

*Jerry Fitzgerald English was appointed Commissioner of the New Jersey Department of Environmental Protection in August, 1979. Prior to her appointment as Commissioner Mrs. English was Legislative Counsel to the Governor. She was appointed Legislative Counsel in January, 1974. Between 1971 and 1974 Mrs. English was Assistant Counsel to the New Jersey Senate. Mrs. English is now a Commissioner of the Port Authority of New York and New Jersey and a member of the advisory committee to the Coalition of Northeast Governors. The author's article provides the reader with a useful tool for examining New Jersey's new water supply legislation as well as providing insights into its interpretation.*

# A NEW APPROACH TO NEW JERSEY'S WATER SUPPLY PROBLEMS

by Jerry Fitzgerald English\*

## Introduction

New Jersey's water law tradition is based on the doctrine of riparian rights.<sup>1</sup> At one time ownership of riparian lands was the dominant means of obtaining entitlement to the use of water. It is now of relatively minor significance.

Statutes developed to regulate this resource have significantly modified common law riparian rights. Prior to 1907, special legislative actions were necessary to secure larger quantities of surface water. Such legislative approval was without regard for the present or future impact of such

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<sup>1</sup> Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 622 (1969).

New Jersey, like other Eastern states, is a riparian state. It adheres to a system under which private rights to the use of water flowing in water courses are based on ownership of land in some way contiguous to the stream (riparian land). Each riparian landowner has equal rights vis-à-vis other similar owners to the use of water irrespective of whether the water is actually used. The premise of riparianism seems to be that restriction of use-rights to those with access to the stream will assure a sufficient supply for all. . . .

*Id.* at 624.

[T]wo distinct theories have developed relating to the manner in which the right—or privilege—may be exercised: the English rule of "natural flow" and the American rule of "reasonable use."

Under the English rule, each landowner has the right to have the water flow past his lands undiminished in quantity and unimpaired in quality.

*Id.* at 628.

However, under the English rule no right exists at all to use water for purposes unconnected with the land or to use water on nonriparian land. It is irrelevant that the proposed use is an otherwise reasonable one. . . . In contrast, the American rule of reasonable use permits use unconnected with the land or on nonriparian land but subjects such use to criteria of reasonableness.

*Id.* at 629. See Trelease, *Law, Water and People: The Role of Water Law in Conserving and Developing Natural Resources in the West*, 18 WYO. L.J. 3 (1963). See also Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 450 (1961).

In the landmark case *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956), New Jersey adopted the rule of reason. The court therein announced, "each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface waters is unreasonable." *Id.* at 327. The rule of reason replaces the "common enemy rule" which espouses that "a possessor of land has an unlimited and unrestricted legal privilege to deal with the surface on his land as he pleases, regardless of the harm which he may thereby cause others." Kinyon and McClure, *Interferences with Surface Waters*, 24 MINN. L. REV. 891, 898 (1940), quoted in *Armstrong v. Francis Corp.*, 320 N.J. at 327-28.

allocation.<sup>2</sup> The 1907<sup>3</sup> and 1910<sup>4</sup> statutes pertained to surface water and groundwater, respectively. They required the approval of the State for all new or additional withdrawals for public water supply purposes.<sup>5</sup>

In 1947, the Water Policy and Supply Council required permits to be secured for private withdrawals of groundwater.<sup>6</sup> In 1963, legislation was enacted requiring permits for private withdrawals and diversions from surface water.<sup>7</sup> Most statutory provisions pertaining to water rights were codified in N.J. Stat. Ann. §§ 58:1-1 to -50. Historically, they are traceable to the enactments of 1907, 1910, 1947, and 1969. At that point in time, holders of legislative grants and grandfather rights were exempt from the permit process.<sup>8</sup>

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<sup>2</sup> In the nineteenth century before particular classes of diverters were able "to secure large quantities of surface water by obtaining state approvals or permits, they could resort only to special acts of the legislature if they wished to exceed the limitations of the riparian system. Major withdrawals for manufacturing, milling or public supply were very likely to impair flows and so to run the risk of illegality through interference with the actual or potential claims of other riparians." NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF WATER RESOURCES, FOR THE NEW JERSEY STATEWIDE WATER SUPPLY PLAN, TASK XA—LEGAL FACTORS 21 (June, 1980) [hereinafter cited as Task 10A].

The City of Trenton presently possesses a legislative grant dating from 1852. The original grant was given to a private water company which was subsequently purchased by the municipality. *See City of Trenton v. State of New Jersey*, 262 U.S. 182 (1922). *See also* Task 10A at 23.

<sup>3</sup> 1907 N.J. Laws 252.

<sup>4</sup> 1907 N.J. Laws 252; 1910 N.J. Laws 98. These two statutes introduced a state approval system for water diversions in the State. Permit approval was based upon whether the use was an in-basin system or an out-of-basin system of diversion. The riparian heritage with its continuing viability imposed an extra obligation on an applicant who would have to justify removing water from its natural basin in preference to capping local sources. *See* Task 10A at 13-14.

<sup>5</sup> The Water Supply Commission was the state entity originally charged with granting state approvals for ground and surface water diversions. The Commission later became known as the Water Policy and Supply Council. *See* 1907 N.J. Laws 252.

<sup>6</sup> 1947 N.J. Laws 375.

<sup>7</sup> 1963 N.J. Laws 181. *See also* Task 10A at 24.

<sup>8</sup> The "[s]o called 'grandfather' provisions have been well known to regulatory programs. Their purposes are to allow those already engaged in a practice or benefiting from activities previously lawful to continue without the need to establish their entitlements anew at the time governmental regulation is first imposed."

"In terms of their effect, the special legislative grants are much like grandfather rights. Since they were given before the present regulatory system went into effect and are not time limited, the holders could use them to continue taking water as they were entitled prior to the 1907, 1910 or later applicable statutes. . . ." *See* Task 10A at 27-28. The prior legislation, 1947 N.J. Laws 375, read in pertinent part:

Any person, corporation, or agency of the public diverting or obtaining water at the time of the passage of this act, in excess of one hundred thousand gallons per day from subsurface or percolating water sources, shall have the privilege of continuing to take

After the 1960 drought two major planning efforts were initiated to address New Jersey water supply problems; namely, the North Atlantic Regional Water Resources Study (NARS)<sup>9</sup> and the Northeastern United States Water Supply Study (NEWS).<sup>10</sup> In 1975, the Governor authorized the preparation of the Statewide Water Supply Master Plan which clearly defined New Jersey's water supply problems. An association of five consulting firms was selected to prepare technical reports and recommendations for the Plan.<sup>11</sup> During the 1980 drought the State was able to utilize consultant recommendations in preparing and submitting, for legislative approval, a package of bills which was designed to improve the State's ability to manage its water resources.<sup>12</sup>

### *Planning: Emerging Resource Management Ethic*

The most significant aim of the legislative package is long-range planning. This goal will revolutionize water resource management in the State. The notion of long-range planning and management has always been foreign to the traditionally water-rich East. By sharp contrast, "[p]eople in the West have always understood that their demand for water would one day push against, if not outstrip, their reasonably available supply. Water is their most precious commodity, and they have

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from the same source, the quantity of water which is the rated capacity of the equipment at that time used for such water diversion without securing a permit as provided above.

By 1976 total grandfather rights amounted to over 740 mgd. This combined with the fact that holders of grandfather rights were not required to report usage, made it impossible to properly manage a finite resource and assure a safe and adequate supply for the State.

The passage of the Water Supply Management Act, N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1982), effectively abolishes grandfather rights by placing all persons who divert either surface or ground water under a single uniform permit system.

<sup>9</sup> NORTH ATLANTIC REGIONAL WATER RESOURCES STUDY GROUP, NORTH ATLANTIC DIVISION, U.S. ARMY CORPS OF ENGINEERS (1972).

<sup>10</sup> See NORTHEASTERN UNITED STATES WATER SUPPLY STUDY: SUMMARY REPORT, NORTH ATLANTIC DIVISION, U.S. ARMY CORPS OF ENGINEERS (1977).

<sup>11</sup> NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF WATER RESOURCES, THE NEW JERSEY STATEWIDE WATER SUPPLY MASTER PLAN (September, 1981) [hereinafter cited as Master Plan].

<sup>12</sup> This legislative package will be the subject of this article. The package includes: the Water Supply Management Act, N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1982) [hereinafter cited as Management Act]; the New Jersey Water Supply Authority Act, N.J. STAT. ANN. §§ 58:1B-1 to -25 (West 1982) [hereinafter cited as Authority Act]; the Water Supply Bond Act of 1981, 1981 N.J. Laws 261 [hereinafter cited as Bond Act]; the Small Water Companies Takeover Act, N.J. STAT. ANN. §§ 58:11-59 to -63 (West 1982) [hereinafter cited as Takeover Act] and the Master Plan, *id.* note 11.

sought to assure its most beneficial use."<sup>13</sup> The droughts of 1960 and 1980 exposed both the fallacious assumption that New Jersey's water supply was inexhaustible and that ad hoc water management would always rectify itself with the succeeding rainfall. It became increasingly apparent that formulation of a rational system of development, distribution, and allocation of water was imperative. "Obviously, the mere existence of a system or plan does not, of itself, guarantee a supply sufficient to meet all reasonable requirements or necessarily prevent a crisis from arising during drought."<sup>14</sup> Nevertheless the droughts of the past two decades present hard evidence that the absence of a long-range design may inevitably lead to a management crisis of vast dimension.

The droughts of the recent past emanated primarily from a management crisis within the State, not from water supply shortfalls. Long-range planning efforts could mitigate the harsh consequences of a water emergency.<sup>15</sup> As a result, the conclusion was reached that:

the presence of a rational system of distributional priorities is important. First, by prescribing with some precision in advance what is to happen in a crisis situation, those most likely to be affected are put on notice . . . . Second, by preventing the wasteful use of the resource, a rational system suppresses overall demand (to the extent that overall demand would otherwise have a waste component) and increases the supply available for beneficial uses. Such a system can forestall, and perhaps prevent, a crisis situation. Further, it can postpone, and perhaps make unnecessary, capital expenditures for the development of additional supplies.<sup>16</sup>

The essential character of water resource management in the future will not be the development of new supplies, but rather a more intensive management of relatively fixed supplies and reallocation of supplies among competitive uses.<sup>17</sup> The recently enacted legislative package<sup>18</sup> will not add a single drop of water to the current supply, but will establish a

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<sup>13</sup> Hanks, *The Law of Water in New Jersey*, 22 RUTGERS L. REV. 622 (1969) [hereinafter cited as Hanks].

<sup>14</sup> *Id.*

<sup>15</sup> See Exec. Order No. 94, 96-98, 103-04 (1980-81) for examples of strong emergency measures during drought conditions.

<sup>16</sup> Hanks at 622.

<sup>17</sup> Hart, *Emerging Values in Water Resource Management*, in WATER NEEDS FOR THE FUTURE 133, 135 (V.P. Nanda ed. 1977).

<sup>18</sup> See *supra* note 12.

long-range management of existing supplies. Such an approach should have been instituted twenty years ago when the projected shortfalls were discovered.<sup>19</sup>

The Management Act,<sup>20</sup> a regulatory reform statute, imposes a rational system over an antiquated, ad hoc system of water management. Its predecessor, a permit allocation system, was placed under the jurisdiction of the Water Supply and Policy Council for seventy years.<sup>21</sup> The Council was an appointed lay body that had done yeoman work in the past;<sup>22</sup> however, rapid industrialization was accompanied by complex, technical water management issues and problems which demanded expertise that the Council simply did not possess.<sup>23</sup>

As can easily be observed from a brief water history overview, the State's capability to manage and regulate its ground and surface water supplies and its treatment and distributional systems was weak and ineffective. At the core of the dilemma were antiquated laws, procedures, and institutions ill-suited for the task of managing the water resources of the most densely populated state in the nation. After the 1960 drought a noted water law scholar observed:

Water law was (and to a large extent still is) an obscure appendix to real property law. The recurring crises of a highly industrial-

<sup>19</sup> *Public Hearing before New Jersey Legislature. Senate Energy And Environment Committee and Assembly Energy And Natural Resources Committee*, 199th N.J. Leg., 1st Sess. (1981).

<sup>20</sup> Management Act, N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1982).

<sup>21</sup> "As it has been indicated, the Water Policy and Supply Council evolved from the State Water Policy Commission (1907). The evolution . . . [was] a complicated process and . . . resulted, over the past seventy years, in certain confusion regarding the Council's functions, powers and duties—particularly in its relationship to the present Division of Water Resources (which was created in 1971)."

"The major responsibility of the Council [was] a regulatory one over the diversion and allocation of water. Subject to the approval of the Commissioner of the Department of Environmental Protection, the Council [was] the primary body for approving the applications and requests for the allocation and diversion of the State's surface and ground waters." The Council had "broad and extensive powers to conduct hearings, and for any investigations or inquiries, the Council [had] all the powers of a legislative committee." See NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DIVISION OF WATER RESOURCES, FOR THE NEW JERSEY STATEWIDE WATER SUPPLY PLAN, TASK VIII A—REGULATORY AND ADMINISTRATIVE 21-22 (June, 1980) [hereinafter cited as Task 8A].

It was delegated "general supervision over all sources of potable and public water supply, to the end that the same may be economically and prudently developed for the use of the people of this State." 1907 N.J. Laws 252. Additional supervisory powers of the Council were created in the 1948 legislation establishing the Department of Conservation and Economic Development. N.J. STAT. ANN. § 13:1B-7 (West 1979). These additional powers and duties were set forth in 1948 N.J. Laws 448.

<sup>22</sup> See *supra* note 19.

<sup>23</sup> See Task 8A, *supra* note 21. See also the Master Plan, *infra* p. 357 which recommended transferring water allocation responsibilities from the Council to the Division of Water Resources.

ized and highly urbanized region have been met with a body of, for the most part, turn-of-the-century cases and a hodge-podge of statutes, supplemented by a number of administrative institutions whose functions, range of decisionmaking power, discretion, and accountability are far from clear. Nevertheless, in the East, and specifically in New Jersey, a system of water allocation, in some sense of that phrase, has been operating.<sup>24</sup>

The old process for discerning water diversion priorities has become woefully obsolete. Emerging public values support a new management ethic. No longer will water management decisions be made by an unspecialized few who base their decisions on outmoded concepts. Ground has been broken to initiate a new management methodology that implements a long-range planning process which will align New Jersey's water resource management with the realities of modern industrial demands. The vehicles for such a transformation are the recently enacted water supply legislative package and the newly adopted Water Supply Master Plan.

### I. *The Water Supply Management Act*

The Water Supply Management Act<sup>25</sup> grants to the Department of Environmental Protection, Division of Water Resources the power to manage the State's water supply through four means:

by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the State's water resources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies.<sup>26</sup>

The Management Act emerged from legislative efforts resulting from drought emergency conditions. It is, therefore, appropriate that the first subsection of the Act provides for a broad amplification of the State's emergency powers.<sup>27</sup> Under this specific subsection of the Act, if the Commissioner of the Department finds an existing or impending water shortage, the Governor may proclaim a state of water emergency. Water

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<sup>24</sup> Hanks at 623.

<sup>25</sup> N.J. STAT. ANN. §§ 58:1A-1 to -17 (West 1982).

<sup>26</sup> *Id.* § 58:1A-2.

<sup>27</sup> *Id.* § 58:1A-4(a)-(h).

restrictions would be imposed according to the Emergency Water Supply Allocation Plan as adopted by the Department. During the water emergency, the Commissioner may order persons engaged in the use or distribution of any water supply to reduce or cease such use or utilize alternate supplies.<sup>28</sup> The Commissioner is, however, not granted plenary authority even in a state of water emergency. Several limitations and procedural safeguards guarantee its fair and equitable administration. Emergency orders cannot conflict with applicable federal law or regulations.<sup>29</sup> The statute also mandates that emergency orders be based upon fair compensation, reasonable rate relief, and just, equitable terms. In order to assure compliance, the statute provides for a hearing. Upon application, aggrieved persons may seek review of these orders.<sup>30</sup>

The Commissioner is also authorized to develop regulations providing water of adequate quality to the State's citizens.<sup>31</sup> Within this authorization is the power to develop a permit system, requiring diverters of over 100 thousand gallons of water per day to obtain Department permits.<sup>32</sup> Standards and procedures ensuring proper diversion methods and maintaining the proper water quality and quantity may be issued under this power.

The Department of Environmental Protection recently adopted Schedules and Procedures for Establishing Privileges to Divert Water and for Obtaining Water Supply Allocation Permits.<sup>33</sup> The rules apply to all persons presently holding a Water Policy and Supply Council permit or to those either diverting or claiming the right to divert more than 100 thousand gallons of water per day. The rules also apply to all persons who wish to divert the same in the future.<sup>34</sup> These rules provide for a grace

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<sup>28</sup> N.J. STAT. ANN. § 58:1A-4(c)(1)-(5). Emergency order powers have been widely broadened to also include the making of emergency interconnections between systems; the transfer of water from any public or private system; the establishment of distribution priorities; the direction of any person engaged in the retail distribution of water to impose and collect a surcharge on the cost of that water as a penalty for the violation of any order to reduce water usage issued pursuant to the Act.

<sup>29</sup> *Id.* It should be noted that orders issued during a state of water emergency may contravene any state or local law or contractual agreements in effect at the time.

<sup>30</sup> N.J. STAT. ANN. § 58:1A-4(c)(6), (d) (West 1982). Relief from emergency orders written pursuant to the Act may be sought by application to the Commissioner. The test applied to determine whether relief should be granted is whether the continuance of the order is unreasonable in light of the prevailing conditions of emergency.

<sup>31</sup> N.J. STAT. ANN. § 58:1A-2 (West 1982).

<sup>32</sup> *Id.* § 58:1A-7.

<sup>33</sup> N.J. ADMIN. CODE tit. 7 § 19-1 to -2.15 (1981). The new regulation will allow the State to put into effect a simplified and streamlined procedure for considering proposed water allocations.

<sup>34</sup> *Id.*, tit. 7, § 19-1.4. Those "claiming the right" refers to those holding legislative grants and grandfather rights to divert.



period for those applying for agricultural or horticultural purposes.<sup>35</sup> They prescribe the procedures to be followed by applicants and the Department when processing applications for permits.<sup>36</sup>

The Department, in developing this permit system, can limit previously allowed permit privileges and require diverters of 100 thousand gallons or more to renew applications granted previously.<sup>37</sup> Diverters of water for agricultural or horticultural purposes may obtain approval under a five year certification program.<sup>38</sup>

The agricultural and non-agricultural permit programs differ in several respects. Agricultural diversions are regulated under a water usage certification program and are approved by county agricultural agents.<sup>39</sup> In contrast, non-agricultural diversions are governed under a departmentally approved permit system. A disparity exists in the manner fees are imposed under these programs. The variance is evidenced by the statutory language employed in the Management Act authorizing the imposition of fees for agricultural certification and non-agricultural use permits. The pertinent permit fee language states: "The department shall in accordance with a fee schedule adopted by rule and regulation, establish and charge reasonable administrative fees. . . ."<sup>40</sup> In contraposition the certification language reads:

[N]othing in this section shall prohibit the imposition of a fee, . . . , for the cost of processing, monitoring and administering a water usage certification program for persons who divert any ground or surface water for agricultural and horticultural purposes.<sup>41</sup>

The permit fee language plainly places an affirmative duty on the Department, while in the case of certifications it does not prohibit their imposi-

<sup>35</sup> N.J. ADMIN. CODE tit. 7, § 19-1.5(c) (1981). In addition to N.J. ADMIN. CODE tit. 7, § 19-1.5(c), 2.2(f) (1981), other exemptions from these rules are set forth in N.J. ADMIN. CODE tit. 7, § 19-1.4(b)-(d) (1981).

<sup>36</sup> N.J. ADMIN. CODE tit. 7, § 19-2.2 (1981).

<sup>37</sup> N.J. STAT. ANN. §§ 58:1A-6(a)(1), -7(a) (West 1982).

<sup>38</sup> N.J. STAT. ANN. § 58:1A-6(a)(2) (West 1982) states that the program includes:

The right to construct, repair or reconstruct dams or other structures, the right to divert water for irrigation, frost protection, harvesting and other agriculturally-related purposes, and the right to measure the amount of water diverted by means of a log or other appropriate record, and shall be obtained in lieu of any permit which would otherwise be required by this Act.

<sup>39</sup> *Id.*

<sup>40</sup> N.J. STAT. ANN. § 58:1A-11 (West 1982).

<sup>41</sup> *Id.* § 58:1A-7.2.

tion. The language regarding certification fees is curiously framed in the negative while the permit fee language imposes a clear and unequivocal mandate. A fair inference to draw from this cautious drafting is that agricultural certification fees are discretionary rather than obligatory. A proposed twenty-five dollar cap on agricultural fees, which is in its essence a nominal imposition, clearly reflects the social policy of the State to aid and encourage agricultural activities.<sup>42</sup>

The Department may fix both the term and maximum allowable diversion in each permit and govern the operations of the facility.<sup>43</sup> New or additional water sources may be approved for the permit privilege by the Department. The Management Act interposes diversion prohibitions affecting the "Pinelands National Reserve."<sup>44</sup> The statute proscribes transportation of ground or surface water more than ten miles outside the Pinelands.<sup>45</sup> This prohibition is consistent with the purposes of the "Pinelands Protection Act"<sup>46</sup> which affirmatively charges the Department of Environmental Protection with the preservation of this unique and significant state and national resource.

## II. *The New Jersey Statewide Water Supply Master Plan*

The Management Act directs the Department of Environmental Protection "to prepare and adopt the New Jersey Statewide Water Supply Master Plan which shall be revised and updated at least once every 5 years."<sup>47</sup> The Master Plan must include, but is not limited to, the identi-

<sup>42</sup> Note that the \$25.00 cap was introduced in A. 1562, 200th Leg., 1st Sess. (1982) to amend N.J. STAT. ANN. § 58:1A-7.2 (West 1982).

<sup>43</sup> N.J. STAT. ANN. § 58:1A-8 (West 1982).

<sup>44</sup> N.J. STAT. ANN. § 58:1A-7.1 (West 1982) describes the Reserve. The Pinelands area of New Jersey constitutes a unique and significant state and national resource. The area overlies the estimated seventeen trillion gallon Cohansey aquifer, one of the largest virtually untapped sources of pure water in the world.

<sup>45</sup> N.J. STAT. ANN. § 58:1A-7.1 (West 1982). It is interesting to note that this provision did not appear in the original draft of the Management Act promulgated August 13, 1981. The provision was introduced in S. 3346, 199th Leg., 2d Sess. (1981) to amend the Management Act.

<sup>46</sup> N.J. STAT. ANN. § 13:18A-1 (West Supp. 1982-83). The legislative purpose of the Pinelands Protection Act is clearly articulated in N.J. STAT. ANN. § 13:18A-2 (West Supp. 1982-83):

The Legislature further finds and declares that a certain portion of the Pinelands area is especially vulnerable to the environmental degradation of surface and ground waters which would be occasioned by the improper development or use thereof; that the degradation of such waters would result in a severe adverse impact upon the entire Pinelands area; that it is necessary to designate this portion as a preservation area, wherein more stringent restrictions on the development and use of land should be utilized . . . .

<sup>47</sup> N.J. STAT. ANN. § 58:1A-13(a) (West 1982).

fication of existing supply sources, the projection of future water supply demands, and the making of recommendations for improvements to water supply facilities and protection of watershed areas.<sup>48</sup> The Master Plan was adopted soon after the passage of the Management Act.<sup>49</sup> It is the first comprehensive statewide plan to study and make projections on all aspects of water supply management within the context of extensive public participation.<sup>50</sup>

The Master Plan action strategy is tied to \$350 million in bonds authorized under the Bond Act<sup>51</sup> for the rehabilitation and consolidation of inadequately operating water supply facilities, and the design of new water supply facilities as recommended by the Master Plan. Pursuant to the Master Plan,

[S]pecific projects will be recommended to provide additional supplies of water, new transmission and distribution capabilities for existing supplies, increased reserve and emergency response capabilities, and increased water quality benefits which may reduce or eliminate the need for advanced wastewater treatment levels in certain areas.

This plan will further recommend specific projects to provide for the consolidation of deficiently operating facilities, in order to insure adequate services in the quantity and quality of water delivered, and to provide for the rehabilitation and repair of

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<sup>48</sup> *Id.* § 58:1A-13(b)(1)-(4).

<sup>49</sup> The statute required its adoption within 180 days of the effective date of the Management Act. See N.J. STAT. ANN. § 58:1A-13(a) (West 1982).

<sup>50</sup> See Commissioner's Memo to the New Jersey Water Supply Advisory Council Re: The New Jersey Statewide Water Supply Master Plan (Sept. 30, 1981).

You should know that this is a history-making report. Far more than a superficial review of existing conditions or 'another engineering report,' this document is the result of a long term investigation which Governor Byrne ordered in 1975. For more than three years, five major consultant firms conducted interviews and researched the state's water supply situation. Their work included discussions with and analysis of the state's 600 public and private water purveyors, interviews with public officials and major water users and discussions with public interest groups. In June of 1981 the State published a draft plan based on the consultant's recommendations. A series of hearings were held to provide further opportunity for public comment . . . .

This pioneering first step in charting the future of water supply needs for the state is not an end result, but a beginning.

*Id.* at 1.

<sup>51</sup> Water Supply Bond Act of 1981, 1981 N.J. Laws 261.

antiquated or damaged water supply facilities, thereby helping to conserve our vital water resources. . . .<sup>52</sup>

If the Department determines the existing water supply is insufficient, it may order water purveyors to develop additional supplies.<sup>53</sup> In carrying out the purposes of this Act, the Department of Environmental Protection may enter upon land for investigative purposes. Additionally, it may subpoena witnesses and the production of books and papers pertaining to the investigation.<sup>54</sup> Another departmental power is the ordering of the interconnection of public water supply systems in public or private ownership when it is in the public interest as determined by the Department after a public hearing.<sup>55</sup> Contracts may be entered into and adequate fiscal controls may be established by the Department to ensure that the provisions of this Act are carried out.<sup>56</sup> For violations of the provisions of the Act, a civil suit may be instituted by the Department for injunctive relief. A civil administrative penalty not exceeding five thousand dollars for each offense may be imposed. It will be enforced under the penalty enforcement law.<sup>57</sup>

All powers and duties of the Water Policy and Supply Council are transferred to the Department of Environmental Protection. A seven-member Water Supply Advisory Council has also been established. This Council advises the Department on the preparation of the permit system, the operation of State water supply facilities and the preparation of the Emergency Water Supply Allocation Plan.<sup>58</sup> It should be emphasized that the powers of the new Council are merely advisory.

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<sup>52</sup> *Id.* § 2(b), (c). Specific Project I Recommendations slated for immediate action are as follows: In the Northeast, the Elizabethtown–Newark Interconnections; the Raritan–Passaic conveyance system; and the Wanaque South/Two Brides project are proposed to make more water available through existing water supply systems. These projects will provide drought insurance capability, allowing the State to cope with protracted periods of reduced rainfall as occurred in 1980 and 1981 without the threat of water system failure. Two additional major improvement recommendations are the Great North Multiple Exchange facility and Delaware and Raritan Canal.

<sup>53</sup> N.J. STAT. ANN. § 58:1A-14(a) (West 1982). Water supply needs in Ocean and Monmouth Counties can be met with immediate construction of the Manasquan Reservoir and local groundwater development.

<sup>54</sup> N.J. STAT. ANN. § 58:1A-15(c), (d) (West 1982). N.J. STAT. ANN. § 58:1A-15(a)–(m) (West 1982) vests the Department with broad enforcement and compliance powers.

<sup>55</sup> N.J. STAT. ANN. § 58:1A-15(e) (West 1982).

<sup>56</sup> *Id.* § 58:1A-15(g).

<sup>57</sup> *Id.* § 58:1A-16.

<sup>58</sup> N.J. STAT. ANN. §§ 13:1B-49.1, -49.2, -49.3 (West Supp. 1982-83). The new legislation dismantles the Water Policy and Supply Council, a citizen-staffed entity which possessed broad powers over water supply matters. The Council's jurisdiction over water supply activities was directly transferred to the Department.

### III. *The Water Supply Bond Act*

Under the Bond Act of 1981,<sup>59</sup> \$350 million in bonds of the State is allocated for the rehabilitation and consolidation of inadequately operating water supply facilities and for the design and construction of new water supply facilities as recommended in the Master Plan.<sup>60</sup> Pursuant to this plan specific projects will be recommended which may reduce or eliminate the need for advanced wastewater treatment levels in certain areas. The Master Plan also recommends projects to consolidate deficiently operating facilities and repair inadequate facilities. Water supply facilities affected by the Act are those to be acquired or renovated in whole or part by the State.<sup>61</sup> The bonds authorized by the Act are for the purpose of providing loans for state and local projects as recommended by the Master Plan.<sup>62</sup>

The Commissioner shall have the authority to adopt rules and regulations regarding the use of the funds generated by the bonds issued pursuant to this Act. He can also review the findings of the Commission on Capital Budgeting and Planning.<sup>63</sup> The Commissioner is required to submit to the Commission on Capital Budgeting and Planning and the State Treasurer "a plan for expenditure of the funds from the 'Water Supply Fund' for the upcoming fiscal year."<sup>64</sup> However, final approval of the Commissioner's proposed spending plan lies with the Legislature.<sup>65</sup> Subsequent to the Governor's Annual Budget message, a copy of the plan must be submitted to the standing committee of the Legislature.<sup>66</sup> The Commissioner shall also report to and consult with the special joint legislative committee, not less than thirty days prior to action, to effectuate the purposes of this Act.<sup>67</sup>

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<sup>59</sup> Water Supply Bond Act of 1981, 1981 N.J. Laws 261. This is not the first bond issuance electorally approved to finance water supply projects. *See also* New Jersey Supply Bond Act of 1958, 1958 N.J. Laws 35; Water Conservation Bond Act, 1969 N.J. Laws 127; Water Resources Bond Act, 1975 N.J. Laws 202.

<sup>60</sup> Water Supply Bond Act of 1981, 1981 N.J. Laws 261, § 2(b).

<sup>61</sup> *Id.* § 2(c).

<sup>62</sup> For further discussion of the allocation of funds between state and local projects see Goldshore, *Water Supply Management: The New Legislative Initiatives*, MUNICIPAL LAW FORUM, 3.61, 3.68 (3d ed. 1982) [hereinafter cited as Goldshore].

<sup>63</sup> Water Supply Bond Act of 1981, 1981 N.J. Laws 261, § 5(a).

<sup>64</sup> *Id.* § 24.

<sup>65</sup> *Id.* § 15(a).

<sup>66</sup> *Id.* § 25.

<sup>67</sup> *Id.* § 26.

Bonds issued under this Act are a direct obligation of the State and the Governor, State Treasurer, and Comptroller of the Treasury; any two of such officials are authorized to carry out provisions of the Act that relate to the issuance of Water Supply Bonds.<sup>68</sup> They may be issued in whole or in part for a shorter term, but must mature and be paid no later than thirty-five years following issuance.<sup>69</sup> The proceeds from the sale of bonds shall be held in a separate fund by the State Treasurer to be known as the Water Supply Fund.<sup>70</sup> Monies in the Water Supply Fund may be invested and net earnings paid into the General State Fund.<sup>71</sup> Refunding bonds may be issued to refund in whole or in part an equal principal amount of the outstanding bonds.<sup>72</sup> A municipal tax on real and personal property, as deemed necessary by the State Treasurer, may be appropriated to provide funds for bond payment in any years in which funds appropriated by the Act are insufficient to meet interest payments on outstanding bonds.<sup>73</sup> A program of charging water supply users benefiting from projects funded by the Act is to be developed by the Department or the New Jersey Water Supply Authority in coordination with the Board of Public Utilities.<sup>74</sup>

#### IV. *The New Jersey Water Supply Authority*

Since 1934, the State of New Jersey has been directly engaged in the water supply business.<sup>75</sup> Its participation has been limited, and laws governing the area were seriously in need of integration and coordination. The passage of the New Jersey Water Supply Authority Act<sup>76</sup> recently modernized the approach to these operations.

Under the Act creating the New Jersey Water Supply Authority, an Authority is established in the Department of Environmental Protection consisting of the Commissioner, as chief executive officer with full voting

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<sup>68</sup> *Id.* §§ 7-8.

<sup>69</sup> *Id.* § 6.

<sup>70</sup> *Id.* § 14. The monies in the Water Supply Fund are specifically dedicated and applied to the cost of the purposes set out in § 4.

<sup>71</sup> *Id.* § 15(c).

<sup>72</sup> *Id.* § 19.

<sup>73</sup> *Id.* § 20(a), (b).

<sup>74</sup> *Id.* § 5(b).

<sup>75</sup> In 1934, the State was empowered to sell water from the Delaware and Raritan Canal. *See* N.J. STAT. ANN. §§ 13:13-4, -12.9 (West 1979). In 1958, water sales from the Spruce Run-Round Valley Complex were authorized. *See* N.J. STAT. ANN. § 58:22-1 to -19 (West 1982). *See also* Goldshore at 3.66.

<sup>76</sup> N.J. STAT. ANN. §§ 58:1B-1 to -25 (West 1982).

rights, and six members appointed by the Governor.<sup>77</sup> The Act transfers to the Authority all water supply facilities now or hereafter owned by the State. Included as State water supplies under the Authority's control are all State-operated facilities authorized to be constructed and operated pursuant to any bond including the Bond Act of 1981.<sup>78</sup>

The Authority is authorized to design, construct, operate, and repair projects in conformance with the Master Plan and to issue bonds to finance these projects.<sup>79</sup> The Authority is to consult with the Water Supply Advisory Council on any project prior to final action.<sup>80</sup> Among the Authority's powers are the power to sue and be sued, to make and alter organizational by-laws, to acquire property, and to borrow and invest money.<sup>81</sup> The Authority may contract with and accept gifts, grants, or loans from any state or federal agency.<sup>82</sup> It may also order public utility facilities to be removed and relocated provided the costs of such relocation are paid.<sup>83</sup>

Bonds may be issued by a resolution of the Authority to accomplish its corporate purpose.<sup>84</sup> These bonds may be sold at public or private sale without the consent of any department or agency of the State. Authority bonds are solely the obligation of the Authority, payable from revenues or funds available by the Act.<sup>85</sup> To secure payment of these bonds the Authority has the power to pledge rents, fees, or tolls which come into existence and to pledge any lease, other agreement, or mortgage.<sup>86</sup> The Authority is also granted the power to establish all other reserves, funds, or accounts it deems necessary to further its objectives.<sup>87</sup> Property may be leased, rented, or conveyed to the Authority by any governmental entity. State House Commission approval and payment is required for grants, conveyances, or leases of State property other than meadowlands, riparian lands, and lands underwater.<sup>88</sup>

Every project of the Authority must be operated and maintained by the Authority.<sup>89</sup> The Authority is empowered to establish and alter rates

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<sup>77</sup> *Id.* § 58:1B-4(a)-(i). See also Goldshore at 3.66.

<sup>78</sup> *Id.* § 58:1B-5(a).

<sup>79</sup> *Id.* § 58:1B-6(a).

<sup>80</sup> *Id.* § 58:1B-6(c).

<sup>81</sup> *Id.* § 58:1B-7(a), (c), (e), (f). Additionally, the Authority may proceed by eminent domain. See N.J. STAT. ANN. § 58:1B-8(a) (West 1982).

<sup>82</sup> *Id.* § 58:1B-7(k).

<sup>83</sup> *Id.* § 58:1B-8(b).

<sup>84</sup> *Id.* § 58:1B-9.

<sup>85</sup> *Id.* § 58:1B-9(e)-(g).

<sup>86</sup> *Id.* § 58:1B-10(a)-(c).

<sup>87</sup> *Id.* § 58:1B-13.

<sup>88</sup> *Id.* § 58:1B-16.

<sup>89</sup> *Id.* § 58:1B-17.

and charges for water sold and for the use of any water system, but it may not acquire or operate any retail water system or project.<sup>90</sup> An annual operating and financial report must be filed yearly by the Authority with the Governor and the Legislature.<sup>91</sup> The Attorney General is authorized to act as counsel to the Authority.<sup>92</sup> The power to enter into contracts and agreements is granted to the Authority. When the sum to be expended exceeds \$2,500 the Authority must advertise and award the contract to the lowest bidder, unless the contract is for services of a professional nature, or is for products or services of a public utility. In cases where an urgency or emergency exists, the Authority may, by resolution, set forth the nature of the circumstances and expend funds.<sup>93</sup> Projects and property of the Authority are exempt from State taxation, except where leased by the Authority to another whose property is not tax exempt.<sup>94</sup> All Authority projects are exempt "from compliance with local zoning regulations, but the authority shall wherever practicable adhere to the regulations."<sup>95</sup> Finally, the functions, powers, and duties of the Water Supply Facilities Element in the Division of Water Resources are transferred to the Authority by the Act.<sup>96</sup>

#### V. *Small Water Companies Take-Over Act*

The recently promulgated Small Water Companies Take-Over Act<sup>97</sup> is a legislative attempt to create a solution to the present small water company crisis. Numerous private companies are too small to be able to meet present potability standards. Many publicly owned water companies are old and dilapidated with little hope that water rates can both be increased sufficiently and actually utilized to meet their rehabilitative needs.<sup>98</sup> The Act empowers the Department and the Board of Public Utilities to order a suitable public or private entity to acquire a small water company, to make necessary improvements, and to ensure an adequate potable water supply to its customers.<sup>99</sup>

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<sup>90</sup> *Id.* §§ 58:1B-18, -19.

<sup>91</sup> *Id.* § 58:1B-20.

<sup>92</sup> *Id.* § 58:1B-21.

<sup>93</sup> *Id.* § 58:1B-22.

<sup>94</sup> *Id.* § 58:1B-23(a).

<sup>95</sup> *Id.* § 58:1B-23(b).

<sup>96</sup> *Id.* § 58:1B-24.

<sup>97</sup> N.J. STAT. ANN. §§ 58:11-59 to -62 (West Supp. 1982-83).

<sup>98</sup> The dilemma has been quite a complex issue to tackle. In *State of New Jersey v. East Shores, Inc.*, 154 N.J. Super. 57, 380 A.2d 1168 (Ch. Div. 1977), *aff'd*, 164 N.J. Super. 530, 397 A.2d 368 (App. Div. 1979), it was found that under certain circumstances the local municipality had an affirmative duty to provide a remedy.

<sup>99</sup> N.J. STAT. ANN. § 58:11-59 (West Supp. 1982-83).



### *Conclusion*

The recently enacted water supply and management legislation has established a modern regulatory scheme of water source management. This all-encompassing statutory reformation resulted from a realization that New Jersey's system of water resource management did not meet the State's changing industrial and regional water needs. This article outlines the components of the water supply and management legislative package. It is intended as an overview of the major statutes in the package and as a guide for those interested in New Jersey's comprehensive water management legislation.