



1616 P Street, NW  
Suite 300  
Washington, DC 20036  
T +202.683.2500  
F +202.683.2501  
[foodandwaterwatch.org](http://foodandwaterwatch.org)

To: Cumberland County Utility Authority Commissioners  
CC: Cumberland County Commissioners, Mayor Albert Kelly, Mayor Benjamin Byrd Sr., and Mayor James P. Crilley  
From: Zach Corrigan, Esq., Food & Water Watch

Date: August 11, 2021

**Re: The legality of the proposed RFQ for a study of the monetization of the CCUA**

Dear Chair Jones and Commissioners Dawson, Rajacich, Smith-Bey, Edwards, Edwards, and Andre,

I write to you on behalf of Food & Water Watch (“FWW”), a national nonprofit organization that works to ensure clean water and safe food, as a follow-up to the organization’s June 16, 2021 letter raising serious concerns about your proposed Request for Qualifications (RFQ) involving the monetization of the CCUA. I have been asked whether this Revised RFQ is illegal under the New Jersey State law. While I am not licensed in the state, I have spent a considerable part of my career researching the intricacies of the state’s law governing the sale and lease of utilities. With that in mind, even a cursory review of the Revised RFQ reveals that it is legally suspect, and I respectfully represent that a failure of the CCUA to follow the proper process for securing the contract it is seeking puts it at legal jeopardy.

The Revised RFQ indicates that the CCUA is planning on “entering into one or more innovative delivery contracts to support the funding and implementation of a comprehensive program to improve its infrastructure.”<sup>1</sup> The scope of the work is to have a “team of experts in the industry that will work with the CCUA representatives to design a program to allow the CCUA to leverage private sector expertise to plan, engineer, finance, construct, and operate water and wastewater infrastructure improvements.”<sup>2</sup> The RFQ further indicates that it “seeks responses from local and national private sector service providers that offer innovative solutions for funding and implementing an affordable and sustainable asset management program for the County infrastructure. Responses to this RFQ may be used by the CCUA to formulate an implementation program that will commence in late 2021 or early 2022.”<sup>3</sup> The necessary implication of this language is that the CCUA is using this RFQ in order to secure a contract for the long-term financing for the wastewater utility.

To the extent that this is true, this would be in flat contravention of the various state laws governing the procurement of such arrangements. The Legal Notice for the Revised RFQ cites that

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<sup>1</sup> Revised Request For Qualifications For Vendor To Conduct An Evaluation Of The Current Infrastructure And Recommending Innovative Solutions Through Monetization, June 3, 2021. (“Revised RFQ”) at 1.

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.* at 1.

the contract is being solicited through the “competitive contracting process in accordance with the Local Public Contracts Law, N.J. Stat. § 40A:11-1, *et seq.*” But, under this law, the competitive contracting process for wastewater treatment is only available for the operation and management of a system for 10 years after approval by the state Department of Environmental Protection (“DEP”). N.J. Stat. § 40A:11-4.1(b)(1) (cross referencing N.J. Stat. § 40A:11-15 (37)). Longer contracts, including those up to 40 years, for the operation or financing of a wastewater treatment system must thus go through public bidding. The CCUA’s failure to allow for such bidding under the Revised RFQ would alone make a resulting contract for financing the CCUA’s wastewater services unlawful.

In addition, pursuant to § 40A:11-15(19) and (36), any financing deal must go through the processes detailed in the “New Jersey Wastewater Privatization Act”—approved by both the Division of Local Government Services (“DLGS”) and DEP—or the “New Jersey Wastewater Treatment Public-Private Contracting Act.” Even assuming *arguendo* that the latter, more abbreviated process applies, the utility would still have to provide 60 days public notice of the utility’s intent to enter into a contract prior to a public hearing under N.J. Stat. § 58:27-23(a); issue a proposals document allowing an additional 30 days for more proposals under N.J. Stat. § 58:27-23(b); it would have to have a public hearing and opportunity to submit comments pursuant to N.J. Stat. § 58:27-24(a), (d); and it would have to pass a resolution in order to approve of the contract. N.J. Stat. § 58:27-24(e). Finally, the contract would have to be reviewed and approval by DLGS after an audit under N.J. Stat. § 58:27-25.

Thus, far more time and public involvement is required under the law than the CCUA appears to be following under the current Revised RFQ. Moreover, some of the most problematic provisions of the Revised RFQ, which FWW outlined in its last letter, would likely mean any deal secured under it would not be approved by the DLGS. For example, under the Revised RFQ, a successful applicant does not have to evaluate whether private financing is in the public interest. It also allows the potential concessionaire or buyer to evaluate their own proposed concession or sale with CCUA. It is hard to imagine that DLGS would approve of such a deal as being “in the best interest of the parties to the contract,” under N.J. Stat. § 58:27-25, given that the CCUA ostensibly precludes the exploration all available options.

In sum, the Revised RFQ skirts statutory requirements applicable to the private financing of wastewater services. CCUA should not rush to approve an unlawful contract, and it should instead follow the procedures set forth under state law to ensure meaningful community input and public involvement. I am happy to talk to you further about any of these issues.

Sincerely,

/s/ Zachary B. Corrigan  
ZACHARY B. CORRIGAN  
Food & Water Watch  
1616 P Street NW, Suite 300  
Washington, DC 20036  
(p) (202) 683-2451/(f) (202) 683-2452  
zcorrigan@fwwatch.org