



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON CROSS-MOTIONS
FOR SUMMARY DECISION

**BOROUGH OF MADISON AND
BOROUGH OF CHATHAM,**

Petitioners,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION AND
NEW JERSEY INFRASTRUCTURE BANK,**

Respondents.

OAL DKT. NOS. EER 03753-21 and
BIB 03757-21

AGENCY DKT. NOS. 20-01/S340715-07A
& S340715-07B

Bradley D. Tishman, Esq., for petitioners Borough of Madison and Borough of Chatham (Cleary Giacobbe Alfieri Jacobs, attorneys)

Elizabeth Delahunty, Deputy Attorney General, for respondent New Jersey Department of Environmental Protection (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Victoria G. Nilsson and **Jeffrey Padgett**, Deputy Attorneys General, for respondent New Jersey Infrastructure Bank (Matthew J. Platkin, Acting Attorney General of New Jersey, attorney)

Record Closed: March 10, 2022

Decided: March 17, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioners Borough of Madison (Madison) and Borough of Chatham (Chatham) (jointly “petitioners”), that together make up the Madison-Chatham Joint Meeting (“Joint Meeting”), appeal from a decision made jointly by the New Jersey Department of Environmental Protection (“NJDEP”) and the New Jersey Infrastructure Bank¹ (“I-Bank”) on October 2, 2020, not to reconsider and reestablish more favorable interest terms on the anticipated long-term loans, into which current short-term notes will be rolled, to Madison and Chatham for several capital upgrades to the Joint Meeting’s Molitor Water Pollution Control Facility (“Facility”).²

PROCEDURAL HISTORY

Each agency transmitted the petitioners’ appeals to the Office of Administrative Law (OAL), where they were filed on April 22, 2021 (EER 03753-21) and April 23, 2021 (BIB 03757-21), for determination as contested cases and to be considered together pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. I convened a case management conference telephonically on May 27 and June 10, 2021. During those conferences, the Deputy Attorneys General for the NJDEP and I-Bank agreed, without objection from petitioners, that NJDEP had the predominant interest and would take the lead in the case.³ A consent agreement to that effect was thereafter presented to and entered on July 2, 2021.

All parties also agreed that the issues herein could be decided on dispositive motion practice. Accordingly, a briefing schedule was agreed upon, with due

¹ The name of the New Jersey Environmental Infrastructure Trust Act was changed to the New Jersey Infrastructure Trust Act. The Legislature also changed the name of the New Jersey Environmental Infrastructure Trust to the New Jersey Infrastructure Bank. N.J.S.A. 58:11B-1 *et seq.*, P.L. 2016, c. 56.

² As set forth below, while the Facility is owned by the Joint Meeting, that entity cannot by law assume debt, so each of Madison and Chatham are borrowers for the funds needed for the Project.

³ It was stipulated that the two actions, Borough of Madison and Borough of Chatham v. NJDEP, OAL Docket No. EER 03753-2021N, and Borough of Madison and Borough of Chatham v. New Jersey Infrastructure Bank, OAL Docket No. BIB 03757-2021N, would be consolidated into one action and bear the caption: Borough of Madison and Borough of Chatham v. NJDEP and New Jersey Infrastructure Bank, OAL Docket No. EER 03753-2021.

consideration and grant of adjournment requests. Petitioners submitted a Notice of Motion for Summary Decision and brief with supporting certification under cover of August 20, 2021. Respondent submitted a Cross-Motion for Summary Decision and Opposition to petitioners' motion, with brief and supporting certifications on October 21, 2021. Petitioners filed a Letter-Brief in Opposition to respondent's motion and in further support of their own, under cover of November 19, 2021. I permitted a brief reply by the NJDEP under cover of December 10, 2021. Oral argument was deemed to be necessary and was held on March 10, 2022. Accordingly, the cross-motions are now ripe for determination.

MOTION UNDER CONSIDERATION

Petitioners argue that the unilateral change by the I-Bank from a 75% zero interest / 25% low-interest ("75/25") to a 50% zero interest / 50% low-interest ("50/50") long-term loan interest rate ratio after the closing of the short-term loan was unauthorized and/or arbitrary and capricious. They maintain that the anticipated long-term loan terms at the 75/25 ratio were specifically detailed in the fully executed Project documents. Petitioners assert that this unilateral change in the loan terms, which was drafted by the agencies and should be construed against them, will cost both towns over \$1 million in additional interest over the term of said loans.

NJDEP cross-moves for summary disposition on the basis that it and the I-Bank correctly set the separate and distinct loan financing rate for the long-term loan on the basis of the then-applicable State fiscal year 50/50 ratio, as evidenced by the law, the program documents, and the loan notes. It opposes petitioners' motion because nothing contained in the short-term notes guaranteed or promised the long-term financing terms that petitioners are now asserting. This is a matter of uniform application of statute and regulations, and not a private contract dispute.

STATEMENT OF UNDISPUTED MATERIAL FACTS⁴

1. The Joint Meeting is a public entity organized pursuant to N.J.S.A. 40:63-68 et seq. as a public body corporate and politic, duly created and validly existing pursuant to the laws of the State.

2. The Joint Meeting is an entity that exists to provide, maintain, and operate a sewerage system and treatment facility for Madison and Chatham; however, it is not authorized to incur debt obligations. [Certification of Steven L. Rogut (“Rogut Cert.”), ¶ 2; MC⁵ 7-8; MC 19-20].

3. Each Borough owns and maintains its respective sewer collection facilities, while the Joint Meeting owns, operates and maintains the Molitor Water Pollution Control Facility (“Facility”) and trunk sewer. [MC 92].

4. To address aging infrastructure, reduce the chemical cost of complying with new effluent limits for total phosphorus, and to enhance the reliability of permit compliance and resiliency at the current permitted flow, the Joint Meeting proposed several upgrades to the Facility, including replacement of the mechanically cleaned influent screen, primary effluent pumps, oxidation channel aerators, grit removal equipment, reroofing two existing buildings, construction of a new effluent filtration facility with low-lift pumps, and installation of a second belt filter press (“Project”). [MC 47; MC 75; MC 93; MC 572].

5. Pursuant to the Water Pollution Control Act, N.J.S.A. 58:10A-5(e), NJDEP is the State agency responsible for the management and administration of the State Revolving Fund (“SRF”) Program, with respect to the application, receipt, and management of federal capitalization grants from the United States Environmental Protection Agency (“USEPA”). [Certification of Eugene Chebra (“Chebra Cert.”) ¶ 3.]

⁴ While many of these enumerated statements contain legal references, nevertheless, they form the factual framework for this controversy. Nothing is intended by their location under this heading.

⁵ “MC ##” refers to documents presented by the NJDEP in a three-volume Appendix that have been Bates stamped “Madison-Chatham ##.”

6. I-Bank was constituted pursuant to the New Jersey Infrastructure Trust Act, N.J.S.A. 58:11B-1 to -27 (“Act”). I-Bank is an instrumentality of the State in, but not of, the Department of the Treasury, and is authorized to make loans in order to finance the construction of eligible environmental infrastructure projects. N.J.S.A. 58:11B-5(m)(1)-(3).⁶

7. The SRF Program is a federal-state partnership providing low-cost financing for a range of water quality infrastructure projects throughout the State. Under an Operating Agreement with the USEPA, the State, through NJDEP, has developed and implemented SRF regulations and procedures to meet the requirements of the federal Clean Water Act (“CWA”). 33 U.S.C. §§ 1251-1387. [Chebra Cert. Exh. C.]

8. The State, through NJDEP, is also required to annually develop an Intended Use Plan (“IUP”), in accordance with CWA requirements, documenting how the State will use the federal funds, establish Project Priority Lists, and ultimately review and approve projects for funding. N.J.A.C. 7:22-3.7(a), -4.7(a); 33 U.S.C. § 1386(c).

9. NJDEP and I-Bank collaborate to administer the New Jersey Environmental Infrastructure Financing Program (“NJEIFP”), which provides low cost financing packages for environmental infrastructure clean water projects. The relative roles and responsibilities of NJDEP and I-Bank are set forth in an Interagency Agreement. [Chebra Cert. ¶ 4, Exhibit D; MC 345.]

10. The main objectives of the NJEIFP are to:

⁶ See also N.J.S.A. 58:11B-2, which provides in pertinent part –

[T]he United States Congress in recognition of the essential role that safe drinking water plays in protecting the public health, and with an understanding that financing, constructing and maintaining water systems that meet the requirements of the “Safe Drinking Water Act,” 42 U.S.C. § 300f et seq. exceed the financial and technical capacity of the operators of some water systems, has established in the “Safe Drinking Water Act Amendments of 1996,” P.L.104-182, a program to provide public water systems with financial assistance to meet national primary drinking water regulations or to otherwise further the health protection objectives of the federal law and that the State must, in order to make use of the federal funds, provide State funds for the program; and therefore, State funding for the program is necessary to meet this financial obligation.

- a. Provide capital for water and wastewater infrastructure renewal to protect public health and the environment for multiple generations of New Jersey citizens;
- b. Continue serving as the Garden State's premier source of environmental infrastructure financing through self-sustaining, efficient and transparent programs;
- c. Establish and efficiently manage a permanent source of funding for clean water and drinking water infrastructure projects;
- d. Provide project financing at a much lower cost than program participants could achieve individually thereby passing substantial savings on to New Jersey taxpayers and rate payers; and
- e. Increase access to capital markets for those participants that find it difficult or expensive on their own, due to lower credit ratings or a lack of familiarity with debt financing.

[MC 354]

11. Thus, each fiscal year⁷, NJDEP develops (1) a Proposed Priority System, (2) an IUP, and (3) a Project Priority List, which establish the funding policies of the NJEIFP. 33 U.S.C. § 1386(c); N.J.S.A. 58:11B-20(a); N.J.A.C. 7:22-3.7 and -4.7. [MC 499; Chebra Cert. ¶¶ 4-6.]

12. 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). NJDEP publishes them, after which, the agency 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). [Chebra Cert. ¶ 5.]

13. After a project is listed in the January Report priority list, the NJDEP must certify a project as eligible before an applicant may receive a short-term loan from I-Bank. N.J.S.A. 58:11B-9(d). Pursuant to N.J.S.A. 58:11B-9(d), I-Bank is authorized to enter into short-term or interim loans for projects identified on the Interim Clean Water Financing Program Project Priority List and "eligible for approval" under N.J.S.A. 58:11B-20 and 58:11B-9(d). See also N.J.S.A. 58:11B-20 (discussing the "Interim Clean

⁷ The State Fiscal Year runs from July 1 through 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.

Water Financing Program”).

14. NJDEP must develop a clean water project eligibility list for long-term funding by the Water Bank which includes the aggregate amount of funds to be authorized for these purposes. The projects must have construction contract certification from NJDEP, have commenced construction, and have a high likelihood of construction completion on or before the end of the ensuing State fiscal year. N.J.S.A. 58:11B-20(a)(2).

15. On or before May 15 of each year, I-Bank must submit the clean water project eligibility list for the ensuing State fiscal year to the State Legislature for consideration for inclusion in appropriation bills. Id. In addition, on or before May 15 of each year, I-Bank must submit to the State Legislature a financial plan (the “Financial Plan” or the “May Report”) designed to implement financing of projects on (1) the clean water project priority list, which may be identified for a short-term loan or a long-term loan in the future, and (2) the clean water project eligibility list, which have been identified for long-term funding. N.J.S.A. 58:11B-20 and -21.

16. The short-term 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”). [Certification of Lauren Kaltman (“Kaltman Cert.”) ¶ 8.] A borrower is not required to pay principal or interest (if applicable) until conversion to long-term financing. [MC 135.] These amounts are generally rolled into the borrower’s long-term NJEIFP loans. [Ibid.]

17. The long-term financing is structured as two long-term loans, memorialized in two, separate loan agreements: a zero-interest NJDEP Fund Loan and an interest-bearing I-Bank (“Trust”) Loan. [MC 146, 155-157, 164-166, 616-617, 625, 627.]

18. In 2018 and 2019, petitioners sought short-term financing in order that each borough could contribute towards their respective share for the Project. [Rogut Cert., ¶ 7; MC 117].

19. On April 5, 2019, Madison executed a note in the amount of \$4,770,000 (MC 4), and Chatham executed a note in the amount of \$2,730,000 (MC 16) (collectively the “Notes”). These Notes represented the contemplated planning, design, and construction costs of the Project. [Rogut Cert., ¶ 8, Exhibits C & D; MC 34-88.]

20. The April 5, 2019 Notes contained identical terms in the Definitions Section. [Rogut Cert., Exhibits C & D.]

21. “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. [MC 35, 63.]

22. “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. [Ibid.]

23. Petitioners’ Notes were sourced 100% from DEP funds and thus charged zero interest until July 2021 when the I-Bank began sourcing funds from interest-bearing funds. [Kaltman Cert. ¶ 22.]

24. “Interest” is defined in each of the Notes as “the interest charged on the outstanding Principal of the Loan at a rate of (a) with respect to the I-Bank Portion of the Principal, the applicable I-Bank Portion Interest Rate and (b) with respect to the Fund Portion of the Principal, 0.00% and payable by the Borrower to the I-Bank (i) on the Maturity Date or (ii) with respect to any optional prepayment or acceleration of the Loan

pursuant to the terms of this Note, on the date of such optional prepayment or acceleration, as the case may be.” [MC 36, 64.]

25. “Maturity Date” is defined in each note as “April 5, 2021, or (i) such earlier date as shall be determined by an Authorized Officer of the I-Bank in his or her sole discretion, which date shall be determined by such Authorized Officer of the I-Bank to be the date of the closing for the Anticipated Financing Program (subject, in all events, to the rights and remedies of the I-Bank pursuant to, respectively, the provisions of Section 6 hereof and the provisions of Section 7 hereof in furtherance of the enforcement by the I-Bank of all covenants obligations of the Borrower hereunder, including, without limitation and in particular, the covenant obligation of the Borrower set forth in Section 3(a) hereof), or (ii) such later date (subject to the then-applicable limits of the Act) to be determined by an Authorized Officer of the I-Bank in his or her sole discretion, pursuant to a written certification thereof, as acknowledged and approved by an Authorized Officer of the Borrower.” [Ibid.]

26. A borrower requisitions draws against the Note, which are limited to allowable amounts, as evidenced by supporting exhibits reflecting either planning and design expenses or approved construction expenses of the eligible projects. [MC 357, 765; e.g., MC 46-60, 74-88.] In this case, petitioners began to receive funding for the planning and design phase in April 2019, after engineering contract certification, and construction phase funding after construction contract certification in February 2020. [MC 46-52, 74-80, 110-111, 121; Chebra Cert. ¶¶ 18-19, 24-25, Exh. F.]

27. The introduction to the NJEIFP’s January 2019 publication (which was the NJEIFP publication issued immediately prior to execution of the Notes) provides in pertinent part:

SY2020 Financing Program

The majority of NJEIFP projects are initially financed through the I-Bank’s short-term loan program which currently offers zero percent financing during the construction phase . . . The program generally converts a short-term loan to a long-term loan upon construction completion offering sum-certain long-term financing which eliminates supplemental

funding needs, mitigates IRS compliance issues, and minimizes interest costs for borrowers as they pay interest only on funds needed for the project and only on the amount of funds utilized from the time of draw.

The majority of the projects that received short-term loans in recent years will receive long-term loans funded 75% with DEP funds at 0% interest and 25% with I-Bank AAA market rate funds, consistent with recent financing programs. On average, these participants will save over 40%, or \$400,000 in interest costs per \$1.0 million borrowed over 30 years compared to financing their projects independently.

[Rogut Cert., ¶ 5; Exhibit A; MC 346.]

28. A borrower may draw down on the Note for the costs of the construction phase upon: (1) the satisfaction of the planning and design commitment milestones, (2) the issuance of the Environmental Decision Document (“EDD”) approving environmental planning, (3) the authorization to advertise the construction contract, (4) the authorization to award the construction contract for at least one project component that is capable of independent operation and testing (operable segment), and (5) construction contract certification. [MC 135-136, 151, 612-613.]

29. On March 29, 2019, NJDEP certified the engineering contract relating to the planning and design for the proposed project. [Chebra Cert. ¶ 18, Exhibit F.] Such costs were to be reimbursed based on NJDEP approval of actual project invoices for planning and design services. [MC 49, 77.] Petitioners started to receive funding for the planning and design phase in April 2019, i.e., SFY2019. [MC 46-52, 74-80.]

30. On July 11, 2019, the construction contract between the Joint Meeting & Kleinfelder in the amount of \$596,240 for construction oversight services was reviewed and found acceptable by NJDEP. [MC 56; MC 84.]

31. Between April 2019 and August 2019, petitioners and NJDEP worked together to ensure the Project complied with all applicable NJEIFP technical requirements pursuant to N.J.A.C.7:22. [MC121; Chebra Cert. ¶ 17.] On August 5, 2019, NJDEP issued its EDD, approving the environmental planning information for the

Project; on October 10, 2019, an authorization to advertise for the construction contract; on January 27, 2020, an authorization to award the construction contract to CMS Construction, Inc. of Plainfield, New Jersey in the amount of \$7,215,000; and on February 18, 2020, a certification of petitioners' construction contract. [MC 90-99, 100-104, 106-108, 110-111, 121; Chebra Cert. ¶¶ 21-24.]

32. Following certification of the Project, petitioners were advised that the 75/25 loan interest ratio established by the Notes would not be applicable to its long-term funding, but would instead consist of the State fiscal year 2020 loan funding ratio of 50/50 due to the certification of the Project's construction contract in February 2020. [Rogut Cert., ¶ 11].

33. Petitioners' short-term Notes were initially due to mature on April 5, 2021. [MC 6, 18, 36, 64.] Petitioners requested, and received, an extension of the maturity date until June 30, 2023.

34. 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 amountfebruary of the Chatham loan increased from \$2,730,000 to \$3,458,000. [Supplemental Rogut Cert., ¶ 2; Supplemental Rogut Cert., Exhibits 1-4]. [Chebra Cert. ¶ 26.] Such additional monies are needed to complete the Project, which is still under construction. [*Id.*] As a result, petitioners are not ready to convert their short-term Notes into long-term loans at this time.

35. On April 16, 2020, Madison Borough Administrator Raymond M. Codey, Esq. contacted Kerry Kirk Pflugh, NJDEP Director of the Office of Local Government Assistance, to inquire whether the NJDEP would reconsider and abide by the 75/25 loan terms reflected in the parties' agreement. [MC 3.]

36. 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.

[MC 2.]

37. NJDEP and I-Bank issued the Decision Letter, pursuant to N.J.A.C. 7:22-4.45(a) and -3.45(a), dated October 2, 2020. [MC 116-124.] The Decision Letter 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.

[MC 123.]

38. The petitioners were advised of the right to appeal the Decision Letter, pursuant to N.J.A.C 7:22-4.45 and -3.45. [MC 123-124.] By letter dated October 16, 2020, petitioners requested an adjudicatory hearing appealing the Decision Letter. [MC 595-598.]

39. NJDEP and I-Bank referred petitioners' hearing request to the OAL as two separate matters. [MC 574-598.] The two matters were consolidated, with NJDEP as the predominant interest agency, under OAL Dkt. EER 03753-2021N, by Consent Order dated July 2, 2021.

40. On November 4, 2021, the parties also executed a side letter in order to effectuate the additional \$2,000,000 loan. The side letter provides in pertinent part:

In connection with the Refinancing, each of Madison and Chatham shall issue a new, refinancing CFP note (each, a “Note”) to the I-Bank, that will serve to refinance, replace and cancel the prior, respective note issued thereby to the I-Bank on April 5, 2019. The parties hereto acknowledge and agree that the issuance of each Note by the respective Borrower and the I-Bank’s purchase of each Note from the respective Borrower, in the form and pursuant to the terms thereof, shall not constitute on the part of the parties hereto an admission, waiver, or relinquishment of any claims, defenses, or 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.

[Supplemental Rogut Cert., ¶ 3; Exhibit 5.]

41. Petitioners anticipate that the long-term loans will close in or about June 2022. The parties will continue their reservation of rights under consideration in this dispute.

42. Petitioners accept respondents’ calculations of \$829,700 over the life of the thirty-year anticipated loans at 1.57% interest in additional interest charges for Petitioners’ initial loans due to the funding ratio change from 75/25 to 50/50. [MC 121 n.14.]

43. Petitioners are struggling with serious economic challenges resulting from the pandemic.

ANALYSIS AND CONCLUSIONS OF LAW

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a full evidentiary hearing should be avoided “when the evidence is so one-sided that one party must prevail as a matter of law.” On a summary decision motion, however, the movant must show that there is no genuine

issue of material fact, and all inferences of doubt are drawn against the movant. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). Nevertheless, if the opposing party offers only facts which are immaterial or insubstantial in nature, these circumstances should not defeat a motion for summary judgment. Id. at 75. Although the pleadings may raise a factual issue, the question before the judge is whether those facts are “material” to the legal issues to be tried.

On these cross-motions for summary decision, I concur that the matter can be resolved as a matter of law on the undisputed facts. For the reasons set forth below, I **CONCLUDE** that the motion of the NJDEP must be granted and the motion of Madison and Chatham must be denied.

As already set forth above, the steps for short-term funding can be summarized as follows:

(a) A project sponsor is eligible for an interim loan from the Trust provided all of the following conditions are met:

1. The project is listed on the project priority list developed in accordance with N.J.A.C. 7:22-4.8(a) for funding in the forthcoming State fiscal year;
2. The project sponsor has submitted a complete application for the project in accordance with N.J.A.C. 7:22-4.11;
3. The project has been certified for funding by the Trust in accordance with N.J.A.C. 7:22-4.13;
4. The project is in the fundable range in the forthcoming funding cycle given the project's rank and the anticipated availability of Department and Trust monies for loans; and
5. The project sponsor has not previously received an Interim loan with the Trust for the same project scope.

(b) Interim loans will be awarded on a readiness-to-proceed basis until the funds available for interim loan awards are exhausted.

[N.J.A.C. 7:22-4.47.]

At issue here are the petitioners' potential long-term loans and, specifically, the applicable funding ratio as between the market rate I-Bank Loan and the zero-interest NJDEP Fund Loan. In the nature of a construction loan that rolls over into a mortgage, an infrastructure authority borrower does not receive long-term funding until after construction completion. [MC 164, 356, 754, 764.] Only when the long-term loan closing occurs are the long-term loans memorialized in two separate loan agreements, one with I-Bank (Trust Loan) and one with NJDEP (Fund Loan), reflecting the financing terms established at the time of construction contract certification. [MC 625, 808.] On the basis of the clear language of all of the relevant laws, regulations and documents, I **CONCLUDE** that such terms, including the funding ratio as between I-Bank and NJDEP, are strictly dependent on the specific State fiscal year during which the borrower receives the construction contract certification. [MC 135 n.1, 611 n.1.]

Long-term financing eligibility is subject to the borrower's timely satisfaction of all applicable conditions precedent to long-term conversion, including construction certification. [MC 146-147, 622.] Furthermore, even after these conditions have been satisfied, the Fund Loan and I-Bank Loan must still receive the State Legislature's prior approval before the projects may obtain long-term financing. N.J.S.A 58:11B-20.

Petitioners' bare reliance on the definition section of the Short-Term Program Notes is unpersuasive. Boilerplate definitions were established once a year by the regulatory agencies. I **CONCLUDE** that the forms made applicable to all infrastructure applicants in this regulatory environment do not make the 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. Moreover, petitioners are also sophisticated governmental parties who had experienced counsel. While there is no caselaw directly on point, I am guided by what the Appellate Division has stated with respect to a comparison on private insurance to governmental insurance benefits:

The Program language should not be approached exactly as one would approach the language of a commercial insurance policy. Since the "mental illness" benefit limitation is prescribed by statute, Program language following the

statute should not automatically be construed against the profferer as a contract of adhesion. Instead, the limitation should be interpreted and applied in accordance with legislative intent and in furtherance of statutory goals.

[Heaton v. State Health Benefits Com'n, 264 N.J. Super. 141, 151 (App. Div. 1993).]

As stated, the undisputed facts establish that the standard form of Note is developed every State fiscal year to be used for all Short-Term Program participants and is approved by the I-Bank's Board of Directors. [Kaltman Cert. ¶9.] The version of the Notes at issue here is consistent with the notes used in years prior and subsequent to SFY2019 in that it defines how interest will be calculated on a short-term note and does not address the long-term funding ratio. The short-term notes are drafted to reflect all possible funding sources and attendant interest rate scenarios for all Short-Term Program participants, including petitioners. There is absolutely no relationship between these definitions and the funding ratios of the anticipated long-term financing; nor is there a genuine ambiguity in the finance documents. I **CONCLUDE** that there is no need for me to reach petitioners' argument that I must utilize the contractual interpretation tools of extrinsic evidence or holding any ambiguity "against the drafters." Cf. Orange Township v. Empire Mtg. Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001).

In order to comply with the terms of the SFY2019 Authorizing Resolution, all of the SFY2019 Short-Term notes, including petitioners' Notes, provide that up to twenty-five (25%) percent of the principal of the short-term notes may be made by the I-Bank from interest-bearing sources that would require the I-Bank to impose interest costs on borrowers. [Kaltman Cert. ¶20(i).] It is correct that prior to July 1, 2021, 100% of petitioners' Notes were funded with non-interest-bearing sources; however, as of July 1, 2021, the "I-Bank Portion" of the "Principal" of all outstanding short-term notes from SFY2019, including Petitioners' Short-Term Notes, began to bear interest as provided pursuant to the terms of such Short-Term Note and the Authorizing Resolution. [Kaltman Cert. ¶22.]

Furthermore, I have reviewed additional terms of the Notes. Section 8 of the Notes, “Certain Miscellaneous Provisions” includes the statement that “this Note shall be governed by and construed in accordance with the laws of the State.” [MC 26.] In addition, Section 3 “Covenants of the Borrower” expressly states with respect to the anticipated long-term financing:

(a) Participation in the Anticipated Financing Program.
The Borrower covenants and agrees that it shall undertake and compete in a timely manner all conditions precedent identified by the I-Bank relating to (i) the participation by the Borrower in the Anticipated Financing Program and (ii) the qualification by the Borrower for receipt of the Anticipated Long Term Loan.

[MC 21.]

Taken together, these provisions clearly differentiate between the short-term Notes which have been executed and remain extant and the long-term Loans which remain “anticipated” but not yet negotiated, memorialized or funded.

I **CONCLUDE** that petitioners’ reliance upon the following provision set forth in the “I-Bank Report to the Legislature Pursuant to P.L. 1985, Chapter 334, New Jersey Infrastructure Act (January 2019) is also misplaced:”

Long-Term Loans are generally issued upon completion of project construction (demonstrated through submitted requisitions). Due to the enhancements to the Short-Term Financing Program, long-term loans are largely mechanisms to refinance previously issued short-term loans for construction and P&D activities. With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans: for example, credit worthiness approval; Division of Local Government Services approval; the State’s commitment of long-term funding at the time of certification of each operable project segment; and the applicability of all program benefits (e.g., principal forgiveness).

[Rogut Cert., Exhibit B at 6; MC 358 (emphasis added).]

It is noteworthy that not only is this document replete with words of generality about anticipated or prospective long-term financing, but that the long-term loan ratio of applicable interest rates is not even mentioned as one of the relevant terms and conditions possibly carried forward.

In other words, petitioners are bootstrapping one generality on top of another without reference to any contractual term guaranteeing them a particular long-term funding ratio. Furthermore, petitioners omit language from the same Report, to wit:

All short-term loans are currently funded with DEP funds. As the demands have increased, the program continues to evaluate the ability to support the I-Bank's short-term loan program with DEP funds. Loans sources with DEP funds are currently 100% interest free. If the I-Bank uses private funds to finance a portion of the short-term loans, the Program will pass the cost of those funds through to Program borrowers.

[Id. at MC 357.]

SFY2020 FUNDING PACKAGES (LONG-TERM LOANS)		
1. Clean Water		
Clean Water Categories	DEP Interest Free Share	I-Bank Market Rate Share
CSO Abatement Projects*	75%	25%
All Other Water Quality Projects (Base CWSRF)	50%	50%
Brownfield Redevelopment (Conduit Projects)	25%	75%

* Costs in excess of \$10M for CSO Abatement Projects will be financed under the Base CWSRF package.

[MC 347.]

It should also go without saying that this State infrastructure program is highly regulated, as are the recipients of such.

On or before May 15 of each year, the trust shall submit to the Legislature a financial plan designed to implement the financing of the wastewater treatment system projects either on the Interim Clean Water Financing Program Project Priority List, hereinafter referred to as the "clean water project priority list," or the clean water project eligibility list, approved pursuant to section 20 of P.L.1985, c.334 (C.58:11B-20) or as otherwise approved by the Legislature. The financial plan shall contain an enumeration of the bonds, notes or other obligations of the trust which the trust intends

to issue, including the amounts thereof and the terms and conditions thereof, a list of loans to be made to local government units or private persons, including the terms and conditions thereof and the anticipated rate of interest per annum and repayment schedule therefor, and a list of loan guarantees or contracts to guarantee the payment of all or a portion of the principal and interest on bonds, notes or other obligations issued by a local government unit to finance the cost of a wastewater treatment system project, and the terms and conditions thereof.

[N.J.S.A. 58:11B-21 (emphasis added).]

Furthermore, 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:

Long-term financing terms, including Principal Forgiveness, are established at the time a loan countenances disbursement of construction funds,¹ and are contingent upon a project receiving long-term financing. These terms vary primarily with the nature of the project activities or populations served.

¹ For Construction Loans issued upon certification of engineering contracts, long-term financing terms are established upon certification of the construction contract. For Construction Loans issued at the time of certification of construction contracts, long term financing terms are established upon Construction Loan closing. . . .

[State FY 2020 Financial Plan, May 2019, Exhibit 17, MC 611.]

In addition, that Financial Plan set forth with respect to long-term financing as follows, in pertinent part:

Long-term loans are available for allowable project costs and consist of an interest-bearing loan component from the I-Bank, and a zero-percent interest loan component from the DEP or otherwise subject to principal forgiveness as referenced herein. In the Water Bank's ongoing effort to provide the most attractive financing for project sponsors and also to maximize the number of projects the Program can finance, the Base SFY2020 NJEIFP 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 DEP. . . . Returning to the financing program's historical format of a 50% DEP / 50% I-Bank funding ratio will result in slightly higher relative interest costs than recent years when the Program offered 75% of funding at 0% interest. . . . Long-term funding from the I-Bank in the SFY2020 Financing Program for a large majority of projects will be between twenty-five percent (25%) and fifty percent (50%) of each loan based on the long-term financing terms in place at the time each project component received certification of construction from the DEP.

[Id. at 616 (emphasis added).]

Thus, the applicability of the recent reversion to 50/50 should have come as no surprise to petitioners. The regulations set out that “[i]nterest on the Trust loan will accrue as indicated in the financial plan submitted to the Legislature pursuant to Section 21 of the Trust Act.” N.J.A.C. 7:22-4.6(b). While the Financial Plans submitted to the Legislature for FY2019 and FY2018 stated that the program will offer loans at the 75/25 ratio, even those documents referenced the more usual 50/50 ration: “Such loans to borrowers include a higher relative proportion of 0% interest funds from the DEP than in earlier Financing Program years when the DEP and the Trust each provided fifty percent (50%) of the funds for Financing Program.” In fact, the FY2019 Financial Plan, issued May 2018, went on to state:

The Water Program is considering a change to the base program for the SFY2020 program to return to the financing package wherein 50% of the allowable project costs will be provided by the DEP interest free and the remaining 50% of project costs will be financed with the NJIB market rate as was offered in program years prior to the 2011 financing program.

[State FY 2019 Financial Plan, May 2018, Exhibit 11, MC 136.]

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, I **CONCLUDE** that there was no requirement that they receive a personalized invitation from the respondents to apply for construction certification by a

certain date, even assuming they were ready for such certification. The primary principal at issue in this dispute is that “ignorance of the law is no excuse.” 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. Moreover, every stage of preparation after their engineering contract certification and before their construction certification also took place in SFY 2020, so there can be no argument that “if only” they had been certified before February 2020 the ratio would have been more favorable. [See Statement of Undisputed Facts ¶¶ 30-31.]

As set forth in respondents’ motion papers, public notice of this potential upcoming change in the funding ratio was first provided in the IUP dated November 13, 2017. [Chebra Cert. ¶9, Exh. E.] A public hearing was noticed and occurred on December 6, 2017. Petitioners did not attend the hearing and no comments were received from petitioners. [Id. at ¶10.] On December 19, 2018, NJDEP posted a notice of an open public comment period and on January 9, 2019, held a public hearing for changes to the Program, including to the interest ratio for the long-term component of the Program. [MC 525, 545; Chebra Cert. ¶¶ 11-12.] In the Response to Comments document prepared after the public hearing, the NJDEP set forth:

COMMENT The AEA commented on the Program revising the financing package from 75% to 50% interest free loans. The Association points out that borrowing from the Program will be more expensive and sponsors may be forced to extend the timing of capital projects to stretch resources thus slowing the construction of critical water infrastructure.

The AEA acknowledges: As everyone involved in the wastewater sector in New Jersey is aware, funding needs outstrip the funds available. AEA members recognize that those constraints have necessitated the return to the 50/50 split. Even so, I-Bank rates are attractive and remain the lower cost option.

RESPONSE The Program has been forced to adjust loan rates in recognition of concerns that the program faces a potential shortage of available funds to meet projected future needs at the current rates. Although this will result in slightly higher interest rates for projects proceeding in SFY 20, the

changes allow the Program to still offer competitive loan rates and at the same time ensure the long-term viability for the Program. . . .

The Program plans to evaluate resources each year going forward and when feasible [sic] adjust loan percentages to provide borrowers with the best rates possible.

[Final Clean Water Intended Use Plan for FFY2019 (and SFY2020), dated March 2019 at 16.

[https://cdn.njib.gov/files/posts/NJEIT/Intended%20Use%20Plan/njwb_cw2019_F_IUP%20\(1\).pdf](https://cdn.njib.gov/files/posts/NJEIT/Intended%20Use%20Plan/njwb_cw2019_F_IUP%20(1).pdf)

On March 28, 2019, the SFY2020 IUP and the Project Priority List were finalized and emailed directly to petitioners containing the change to the 50/50 loan funding ratio for FY2020. [MC 509-510, 513; Chebra Cert. ¶ 14; Exh. A, B.]

For SFY20, the Water Bank CWSRF base program will consist of 50% funding from the I-Bank at market rate and 50% funding from the DEP at 0% interest with opportunities for principal forgiveness. Prior to long-term funding, projects are encouraged to seek a short-term loan from the I-Bank for activities from planning through construction completion.

The Water Bank made several changes to the program in recent years and is continuing to support those changes. However, the Program has insufficient funds to continue to provide the very generous financing packages offered in prior years.

For SFY20, the Clean Water IUP includes changes to the Department and I-Bank loan shares for every project category eligible for clean water funds. Although this will result in slightly higher interest rates for projects financed in SFY20, the changes allow the Program to still offer competitive loan rates and ensure long-term viability for the Water Bank.

[Final Clean Water Intended Use Plan for FFY2019 (and SFY2020) Exhibit 14, MC 512-513.]

In sum, I **CONCLUDE** that respondents have clearly demonstrated that their joint decision and announcement that petitioners' long-term financing, if and when it goes into effect, will bear the more standard 50/50 ratio once again and uniformly applicable to Program participants was correct as a matter of law. Petitioners are simply wrong

that the generic definitions drafted into the Short-Term Program Notes must be construed against the respondents and bind them on the anticipated long-term loans funding ratios.

ORDER

For the reasons set forth above, it is **ORDERED** that the motion for summary disposition filed by the petitioners Borough of Madison and Borough of Chatham is and the same is hereby **DENIED**. It is further **ORDERED** that the cross-motion of the respondent New Jersey Department of Environmental Protection and the New Jersey Infrastructure Bank is and the same is hereby **GRANTED**.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering his final decision, the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** shall forward the record, including this recommended decision and its final decision, to the **NEW JERSEY INFRASTRUCTURE BANK**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **NEW JERSEY INFRASTRUCTURE BANK** within forty-five days of the predominant-agency decision. If the **NEW JERSEY INFRASTRUCTURE BANK** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



March 17, 2022
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency:
NJDEP

3/17/22

Mailed to Parties:

3/17/22

id

TABLE OF CONTENTS OF APPENDIX

1	Madison Chatham Joint Meeting Correspondence, dated April 16, 2020, and highlighted documents	1-32
2	Madison Borough Note, dated April 5, 2019	33-45
2a	Madison Borough Exhibit to Note, dated April 5, 2019	46-52
2b	Madison Borough Exhibit to Note, dated April 20, 2020	53-60
3	Chatham Borough Note, dated April 5, 2019	61-73
3a	Chatham Borough Exhibit to Note, dated April 5, 2019	74-80
3b	Chatham Borough Exhibit to Note, dated April 20, 2020	81-88
4	Environmental Decision Document for Madison Chatham Joint Meeting Molitor Water Pollution Control Facility Improvements, dated August 5, 2019	89-99
5	Authorization to advertise construction project, dated October 7, 2019	100-104
6	Authorization to award contract, dated January 27, 2020	105-108
7	Certification of construction contract, dated February 18, 2020	109-111
8	Adjudicatory hearing request checklist and tracking form NJDEP	112-113
9	Adjudicatory hearing request checklist and tracking form I-Bank	114-115
10	Joint Decision, dated October 2, 2020	116-124
11	New Jersey Environmental Infrastructure Financing Program State Fiscal Year 2019, dated May 2018	125-337
12	New Jersey Environmental Infrastructure Financing Program State Fiscal Year 2020, dated January 2019	338-444
13	New Jersey Environmental Infrastructure Financing Program Final Clean Water State Revolving Fund Intended Use Plan for Federal Fiscal Year 2018 and State Fiscal Year 2019 and Drinking Water State Revolving Fund Intended Use Plan for Federal Fiscal Year 2018 and State Fiscal Year 2019 and	445-507

	Drinking Water State Revolving Fund Intended Use Plan for Federal Fiscal Year 2019 and State Fiscal Year 2020	
14	New Jersey's Water Bank Financing Program, Final Clean Water Intended Use Plan for Federal Fiscal Year 2019 and State Fiscal Year 2020	508-542
15	Notice of Public Comment Period Clean Water State Revolving Fund and Drinking Water State Revolving Fund Intended Use Plans for Federal Fiscal Year 2018 and State Fiscal Year 2019 and Federal Fiscal Year 2019 and State Fiscal Year 2020	543-572
16	Adjudicatory Hearing Requests	573-598
17	New Jersey Environmental Infrastructure Financing Program State Fiscal Year 2020, dated May 2019	599-745
18	New Jersey Environmental Infrastructure Financing Program State Fiscal Year 2019, dated January 2018	746-888

MATERIALS SUBMITTED ON CROSS-MOTIONS

For Petitioners:

Brief in Support of Motion for Summary Decision, dated August 20, 2021
Certification of Steven L. Rogut, Esq., dated August 6, 2021
Responsive Brief, dated November 19, 2021
Supplemental Certification of Steven L. Rogut, Esq., dated November 17, 2021

For Respondents:

Brief in Support of Cross-Motion for Summary Decision and in Opposition to Petitioners' Motion for Summary Decision, dated October 21, 2021
Certification of Eugene Chebra, dated October 21, 2021
Certification of Lauren Kaltman, dated October 21, 2021
Letter-Reply Brief, dated December 10, 2021