costs of the Project.
[4] Financial Plan years refer to the State fiscal year ("SFY"), which begins on July 1 and ends on June 30. N.J.S.A. 52:5-1. SFY2019 was July 1, 2018 - June 30, 2019. SFY2020 was July 1, 2019 to June 30, 2020.

on December 6, 2017, at which the public commented on the proposed change. Petitioners did not attend the hearing or submit comments. On December 19, 2018, DEP posted a notice of an open public comment period and on January 9, 2019, held a public hearing for changes to the Water Bank Financing Program, including to the interest ratio for long-term loans. On March 28, 2019, the 2020 IUP and the Project Priority List were finalized and emailed directly to Petitioners, containing the change to the loan funding ratio for 2020. The change to a 50/50 ratio was made because the changes allow the Program to still offer competitive loan rates and ensure long-term viability for the Water Bank Financing Program.

The January Reports and the Financial Plans for both 2019 and 2020 state that the date of construction contract certification is the operative date for determining the long-term financing terms for a borrower. DEP certified the construction contract for Petitioners' Project in February 2020. Thus, later in February 2020, when Petitioners sought to refinance their short-term Notes into long-term loans after the construction phase of their project had been certified, Respondents applied the terms indicated in their 2020 Financial Plan and updated the ratio to 50 percent zero-interest DEP Loans and 50 percent interest-bearing I-Bank-Loans.

Petitioners challenged the updated ratio, asserting that the terms of their long-term loans should have been determined at the time Petitioners obtained the short-term Notes; that is, at the more favorable ratio of 75 percent zero-interest DEP Loans to 25 percent interest-bearing I-Bank Loans under the 2019 Financial Plan. Petitioners argue that any difference between the terms of the short-term Notes and the long-term loans constitutes a retroactive, unilateral change to a contract by Respondents.

On April 16, 2020, Madison Borough Administrator Raymond M. Codey, Esq. contacted Kerry Kirk Pflugh, the Director of DEP's Office of Local Government Assistance, to inquire

whether the DEP would reconsider and abide by the 75/25 ratio of the loan terms reflected in the parties' agreement in the short-term Notes. On April 16, 2020, Pflugh responded to Codey:

> There have been many discussions in the program on this issue and unfortunately the conclusion remains that [the] Madison and Chatham package will be offered at the 50/50 DEP/I-Bank ratio for the financing of this project and not at the requested 75/25 ratio. The program apologizes for any miscommunication on the policy but any reversal of this policy for Madison/Chatham would have broader programmatic impacts. Many other projects in this exact same position were aware of this policy, understood it and have not objected.

Later, by letter dated October 2, 2020, DEP and I-Bank issued their decision (Decision Letter) in which they concluded that:

> [T]he long-term financing terms that would apply if Applicants' short-term CFP Loans were converted to long-term loans are those stated in the SFY2020 Water Bank Financing Program Documents: 50% low-interest long-term loan from the I-Bank and 50% zero interest long-term loan from the Department. The Water Bank Financing Program Documents are clear that engineering contract certification does not count for establishing the terms and conditions of long-term financing. Rather, construction contract certification is the operative date for setting long-term financing terms.

On October 16, 2020, Petitioners requested adjudicatory hearings through both the Department and I-Bank to contest Respondents' determination in the Decision Letter. The matters were referred to the Office of Administrative Law (OAL) by the Department on April 22, 2021, and by I-Bank on April 23, 2021. The two matters were consolidated at OAL, where it was agreed by Consent Order dated July 2, 2021, that DEP is the agency with the predominant interest in the matter, pursuant to N.J.A.C. 1:1-17.6. On October 21, 2021, Petitioners moved for summary decision and Respondents filed a cross-motion for the same.

Administrative Law Judge (ALJ) Gail M. Cookson issued an initial decision on March 17, 2022, denying Petitioners' motion for summary decision and granting Respondents' cross motion for the same.[5] In the Initial Decision, ALJ Cookson found that Respondents' October 20, 2020, Decision Letter correctly set forth the long-term funding ratio for Petitioners' potential future long-term loans. The funding ratio is strictly dependent on the specific State fiscal year during which a project receives construction contract certification. As such, Respondents were bound by State and Federal law to apply the 2020 Financial Plan terms to Petitioners' long-term loans. The governing laws and pertinent program documents clearly established that Petitioners were entitled to 50 percent zero-interest DEP Loans and 50 percent interest-bearing I-Bank Loans for their long-term loans. The ALJ further found that the language of the 2019 and 2020 Financial Plans, as well as I-Bank's 2019 January Report to the State Legislature[6] did not support Petitioners' claim that the terms of their long-term loans were established in their short-term Notes. And while Petitioners argue that they were never advised that their loan funding ratio would be determined as of the State fiscal year within which their construction contract was certified, Respondents were not required to invite Petitioners to apply for construction certification by a certain date, even assuming Petitioners were ready for such certification. Additionally, the ALJ found that the forms made applicable to all loan applicants do not make the short-term Notes "contracts of adhesion" that must be held against the drafters. The definitions are broad enough to encompass both the 75/25 and 100/0 ratios applicable during the relevant period to the short-term interest rates and Petitioners are sophisticated governmental parties who had experienced counsel. Finally, ALJ

[5] In their exceptions, Respondents request clarification that both parties moved for summary decision. The Initial Decision is clear that "Petitioners submitted a Notice of Motion for Summary Decision and brief with supporting certification…Respondent[s] submitted a Cross-Motion for Summary Decision." I find that further clarification is unnecessary.

[6] REPORT TO THE LEGISLATURE PURSUANT TO P.L. 1985, CHAPTER 334, NEW JERSEY INFRASTRUCTURE ACT (2019)

Cookson concluded that there is no genuine ambiguity in the finance documents and, as such, there is no need to reach Petitioners' argument that the contractual interpretation tools of extrinsic evidence must be used or that any ambiguity must be held "against the drafters."

Respondents submitted timely exceptions on March 30, 2022. In their exceptions, Respondents request clarification on eight separate points of fact in the Initial Decision. Petitioners did not file exceptions. On April 4, 2022, Petitioners requested an extension of time to file a reply to Respondents' exceptions and the Department granted the extension the following day. Petitioners filed their reply on April 26, 2022.

DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. E.S. v. Div. of Med. Assistance & Health Servs., 412 N.J. Super. 340, 350 (App. Div. 2010). When a party moves for summary decision, in order to prevail, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue that can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply "sit on his or her hands," but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is "'sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" Piccone v. Stiles, 329 N.J. Super. 191, 194 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)). And even though the allegations of the

pleadings may raise an issue of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment should be granted. Leslie Blau Co. v. Alfieri, 157 N.J. Super. 173, 201 (App. Div. 1978) (citing Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 75 (1954)). The ALJ's ruling granting summary decision in favor of Respondents, and denying Petitioners' cross motion for summary decision, was appropriate under these circumstances.

ALJ Cookson found, and I concur, that the terms of long-term loans issued through the Water Bank Financing Program, including the funding ratio between DEP Loans and I-Bank Loans, are "strictly dependent on the specific State fiscal year during which the borrower receives the construction contract certification." Initial Decision at 16. Petitioners' short-term Notes make clear that they "shall be governed by and construed in accordance with the laws of the State." MC72.[7] Both the 2019 Financial Plan and the 2020 Financial Plan specifically state that "[f]or Construction Loans issued upon certification of engineering contracts, long-term financing terms are established upon certification of the construction contract." MC135 n.1, 611 n.1. As the Initial Decision correctly recognized, the conversion of short-term Notes into long-term loans required certain "conditions precedent," one of which is construction certification. The clear language of the applicable laws, regulations, and loan program documents establishes that the funding ratio is dependent on the State fiscal year during which the construction contract is certified. Accordingly, I ADOPT the ALJ's conclusion that such terms, including the funding ratio as between DEP Loans and I-Bank Loans, are strictly dependent on the specific State fiscal year during which a project receives construction contract certification. I concur with the ALJ's finding that such laws and documents clearly established that Petitioners were entitled to 50 percent zero-interest DEP Loans and 50 percent interest-bearing I-Bank Loans for their long-term loans.

[7] The appendix presented to the Office of Administrative Law was bates-stamped "Madison-Chatham" on each page. The appendix page numbers are therefore referenced herein as "MC[page number]."

Petitioners are incorrect to suggest that the percentages listed in the definitions section of the short-term Notes constitute a binding term that must be carried over into the long-term financing agreement. ALJ Cookson recognized that the definition sections of Petitioners' Notes, on which Petitioners rely, are simply "boilerplate definitions,"[8] which are "established once a year by the regulatory agencies." Initial Decision at 16; see also [Kaltman Cert. ¶ 9.] The definitions are adopted by the I-Bank's Board of Directors for all short-term notes in a given fiscal year. While the definitions of "Fund Portion"[9] and "I-Bank Portion"[10] in Petitioners' Notes reference a funding ratio (up to 75 percent zero-interest DEP Loans and up to 25 percent interest-bearing I-Bank Loans), Petitioners cannot rely on those definitions to create binding terms for their long-term loans. I concur that Petitioners' Notes are "consistent with the notes used in years prior and subsequent to SFY2019," especially in that they "define[] how interest will be calculated on a short-term note and do[] not address the long-term funding ratio." Initial Decision at 16; see also [Kaltman Cert. ¶ 9] (emphasis added).

Likewise, I ADOPT the ALJ's conclusion that the forms made applicable to all Water Bank Financing Program applicants do not make the Notes "contracts of adhesion" that must be held against the drafters. There is insufficient reason to construe Petitioners' short-term Notes as "contracts of adhesion." In their original cross motion for summary decision, Petitioners assert that "[t]he loan funding ratio is a critical term of the April 5, 2019 [N]otes…which could not be

[8] Respondents take exception with the Initial Decision's characterization of the definitions contained in the Notes as "boilerplate." Respondents argue that the definitions were "standardized definitions used among all short-term notes issued to I-Bank during a given State Fiscal Year." This exception requires no change, given my understanding of the term "boilerplate" and the ALJ's thorough explanation of its reasoning.

[9] "Fund Portion" means, on any date, an amount equal to seventy-five (75%) percent of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, which NJDEP Loan Origination Fee shall be financed exclusively from the I-Bank Portion. MC35, 63.

[10] "I-Bank Portion" means, on any date, an amount equal to the aggregate of (i) twenty-five percent (25%) of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, plus (ii) one hundred percent (100%) of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee. MC35, 63.

retroactively changed by Respondents at a later date as it was intended to apply to both short-term and long-term financing." Petitioners Cross Motion at 19 (citing [Rogut Cert., ¶ 6]; [Rogut Cert., Exhibit B]) (emphasis added). The language to which Petitioners cite is taken from the 2019 January Report, which goes on to clarify: "for example…the State's commitment of long-term funding at the time of certification of each operable project segment." [Rogut Cert. Exhibit B at 6] (emphasis added). The 2019 January Report also clarifies that while a short-term Note can reference "the entire estimated cost of [a] project," the actual "commitment of funds is limited to the approved planning and design costs." [Rogut Cert. Exhibit B at 5] (emphasis added). As noted by ALJ Cookson, the Appellate Division has previously found that an agency's broadly applicable program language should be approached differently than language issued in a commercial contract. See Heaton v. State Health Benefits Com'n, 264 N.J. Super. 141, 151 (App. Div. 1993) (finding that "language following the statute should not automatically be construed against the profferor as a contract of adhesion"); see also Tulipano v. U. S. Life Ins. Co. in City of New York, 57 N.J. Super. 269, 276 (App. Div. 1959). Although the issue has usually arisen in the insurance context, Petitioners' Notes contain similarly standard language.

Further, I ADOPT the ALJ's conclusion that there is no need to reach Petitioners' argument that the contractual interpretation tools of extrinsic evidence must be used or that any ambiguity must be held "against the drafters." Cf. Orange Township v. Empire Mtg. Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001). There was no ambiguity regarding when the long-term funding ratio is established. As explained previously, the program documents, including the 2019 Financial Plan and 2020 Financial Plan, make abundantly clear that long-term financing terms are established at the time of the construction certification. See MC611 ("Long-term financing terms…are established at the time a loan countenances disbursement of construction funds" and

"long-term financing terms are established upon certification of the construction contract" or "upon Construction Loan closing"). The Notes themselves are careful to differentiate the agreed-upon terms of the executed short-term Notes from speculative terms of long-term loans, "which remain 'anticipated' but not yet negotiated, memorialized[,] or funded." Initial Decision at 18; MC21 (repeatedly using the phrase "anticipated" to refer to future financing program and long-term loans). Likewise, the 2019 January Report carefully couches its references to future long-term loans, noting that they are "generally issued upon completion of project construction," that "long-term loans are largely mechanisms to refinance previously issued short term loans for construction and P&D activities," and that "with limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans: for example…the State's commitment of long-term funding at the time of certification of each operable project segment." Initial Decision at 18-19; [Rogut Cert., Exhibit B at 6]; MC358 (emphasis added). By using these "words of generality," the Notes and the 2019 January Report preclude borrowers from inferring any definitive, binding rules that would apply to future long-term loans.

Finally, I ADOPT the ALJ's conclusion that Respondents were not required to invite Petitioners to apply for construction certification by a certain date, even assuming Petitioners were ready for such certification. ALJ Cookson appropriately noted that ample notice was given of the change to a 50/50 ratio in SFY2020. Initial Decision at 20-22. The applicable regulations require that the Respondents note the interest terms in their annual Financial Plan submitted to the Legislature. N.J.A.C. 7:22-4.6(b). The SFY2020 Financial Plan therefore gave notice that the "[Water Bank Financing Program] will offer eligible participants whose projects receive construction certification in SFY2020, fifty percent (50%) market rate loans from the I-Bank in combination with fifty percent (50%) zero percent (0%) interest rate loans from the [NJ]DEP."

MC616. Even in the SFY2019 Financial Plan, the Respondents warned that they expected to return to a 50/50 long-term funding ratio, noting that they were considering a "return to the financing package wherein 50% of the allowable project costs will be provided by the [NJ]DEP interest free and the remaining 50% of project costs will be financed with the [I-Bank] market rate." MC136. There were also multiple public hearings and opportunities for public comment between Respondents' first consideration of the change, contained in an IUP dated November 13, 2017, and the finalization of the change in the SFY 2020 IUP and Project Priority list that were mailed to Petitioners on March 28, 2019. See [Chebra Cert. ¶ 9, Exhibit E.] (proposed changes referenced in 2017 IUP); [Chebra Cert. at ¶¶11-12]; MC525, 544-45 (notice given of proposed ratio change in public comment period beginning December 19, 2018); MC509-510 (letter to Petitioners), 513 (IUP section titled "What's New in 2019"); [Chebra Cert. ¶ 14; Exhibit A, B.]

ALJ Cookson correctly determined that the public notice and comment opportunity afforded by Respondents was more than enough notice of the forthcoming change. "It was always readily determinable, knowledge of which must be assumed or imputed to petitioners, that the construction certification date was the critical moment on the issue of long-term loan finance terms." Initial Decision at 22.

As discussed above, Respondents filed exceptions to the Initial Decision and Petitioners filed a reply.[11] Among Respondents' exceptions[12] to the Initial Decision is the assertion that several facts should be included in the "undisputed facts" section of the Initial Decision, including: (a)

[11] Though Petitioners failed to timely file their own exceptions, Petitioners' reply raises arguments against the conclusions of the Initial Decision, including reiterating their argument that Respondents had unilaterally altered a contract and that the language of the short-term Notes bound Respondents to a 75/25 long-term funding ratio. Under the Uniform Administrative Procedure Rules at N.J.A.C. 1:1-18.4(d), replies to exceptions are permitted only to "address the issues raised in the exceptions filed by the other party" or argue "in support of the initial decision." To the extent Petitioners' arguments fall within the scope of that rule, they are considered and addressed below.

[12] I do not address all of Respondents' eight numbered exceptions. I have omitted those factual concerns raised in Respondents' exceptions that are not material to the ultimate conclusions of the ALJ's Initial Decision.

facts related to the public notice of the changes to the loan interest ratio that was ultimately included in the 2020 IUP; and (b) that the "January Reports and the Financial Plans for both SFY2019 and SFY2020 state that the date of construction contract certification is the operative date for determining the long-term financing terms for a borrower"; I find these facts are supported by the record and uncontested by Petitioners. They have been added to the Factual and Procedural Background above.

Respondents' also assert in their exceptions that the "undisputed facts" section of the Initial Decision should be augmented to include that Petitioners can choose to pay off their Short-Term Notes and seek financing outside of the Water Bank Financing Program for long-term loans. In their reply, Petitioners contest this point. They claim that they agreed to the terms of the short-term Notes only because they believed they could rely on the Respondents to provide subsidized lower interest rates in their long-term financing plans. It is true that short-term loans can be allowed to mature and need not necessarily be rolled into refinancing for a Water Bank Financing Program long-term loan. [Kaltman Cert. at 7]; [Rogut Cert. Exhibit B at 5-6.] However, the issue here is whether the terms included in the Notes are binding on the later long-term loan agreement.

It is not an undisputed, material fact that the Petitioners can seek payment elsewhere because not only is it in dispute, but it is also immaterial to the disposition of this case. Petitioners dispute the treatment of each loan as entirely separate under applicable law. If the funding ratio in Water Bank Financing Program long-term loans is dependent on the terms included in the borrower's short-term Notes, it is irrelevant whether a borrower could theoretically abandon their requests for long-term loans available from Water Bank Financing Program and seek loans elsewhere. Whether Petitioners can pay off the short-term Notes is likewise irrelevant. I therefore

reject the Respondents' suggestion that Petitioners' ability to seek funding elsewhere is an undisputed, material fact.

In their exceptions, Respondents' request modification of paragraph 34 of the Initial Decision. The original paragraph reads as follows:

> On November 4, 2021, petitioners borrowed an additional $2,000,000 from Respondents to finance the Project, bringing the total of the short-term loan to $9,500,000. The principal amount of the Madison loan increased from $4,770,000 to $6,042,000, and the principal amount of the Chatham loan increased from $2,730,000 to $3,458,000. [Supplemental Rogut Cert., ¶ 2, Exhibits 1-4]; [Chebra Cert. ¶ 26.] Such additional monies are needed to complete the Project, which is still under construction. Ibid. As a result, petitioners are not ready to convert their short-term Notes into long-term loans at this time.

Respondents take issue with the "at this time" language, requesting modification to make clear that the Petitioners' projects are now complete and that they can enter their respective long-term loans, should they choose to do so. Petitioners do not dispute this clarification in their reply. I therefore MODIFY the fact section of the ALJ's Initial Decision accordingly.

Respondents' also take issue in their exceptions with Paragraph 41 of the Initial Decision, which addresses the parties' reservation of rights related to the supplemental loans taken out by the Petitioners. Respondents ask that the paragraph be modified to specify the reservation of rights with a quote from their November 4, 2021 letter, and insist that "[t]he parties have not yet formally agreed to continue any reservation of rights under consideration in this dispute." Petitioners contest this exception, also citing to and quoting the November 4th letter. I do not read the Respondents' exception to argue that the reservation of rights under the November 4, 2021 letter has expired. To the extent that is their argument, it is untenable. The parties reserved their rights "pursuant to Borough of Madison and Borough of Chatham v. NJDEP and New Jersey Infrastructure Bank,

OAL Docket No. EER 03753-2021N, now pending before the Administrative Law Judge Cookson." Initial Decision at 14; [Supplemental Rogut Cert. ¶ 3, Exhibit 5.] That reservation necessarily covers this Final Decision as part of those proceedings. Because the November 4, 2021 letter is quoted in the paragraph immediately preceding paragraph 41, I see no reason to repeat the quotation again. However, I MODIFY paragraph 41 of the ALJ's Initial Decision for clarity as follows:

> At the time of their filing before the Office of Administrative Law, Petitioners anticipated that the long-term loans would close in or about June 2022. The parties will continue their reservation of rights under consideration in this dispute in accordance with their November 4, 2021 letter. See [Rogut Cert., ¶ 3, Exhibit 5.]

Additionally, Respondents take exception to the ALJ's characterization that the short-term Notes contain funding ratios. Specifically, Respondents take exception to the ALJ's statement of undisputed material facts, paragraph 32, finding that "Following certification of the Project, [P]etitioners were advised that the 75/25 loan interest ratio established by the Notes . . .". ID at 12; (emphasis added). Respondents assert there was no loan interest ratio established by the short-term Notes, which "only established the potential interest rate for the Short-Term Program Notes." Initial Decision at 17-18 (emphasis added). In their reply to Respondents' exceptions, Petitioners reiterate their contention that the definitions included in the short-term Notes contained a "crucial loan funding ratio that Petitioners relied upon when procuring funding for the project." Petitioners Reply at 2. Petitioners argue that the 75/25 ratio referenced in the definitions would be rendered meaningless if it were only a "potential" interest rate ratio, ibid, and cite to case law interpreting contract terms. This point requires further clarity.

The Initial Decision's characterization of the 75/25 ratio as one "established" in the Notes could more accurately be framed as the ratio "referenced" in the short-term Notes. As explained

above, the Initial Decision is unequivocal in its finding that the short-term Notes are standard forms that are applied to every short-term program participant. Initial Decision at 16-17. The standard forms are updated every State fiscal year. Id. at 17. The definitions section is included in the Notes to ensure that a certain term will have the same meaning for each executed short-term note.

The ALJ correctly found that the standardized definitions section of the Notes cannot support Petitioners' reliance claim—in light of, as discussed below, the carefully couched language in the 2019 January Report, the numerous references to the requirement that the Water Bank Financing Program is subject to regulatory changes, repeated reminders that the terms of long-term financing are established upon certification of a construction contract, as well as the public notice and comment opportunity to challenge the change prior to SFY 2020, there was no reasonable basis to rely on the 75/25 ratio referenced briefly in Petitioners' Notes. As explained in the Initial Decision, "every regulatory document gave notice to petitioners of the trigger that would determine the terms of the long-term loans that were 'anticipated' but not yet executed." Initial Decision at 20. Petitioners were given ample notice of the change and offered no challenge.

Finally, Respondents contend in their exceptions that the ALJ mischaracterized the 2019 January Report when stating the report is "replete with words of generality about anticipated or prospective long-term financing." Initial Decision at 19. Respondents request that the Initial Decision be clarified to indicate the January 2019 Report and other program documents "clearly and specifically" provide the details of long-term financing. Respondents Exceptions at 7. Petitioners reply that such "words of generality" referred to in the Initial Decision in fact support their claim that the ratio referenced in the short-term Notes is binding on the Respondents in their long-term loan financing. Petitioners reiterate that since Respondents drafted the language that "all relevant terms and conditions are established at the time of issuance of short-term loans,"

Respondents' word of generality and failure to indicate the ratio between the DEP Loan and I-Bank Loan must be construed against Respondents. Petitioners Reply at 6. Both parties appear to misunderstand the Initial Decision's analysis.

The ALJ had characterized the 2019 January Report as "replete with words of generality about anticipated or prospective long-term financing." Initial Decision at 19. As explained in more detail previously, the ALJ referred to the language of the 2019 January Report explaining that long-term loans "are generally issued upon completion of project construction" and that program terms and conditions are established at the time of issuance of short-term loans "with limited exception." Initial Decision at 18. These "words of generality" work to preclude a reasonable reader from assuming the loan refinancing process will work exactly the same way every single time. The language is carefully couched to ensure that changes to the Water Bank Financing Program's governing laws and regulations can be accounted for from year to year. The ALJ points to this language as part of sound analysis finding that the Petitioners cannot support their assertion that they were "guarant[eed]" in the terms of the Report "a particular long-term funding ratio." Initial Decision at 19. Likewise, the Notes refer to "anticipated" financing, and "anticipated" long term loans. See MC62, 67.

I find that Respondents' exception and Petitioners' reply in this regard are therefore unpersuasive.

CONCLUSION

Having reviewed the record, for the foregoing reasons I ADOPT as the ALJ's Initial Decision as MODIFIED as set forth above. IT IS SO ORDERED.

Dated: September 12, 2022

Shawn M. LaTourette
Commissioner

BOROUGH OF MADISON AND
BOROUGH OF CHATHAM
v.
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND NEW JERSEY INFRASTRUCTURE BANK

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