

MUNICIPALIZATION GUIDE



How U.S. Communities Can Secure Local Public Control of Privately Owned Water and Sewer Systems

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About Food & Water Watch

Food & Water Watch works to ensure the food, water and fish we consume is safe, accessible and sustainable. So we can all enjoy and trust in what we eat and drink, we help people take charge of where their food comes from, keep clean, affordable, public tap water flowing freely to our homes, protect the environmental quality of oceans, force government to do its job protecting citizens, and educate about the importance of keeping shared resources under public control.

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Executive Summary

Many communities across the country want local public control of their water and sewer services. Municipalization – the purchase of a privately owned system by a local government – is a fairly common occurrence, but for communities unfamiliar with it, the process could appear daunting.

This guide provides an overview of the process and a number of logistical considerations involved in government purchases of privately owned water and sewer systems. Although the general procedure is similar, the specifics will vary by situation, partly because every state has its own legal and regulatory framework.

These are the four basic phases involved in a public purchase of a privately owned water system:

1. Study and planning
2. Negotiation
3. Condemnation (if negotiation fails)
4. Sale and transition

The entire process must be as open and transparent as possible, with ample opportunity for public input.

Communities will need to make several key decisions about how they want their water systems to work, and these choices will have long-term effects on water service.

Municipalization is fairly straightforward unless the company owning the system refuses to come to the bargaining table. Certain large water companies frequently spurn negotiation and aggressively resist local-control efforts. In these instances, strong community organization is essential to counter the opposition from special corporate interests and to see the municipalization through the condemnation process.

Federal and state policies should support public ownership of community water and sewer systems. Legislators should streamline the municipalization process and forestall unnecessary and wasteful legal challenges from large water corporations.

Water and sewer services are natural monopolies – necessary for public health and without substitution. Responsible and locally accountable public operation can best ensure safe and affordable service for all.

Background: Trends in Water System Ownership

Local governments provide most water and sewer services in the United States.¹ Public entities own community water systems that serve about eight out of ten people nationwide,² as well as approximately 95 percent of major sewage treatment plants.³ Despite the predominance of public provision, for-profit companies still control more than 5,000 community water systems⁴ and a number of sewer systems. (See Figures 1 and 2.)

Nationally, there is an ongoing shift away from private provision of drinking water services. Between October 2007 and October 2011, the number of people served by privately owned systems fell by 16 percent,

while the number of people served by publicly owned systems increased by 8 percent.⁵ A report by the U.S. Environmental Protection Agency identified a similar trend between 2006 and 2008 among small community water systems.⁶ Given these shifts, municipalization appears much more common than privatization. Indeed, local governments purchase privately owned systems with relative frequency.⁷ In Georgia, for example, between 1998 and mid-2010, municipal utilities purchased 379 privately owned water and sewer systems, or about 29 systems a year,⁸ and Florida had a dozen government acquisitions in 2010 alone.⁹

Municipalization of drinking water service was even more prevalent a century ago than it is today.¹⁰ Around the turn of the 20th century, many of our country's largest cities – including Baltimore, Boston and New

Fig. 1: Portion of U.S. Population Served, By Water System Ownership (2011)

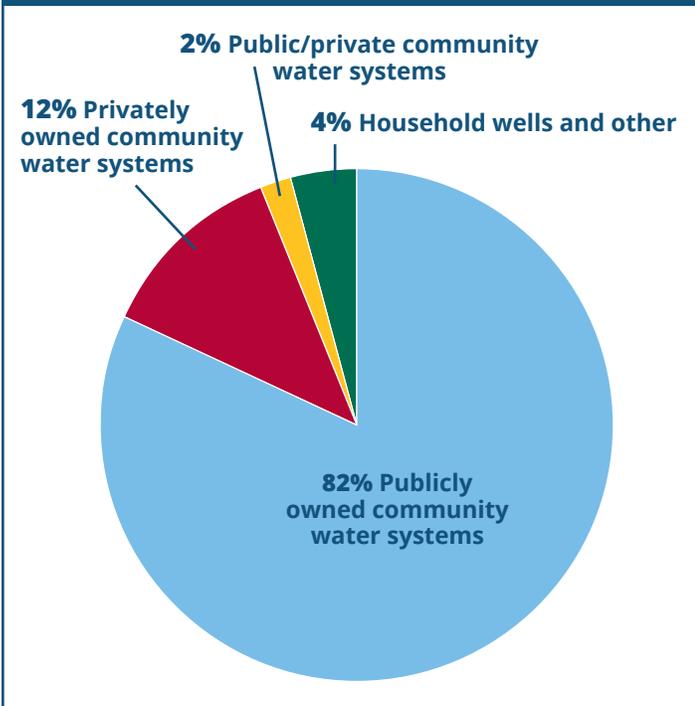


FIGURE 1. Community water systems served 299 million people in 2011. Given an estimated national population of 313 million, another 14 million people were not covered by any community water system and may have received their water from other sources including individual household wells or water systems not classified as community water systems. Public includes Native American, federal, state and local government systems.

SOURCES: U.S. Environmental Protection Agency. Safe Drinking Water Information System - Federal Version (SDWIS/FED). Inventory Pivot Table. October 2011; U.S. Census Bureau, Population Division. "U.S. & World Population Clocks." December 13, 2011.

Fig. 2: Ownership of Major Sewerage Treatment Facilities (2011)

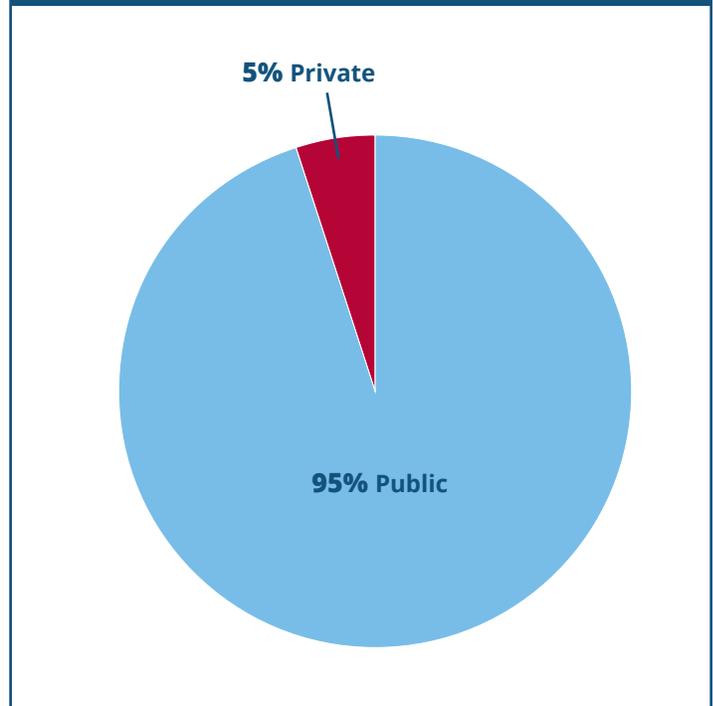


FIGURE 2. There were 7,993 major sewerage facilities (SIC 4952) with NPDES permits in 2011. Major municipal facilities had design flows of more than 1 million gallons a day or industrial pre-treatment programs. This chart excludes three facilities whose ownership was listed as "N/A." Public includes public, federal and state facilities.

SOURCES: U.S. Environmental Protection Agency. Permit Compliance System and Integrated Compliance Information System - National Pollutant Discharge Elimination System. Accessed December 2011.

York City – took over drinking water provision from private companies to improve service, reduce water-borne disease rates and increase water supplies to better fight fires.¹¹ New York City, for example, took over drinking water services from the Manhattan Company,¹² the predecessor of JPMorgan Chase,¹³ after an outbreak of cholera killed 3,500 people and a devastating fire caused extensive property damage.¹⁴

Reasons to Municipalize

Although communities take public control of water and sewer systems for a number of reasons, three common ones are to:

- *Gain local control.* Public ownership of water and sewer systems allows local governments to better manage water resources, growth and development.¹⁵ For example, public officials for the city of Cottonwood and the town of Prescott Valley in Arizona found, “Acquiring private water companies by municipalities (Chino Valley & Prescott Valley) allowed for better water management through more robust planning and control.”¹⁶
- *Improve service.* Other communities have bought systems to improve water quality and service.¹⁷ Washington State’s Department of Health found that small privately owned community water systems were 30 percent more likely to have violated drinking water rules than small publicly owned systems,¹⁸ leading it to conclude, “The department’s data suggest that public ownership provides better assurance for providing safe and reliable water than private ownership.”¹⁹
- *Lower water bills.* Communities have also bought privately owned systems to control household water costs.²⁰ In general, compared to local governments, for-profit water utilities charge considerably higher rates.²¹

Overview of the Municipalization Process

The process of municipalizing a privately owned water or sewer system varies by state, and the specific procedures depend on the circumstances of the community served by the system. Unincorporated areas and neighborhoods within city limits face different challenges and opportunities.

In general, there are four basic phases to assume public ownership of a water system:

1. Study and planning
2. Negotiation
3. Condemnation (if necessary)
4. Sale and transition²²

Throughout the process, there should be public hearings and meetings to keep the community informed and to solicit input.²³ To best serve the public interest, the transaction must be transparent and democratic.

Phase 1. Study and Planning

For public officials, the first step toward a public purchase is to conduct a feasibility study.²⁴ A feasibility study is an initial evaluation of system that examines possible public ownership structures (whether to transfer ownership to an existing public entity or to form a new one); operating structures (whether to connect the privately owned system to an existing municipal system or to operate it independently); and potential acquisition costs.²⁵ After reviewing the study, the community selects the most appropriate option. The governing board of the public buyer then resolves to pursue a purchase.²⁶

Ownership Structure

The community must decide which public entity should own and operate their system. In most cases, the simplest option will be to petition their municipality or a nearby existing public utility to expand their service area and purchase the system. In some places, particularly in rural areas, the community must form a new public utility to make the purchase. The public buyer can be a municipality, county, district or regional authority. For the best outcome, the community should seek the most local form of ownership, which is the easiest to hold accountable.

Municipalities often purchase privately owned systems near their existing service area.²⁷ Although many states do not require the acquired systems to be within municipal limits (see Table 1 on page 9 for examples), local governments can annex an area before extending public services.²⁸

- *Charlotte, N.C.* In 2010, five years after Charlotte annexed the Emerald Point subdivision, Char-

lotte-Mecklenburg Utilities purchased the subdivision's private water and sewer system from a subsidiary of Utilities, Inc. Public ownership improved service and reduced rates.²⁹

In some cases, a local government does not have an existing utility and must form a new department or authority before purchasing its system.

- *Vernon, N.J.* In 2011, Vernon Township created a municipal utilities authority to purchase its sewer system from United Water.³⁰

Counties tend to buy small privately owned systems, especially those adjacent to their existing utility systems. They also often acquire nonviable private systems in unincorporated areas within their borders.³¹

- *Martin County, Fla.* In 2009, Martin County purchased two water systems from Utilities, Inc. and connected them to the county's consolidated system, "significantly improving the service to these customers."³²

Public districts generally buy privately owned systems that serve unincorporated areas. These districts are quasi-governmental entities usually with the power to use eminent domain, issue revenue bonds and collect user fees. One report noted that public districts are usually formed after "taxpayers petition for one due to water quality concerns."³³ In some states, such as Maine, the creation of a water district requires legislative approval.³⁴

- *Felton, Calif.* At the community's request, the San Lorenzo Valley Water District expanded its jurisdiction to include the unincorporated community of Felton,³⁵ before purchasing its water system from California American Water in 2008.³⁶

Regional authorities or agencies can be created to purchase privately owned systems that serve multiple municipalities.³⁷ After forming a new regional authority, the participating governments usually appoint a board of directors from their respective jurisdictions to oversee it.³⁸

- *Southeastern Nassau County, N.Y.* In 2010, the towns of Hempstead and Oyster Bay in New York reinstated the Water Authority of Southeast Nassau County to explore a public purchase of a water



system from Aqua New York. A board with five members, all of whom are volunteers and customers of the water company, oversees the authority.³⁹

When a private entity owns a water supply or wastewater treatment plant that serves multiple localities, the local governments can enter into an intergovernmental agreement that allows them to share the cost of purchasing the system.⁴⁰ Typically, in these arrangements, a newly created agency owns and operates the system and provides wholesale service to member communities.⁴¹

- *Northern Will County, Ill.* In 2010, five communities – Bolingbrook, Homer Glen, Lemont, Romeoville and Woodridge – formed a joint action water agency to explore purchasing, possibly via eminent domain, their water supply pipeline from a subsidiary of American Water.⁴²

Regional authorities may also purchase privately owned systems in unincorporated areas adjacent to their existing service area.

- *Washington Metro Area, Md.* In 2007, the Washington Suburban Sanitary Commission extended public water service to the Upper Marlboro neighborhood after purchasing the area’s water and sewer system from Utilities, Inc. of Maryland. The neighborhood was the last unincorporated suburb in Prince George’s and Montgomery counties with a privately owned water and sewer system. Public ownership improved water quality and lowered rates.⁴³

It is important to note that regional authorities can have serious drawbacks if they are not set up properly. Independent agencies and authorities can restrict public input and curb local decision-making power. They are an inferior option to local control at the community level. For the best outcome, it is essential for communities to ensure that the regional entities are not independent actors and that they are accountable to the public.



Operating Structure

In most cases, when a publicly owned utility acquires a privately owned water or sewer system, it must decide whether to consolidate the purchased system with its existing infrastructure or to operate it separately as a satellite.⁴⁴

- *Consolidation in Cottonwood, Az.* Between 2004 and 2006, Cottonwood purchased four privately owned water systems, serving 12,000 city residents and another 13,000 people outside city limits. The city interconnected the systems and integrated them into its existing sewer utility department.⁴⁵
- *Satellite Operation in Manchester Township, N.J.* In 2010, Manchester Township bought the Crestwood Village Water and Sewer Company, which served roughly 9,990 customers in the township.⁴⁶ It decided to operate the system separately from its existing utility using the system's existing workforce.⁴⁷

Shared Treatment Options

In some cases, a community buys its water distribution system or sewer collection system but not the treatment facility. When this occurs, the community must determine whether to purchase bulk water or wastewater treatment service from a neighboring public utility or to build its own treatment system. Public-public partnerships are a cost-effective model to meet treatment needs. Public entities can cooperate by sharing treatment services or building a joint infrastructure project.

- *Sharing a Water Treatment Plant in Mattapoissett, Mass.* The towns of Fairhaven, Marion, Rochester and Mattapoissett came together and formed the Mattapoissett River Valley Water District to build a new water treatment plant, which was completed in 2008. By working together, the towns saved \$4.9 million or 22 percent on capital costs.⁴⁸ The district owns the new plant while the town of Mattapoissett operates it, and each town continues to own and operate its own wells and distribution system. In this way, the public-public partnership not only saved money but also preserved local control of water services.⁴⁹

- *Sharing a Treatment Plant Operator in Canton Township and Westland, Mich.* Through a shared service agreement, the city of Westland provided its neighbor, Canton Township, with a qualified water system operator, which was necessary to comply with water quality regulations.⁵⁰ "In these difficult economic times, it is very important to share services whenever and wherever we can," Phil LaJoy, supervisor of Canton Township, told the local newspaper in 2011. He called the agreement a "win-win situation for both of our communities."⁵¹

Phase 2. Negotiation

After deciding to pursue municipalization, the public entity should hire independent appraisers to determine the asset value. Based on this appraisal, the public body then makes an official purchase offer to the private owner. The public must attempt to negotiate in good faith with the company over the purchase price before making its final offer.⁵²

Setting the Purchase Price

There are several methods to determine the value of a water system:

- *Income approach:* the net present value of the projected earnings generated by the utility.⁵³
- *Market approach:* the estimated value based on comparable sales.⁵⁴ This approach is problematic when there are few relevant transactions for comparison.⁵⁵
- *Reproduction cost approach:* the reproduction cost less depreciation.⁵⁶ According to a report by the National Regulatory Research Institute, this method "tends to significantly inflate prices above market levels,"⁵⁷ and many regulators disapproved of using it.⁵⁸
- *Original cost approach:* the net book value or the original cost less depreciation and contributed assets.⁵⁹ This seems to be the most reasonable method.

The purchase price should exclude the value of property donated to the company by developers and other entities (often called *contributions in aid of con-*

struction),⁶⁰ and it should reflect the *system condition*. When systems need extensive improvements in order to comply with quality regulations, then the purchase price should be reduced accordingly.⁶¹

In Illinois, for example, a 2010 law clarified that when determining the fair market value of a waterworks or sewerage system condemned by a municipality, the court may consider the condition of the infrastructure. The law also limited the fair market value to include only the assets constructed by the utility and the payments made by the utility for system property, thus excluding contributed assets from the purchase price.⁶²

Phase 3. Condemnation (if necessary)

Certain large water corporations typically refuse to negotiate a sale of a system to a local government. When this happens, in most states, a local government can exercise its power of eminent domain to condemn the privately owned system.⁶³ Eminent domain is a government's right of sovereignty to take private property, so long as it is done for the public's use and best interest and the private property owners receive just compensation, as required under the U.S. Constitution's Fifth Amendment.⁶⁴ When a government uses eminent domain, the Fourteenth Amendment guarantees due process of law.⁶⁵

States must delegate policymaking power, including eminent domain authority, to localities. As a result, the extent of a municipality's power varies by state. Most states, however, grant more autonomy to home-rule cities, giving them authority to municipalize for city planning purposes.⁶⁶ A couple of states, including Missouri, however, do not allow municipalities to condemn privately owned water utilities.⁶⁷ Some states restrict a city's condemnation powers to within municipal limits,⁶⁸ while others allow a city to condemn water and sewer systems assets outside their boundaries. (See Table 1 on page 9 for examples.)

This is the typical procedure for using eminent domain:

- *Negotiation*. Generally, before pursuing eminent domain, local governments must attempt to negotiate with the private owner.⁶⁹ In California, for example, a public entity must first appraise the



utility and then make “every reasonable effort to acquire expeditiously real property by negotiation.”⁷⁰

- *Petition*. The public buyer files an eminent domain lawsuit in the trial court of general jurisdiction, typically the county circuit or superior court, in the county where the utility property is located.
- *Trial*. The court holds a trial to determine the condemned asset's value and set the purchase price⁷¹; this valuation trial may occur after a separate trial determining a municipality's right to take the utility.⁷² In some states, a jury trial is held, while in other states, the court appoints special commissioners to hear the case.
- *Appeals*. Either party may appeal the decision.⁷³

Most eminent domain cases are settled out of court, but the threat of eminent domain has compelled private companies to negotiate with local governments. A U.S. Government Accountability Office report said, “Although few eminent domain cases go to jury trial, authority officials stated that eminent domain is the

Table 1: State Survey of Laws Affecting the Municipalization of Privately Owned Water and Sewer Systems

	California	Florida	Illinois	New Jersey	Texas
Do municipalities have the legal authority to condemn privately owned water or sewer systems?	Rebuttable presumption, ^a so a water company can challenge the public's right to condemn	"Yes, ^b and alternatively, a municipality can purchase a system when a company's franchise expires ^c	Yes ^d	Yes ^e	Home-rule municipalities can condemn water utilities, ^f and the state water code provides for eminent domain to some large non-home-rule municipalities ^g
What court has jurisdiction in eminent domain trials?	Superior court ^h	Circuit court ⁱ	Circuit court ^j	Superior court ^k	District court and county court at law ^l
Who decides the purchase price in eminent domain trials?	Jury, unless waived ^m (elective alternative valuation process through public utilities commission) ⁿ	Jury ^o	Jury ^p	Court-appointed commissioners ^q	Court-appointed commissioners ^r
Can municipalities acquire systems outside their legal boundaries?	Yes ^s	Yes, if not within another municipality ^t	Yes, if at least 70% of customers are within boundaries ^u	Yes ^v	Yes, but must be within county ^w
Do purchases require approval from the state public utility commission?	Not for condemnations ^x	Yes, but approved "as a matter of right" ^y	No ^z	No ^{aa}	Yes ^{bb}
Can state regulators initiate the sale or receivership of poor performing systems?	Yes, by petitioning the court ^{cc}	In case of abandonment, ^{dd} and they can revoke a utility's certificate of authorization ^{ee}	Yes, for small systems, by petitioning the court ^{ff}	Yes, for small systems ^{gg}	Yes, by requesting that the attorney general file suit ^{hh}

a California Code of Civil Procedures §1240.650(c), §1245.250(b).

b Fla. Stat. §153.03, §153.62, §166.401, §166.411.

c Fla. Stat. §180.16.

d 65 ILCS 5/§11-124-5.

e N.J.S.A. §20:3-45, §40:14A-20, §40:62-109, §40:62-149, §40A:12-4(a), §40A:12-5(a)(1), §40A:26A-5(d) and §40A:31-5(d).

f Texas Local Government Code §552.002(b).

g Texas Water Code §13.247.

h California Code of Civil Procedures §1250.010.

i Fla. Stat. §73.021.

j 735 ILCS 30/§10-5-10(a).

k N.J.S.A. §20:3-2(e), §20:3-5.

l Texas Property Code §21.001.

m California Constitution §1.16, §1.19(a); Code of Civil Procedures §631(a), §1230.040.

n California Public Utilities Code §1403, §1404 and §1416.

o Fla. Stat. §73.071.

p 735 ILCS 30/§10-5-5.

q N.J.S.A. §20:3-12, §40:62-109.

r Texas Property Code §21.014.

s California Code of Civil Procedures §1240.125.

t Fla. Stat. §180.02, §180.22.

u 65 ILCS 5/ §11-124-5(c).

v N.J.S.A. §40:14B-34, §40A:12-4(a).

w Texas Local Government Code §273.001(b) and §552.001(b).

x California Public Utilities Code §851; California Code of Civil Procedures §1230.060; People ex re. v. Public Utilities Commission v. City of Fresno 254 Cal. App. 2d. 76, 84 (Cal-Court of Appeal 1967).

y Fla. Stat. §367.071(4)(a).

z 65 ILCS 5/§11-124-5(g).

aa N.J.S.A. §48:3-7a.

bb Texas Water Code §13.251, §13.301.

cc California Public Utilities Code §855.

dd Fla. Stat. §367.165.

ee Fla. Stat. §367.161(2).

ff 220 ILCS 5/§4-501.

gg N.J.S.A. §58:11-59.

hh Texas Water Code §13.412.

most effective tool they have to acquire needed property from owners who hold out for a higher purchase price or refuse to sell.”⁷⁴ Eminent domain generally is not necessary when purchasing a small private mom-and-pop operation, but it can play an important role when dealing with large national or international water corporations that refuse to even come to the table.

Many local governments have used their eminent domain powers to acquire systems from recalcitrant water corporations,⁷⁵ often when the privately owned systems provided unsafe or unreliable water service.⁷⁶

Caution: Corporate Tactics to Oppose Public Control Efforts

As communities pursue local public control of their water supplies, they may encounter resistance from the private company that owns the system. Certain large water companies habitually oppose municipalization efforts, perhaps as a matter of corporate policy.

Common tactics used by these companies to try to stop public efforts include:

- Mass mailings, robocalls and newspaper advertisements⁷⁷
- Push polls⁷⁸
- Dubiously named websites (For example, American Water created FeltonWaterFacts.com for Felton, Calif.; LexingtonWaterFacts.com for Lexington, Ky.⁷⁹; and ChicagoMetroWaterFacts.com for Will County, Ill.⁸⁰ Golden State Water Company created OjaiWaterFacts.org for Ojai, Calif.⁸¹)

Companies may adopt aggressive communication, organizing or lobbying strategies. For example, American Water hired the public-relations firm the Moriah Group to help oppose local control efforts including those in Lexington, Ky.,⁸² and Felton, Calif.⁸³ In Felton, the company – via the Moriah Group – even hired a political organizer to live and work in the community to “serve as both an ambassador and a strategist.”⁸⁴

Some corporations may obstinately refuse to negotiate with the public. This forces communities to pursue eminent domain action to convince a water corporation to come to the bargaining table. The purchase price can also be an area of contention. For-profit water corporations, of course, want to get the most out of public purchases and can aggressively try

to inflate the price. Certain companies expect to be compensated well above and beyond the actual book value of their systems.⁸⁵

With slick lawyers and sizable legal budgets, some litigious companies might even try to exploit the legal process to drive up the public’s acquisition costs. In some cases, a company waits until just prior to the start of the actual eminent domain trial before coming to the bargaining table and agreeing to a negotiated settlement. (See box on page 11 for an example from Felton, Calif.) This delays the transfer and wastes public resources while avoiding actual adjudication. Some companies have spent years in court bickering over the public’s legal authority to condemn a system and about what constitutes a fair market value.

American Water said that it might dedicate a considerable amount of corporate resources to fight condemnation efforts. “Should a municipality or other government subdivision seek to acquire our assets through eminent domain, we may resist the acquisition,” the company said in its annual report to shareholders. “Contesting an exercise of condemnation through eminent domain may result in costly legal proceedings and may divert the attention of the affected Regulated Business’s management from the operation of its business.”⁸⁶

Dollar figures for corporate campaigning against local control are not typically available to the public, but American Water disclosed to investors that in 1999 alone, it spent \$5.6 million (\$7.6 million in 2011 dollars) fighting municipalization efforts in Chattanooga, Tenn., and Peoria, Ill.,⁸⁷ eventually defeating both.⁸⁸ In Felton, Calif., American Water spent hundreds of thousands of dollars in just the first two years to stop the public acquisition,⁸⁹ but the public control movement triumphed.⁹⁰

Aqua Indiana Wages Legal War in Fort Wayne, Ind.

Fort Wayne took over the operation of a water and sewer system from Aqua Indiana in 2008,⁹¹ after winning a lengthy battle over the city’s right to condemn that went all the way to the state supreme court.⁹² Four years later, however, the sale has yet to be finalized because the company also sued over the purchase price.⁹³

Setting the Record Straight: American Water's Spin about Felton, California

American Water has tried to distort the successful public purchase of its Felton water system into a warning against municipalization,⁹⁹ and some companies have echoed its claims to attack other local-control efforts.¹⁰⁰

American Water has implied that local-control proponents in Felton misled the public about the cost of purchasing its system,¹⁰¹ but that is simply untrue. The San Lorenzo Valley Water District bought the system in 2008 for \$10.5 million in cash and the assumption of \$2.9 million of debt.¹⁰² Felton Friends of Locally Owned Water (FLOW), the primary local-control proponent, said in 2004 that the acquisition would cost \$10 million to \$12 million,¹⁰³ and the water district's official appraisal put the asset value at \$7.6 million.¹⁰⁴ These projections were closer to the final price than the company's appraisal, which put the value at \$25.6 million.¹⁰⁵

At one point in 2005, the company even claimed that the system was worth as much as \$46 million¹⁰⁶ — nearly three-and-a-half times the final purchase price.

Moreover, during a special election in 2005, residents specifically authorized raising their taxes and issuing \$11 million of bonds to purchase the system. The measure passed with more than two-thirds of the vote.¹⁰⁷ As one district official remarked, "It is hard to image how any stronger proof could be provided of the Felton community's level of commitment and support for gaining local control of their water utility."¹⁰⁸

Public ownership saved a typical Felton household about 30 percent or \$518 a year on the total cost of water service.

American Water has also claimed that public ownership increased the total cost of water service for customers,¹⁰⁹ but compared to the company's proposed rates for 2011, public ownership saved a typical Felton household about 30 percent or \$518 on total annual water costs, including taxes.¹¹⁰ (See Figure 3.)

What is true is that the company's legal wrangling delayed the purchase and wasted public resources. The water district repeatedly told California Ameri-

can Water that it wanted to negotiate a settlement and avoid eminent domain litigation,¹¹¹ but the company refused to come to the bargaining table until after the district filed an eminent domain petition.¹¹² The company then contested the public's right to condemn and only withdrew its legal challenge a week before it was to go to trial.¹¹³ It also settled with the district over the purchase price less than a week before the valuation trial was to start.¹¹⁴

Other local-control movements can look to Felton as an example of why they should not become discouraged when water corporations refuse to negotiate or demand excessive prices.

Figure 3: Estimated Annual Water Cost for a Felton Household in 2011

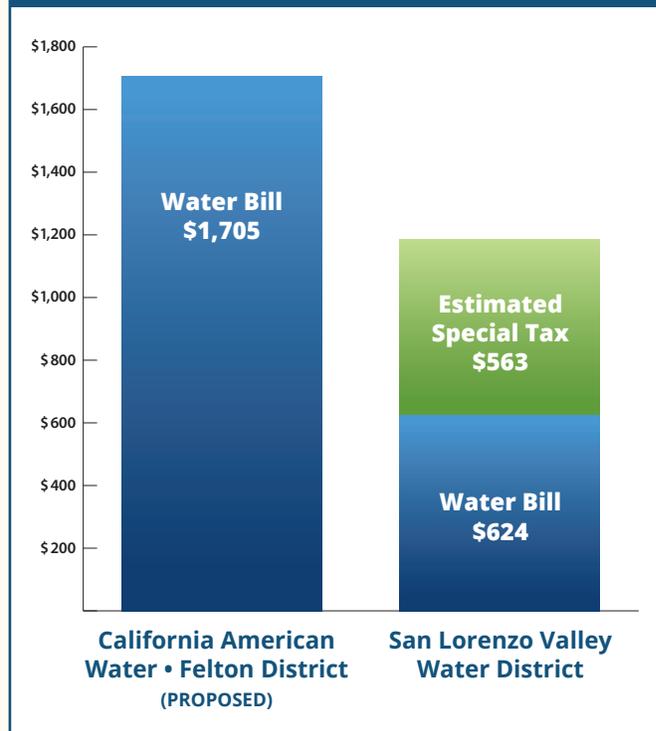


FIGURE 3. Water bill for a residential customer with a 5/8-inch meter and annual water use of 12,000 cubic feet (about 90,000 gallons); estimated special tax for the Series B acquisition bond for a customer with a 5/8-inch meter.

SOURCES: San Lorenzo Valley Water District. "Rates and Charges." June 11, 2011; Mauriello, Susan A. Santa Cruz County. (Memorandum). "Bond for the Acquisition of the Felton Water System." June 11, 2008 at 2; California Public Utilities Commission. "Opinion Resolving General Rate Case." (Decision 06-11-050). November 30, 2006 at 108 and attachment 2, Appendix B; California-American Water Company. "Compliance Filing." (A.08-01-022). March 24, 2008 at Exhibit A.

Upon assuming operational control, the city paid the company \$16.9 million, reflecting the system's appraised value. Although Aqua America noted in its financial filings that this amount exceeded the system's book value,⁹⁴ it still challenged the price in court to try to squeeze more money from the city.⁹⁵ In January 2012, a state appeals court ruled against the company, but the company promptly petitioned to take the fight to the state supreme court. As of May 2012, the matter is pending.⁹⁶

Because of the uncertainty over the price of that system, the city has delayed and may forgo the acquisition of another water system from the company,⁹⁷ even as those residents clamor for public service.⁹⁸

Community Action for Local Control: How to Form a New Group

For community members, the first step toward local control of water is to form an organization, coalition or steering committee to champion the issue and ensure that it moves forward.¹¹⁵ These groups are necessary to counter the corporate mudslinging about municipalization and public water service. Felton Friends of Locally Owned Water (FLOW), for example, was essential to the successful public purchase of Felton's water system in California. (See box on page 11.)

Here are basic steps to form a new group:

1. Identify and recruit others
 - a. Find like-minded individuals who support local public control of water
 - b. Have one-on-one conversations with each potential member
2. Hold your first meeting
 - a. Have everyone introduce themselves
 - b. Present the problem and goals of the organization
 - c. Establish action steps
3. Continue to have regular follow-up meetings
 - a. Present updates
 - b. Discuss next steps
 - c. Assign tasks and responsibilities

Communities can contact Food & Water Watch for help forming a new group or developing an organizing strategy.

Receivership: An Alternative for Distressed Systems

Several states facilitate public acquisitions of privately owned water systems that fail to meet water quality regulations.¹¹⁶ In certain states, regulators can put a failing system into receivership or force a regulatory takeover,¹¹⁷ and some states require that a publicly owned system assume responsibility for these systems.¹¹⁸

Here are a few examples:

- The Connecticut Department of Public Utility Control, which regulates privately owned water utilities, can order the sale of a poor-performing private utility.¹¹⁹
- In Mississippi, a county court can put a poor-performing privately owned water system into receivership. If the court decides that the system should not be given back to the private owner, the receiver can liquidate the system's assets. Municipalities and counties are preferred buyers.¹²⁰
- The Texas Commission on Environmental Quality can put a water system into receivership if the system "displays a pattern of hostility toward or repeatedly fails to respond to the TCEQ or its customers."¹²¹ The receiver can apply to acquire or sell the system's facilities.¹²²
- The Virginia Board of Health appoints a receiver to operate a poorly performing small water system "upon the petition of two-thirds of the affected customers, water system staff, or the BOH."¹²³ A new owner can acquire the facilities if the State Corporation Commission determines that this is in the best interest of the customers.¹²⁴
- Washington State can put a failing water system under the control of a county government to improve the system.¹²⁵

(See Table 1 on page 9 for more examples.)

States can also apply regulatory pressure on the owners of non-viable systems to facilitate municipalization. According to the U.S. EPA, public entities generally are "unwilling to pay high prices to an owner who clearly has shirked his responsibility,"¹²⁶ and in these cases, state regulators can apply "enforcement pres-



sure” on the private owner to “enhance the bargaining power” of the public entity.¹²⁷

Phase 4. Sale and Transition

Before completing the acquisition, the public entity must issue bonds or identify other financing sources, obtain necessary approvals, apply for proper permit modifications and complete other preparations.¹²⁸ All community water systems, for example, need certified operators.¹²⁹ A simple way to meet this requirement and ensure a smooth transfer of operation is to extend job offers to the system’s existing workforce.¹³⁰ This appears to be a common approach,¹³¹ and states like Illinois require it.¹³²

The public buyer may also need to finalize an equipment inventory,¹³³ the necessary operation and maintenance procedures,¹³⁴ a capital improvement plan¹³⁵ and a rate schedule.¹³⁶ It may have to transfer or cancel contractual obligations, including water purchase agreements, that are associated with the acquired system.¹³⁷

Financing Options

Local governments usually finance acquisitions and infrastructure-improvement projects with tax-exempt municipal bonds.¹³⁸ They can issue either revenue bonds, repaid through water bills, or general obligation bonds, backed by a municipality’s taxing authority.¹³⁹ In some communities, voter approval may be necessary before issuing certain types of bonds.¹⁴⁰

- *Oviedo, Fla.* In 2010, under threat of condemnation, a subsidiary of Utilities, Inc. sold its wastewater system in Seminole County, Fla., to the city of Oviedo.¹⁴¹ City residents voted by a margin of 25 percent to issue revenue bonds to finance the acquisition. The city charter required voter approval for all borrowing in excess of \$5 million.¹⁴²

In some cases, states may have special programs to support public water utilities,¹⁴³ or the county may provide assistance.¹⁴⁴

- *Bay County, Fla.* In 2011, Bay County and the cities of Callaway and Panama City Beach began work-

ing together to buy two utility systems owned by Utilities, Inc. Bay County offered \$175,000 to each city to help pay for the purchase.¹⁴⁵

Communities can also apply for federal funding. The State Revolving Fund programs can provide loans and grants to finance system improvements and acquisitions from willing sellers, but they cannot be used to pay for condemned assets.¹⁴⁶ Other federal assistance may be available through the Department of Housing and Urban Development's Community Development Block Grant program, the Department of Agriculture's Rural Community Advancement Program and the Department of Commerce's Economic Development Administration.¹⁴⁷

- *Winter Harbor, Maine.* Winter Harbor, a small disadvantaged community in Maine, formed a water district and received funding from the USDA's Rural Development Agency to pay for the condemnation of its privately owned water system, which provided poor and expensive service. The district also received a Drinking Water State Revolving Fund loan and a Community Development Block Grant to make necessary system improvements.¹⁴⁸

Regulatory Approvals

The public buyer and the selling company must obtain all necessary regulatory approval, the specifics of which vary by state. "The transfer of assets and ownership probably requires regulatory approval," according to a report for the National Regulatory Research Institute. "In most cases regulation will not prove to be a significant barrier to the transfer."¹⁴⁹ The report went on to add that regulatory involvement is often "mostly cursory."¹⁵⁰

Some states require that the public utility commission approve all sales, while others require this approval only when the acquisition was negotiated and not for condemnations. For example, in 1996, New Mexico's supreme court ruled that the state Public Utility Commission does not have jurisdiction over municipal condemnations of privately owned water and sewerage utilities.¹⁵¹ (See Table 1 on page 9 for more examples.) Usually, at the very least, investor-owned utilities must notify state regulators of the transfer of assets and amend their certificates of service. Communities should consult with the public utility commission to determine the requirements in their state.



Permit Modifications

Water supply and wastewater permits must be modified or transferred to the public buyer. Most states require water utilities to obtain operating or construction permits. As part of the permitting process, regulators approve system plans, procedures and specifications.¹⁵² When ownership changes, a water system's operating permit may need to be renewed.¹⁵³ Some states require a capacity review for water supply systems undergoing a change in ownership or major modification. If a water utility decides to consolidate a newly purchased system with its existing municipal system, it may need to obtain a construction permit from the appropriate state agency. The state may have to approve the utility's engineering plans and specifications.¹⁵⁴

Here are a few examples:

- The California Department of Public Health must review a water system's technical, managerial and financial capacity before approving a change in ownership of a water supply permit. As part of this review, the system must submit detailed information including a consolidation feasibility evaluation, a 10-year source-water capacity plan, an operations plan, a training plan, an emergency response plan and a five-year capital improvement plan.¹⁵⁵
- Florida requires that the former owner and new owner jointly notify the appropriate state Department of Environmental Protection district office or approved county health department at least 30 days before the proposed sale or legal transfer of ownership.¹⁵⁶
- The Illinois Environmental Protection Agency requires notification within 15 days of the sale of a water supply system.¹⁵⁷ A public water utility must obtain a construction permit and then an operating permit from the state Environmental Protection Agency for a major modification.¹⁵⁸
- The New Jersey Department of Environmental Protection at its discretion can decide to review an existing water system's managerial capacity when the system changes ownership.¹⁵⁹

Regulators must be notified of all changes in ownership of wastewater treatment plants. They will decide whether to automatically transfer the plant's National Pollutant Discharge Elimination System (NPDES) permit or to require a minor permit modification.¹⁶⁰ State agencies oversee the authorization and modification of NPDES permits for municipal wastewater treatment plants in every state except Idaho, Massachusetts, New Hampshire and New Mexico,¹⁶¹ where the U.S. EPA oversees the permitting system.¹⁶²

State water quality program administrators can typically assist communities in identifying the necessary permit modifications.

Policy Recommendations and Best Practices

Public policy should encourage and facilitate public ownership of community water and sewer systems. The treatment, delivery and collection of water are important public services that are vital for public health and without substitution. Responsible public operators are in the best position to ensure universal access to safe and affordable service. Public provision is in the public interest and promotes the welfare of the general population.

States should differentiate government condemnations of privately owned water and sewer systems from condemnations of other private property. They should expressly authorize and streamline eminent domain proceedings for public acquisitions of investor-owned water and sewer systems, particularly ones with unaffordable rates or water quality violations. This would avoid excessive and unnecessary litigation that wastes public resources.

The federal government should open up the State Revolving Fund programs to allow public utilities to access the funding to finance the condemnation of privately owned systems. It should also provide special assistance to local governments that acquire poor-performing privately owned systems.

State Best Practices

Georgia. The state Environmental Protection Division encourages government acquisitions and consolidations of private water systems. It may lower water



quality penalties against a system owner if the owner agrees to connect the system to a government utility within a reasonable amount of time.¹⁶³ The division's enforcement program has been a "significant factor in encouraging private public water systems with limited capacity to physically merge or consolidate with local governmentally owned water systems or water authorities."¹⁶⁴ Georgia also allows funding from the drinking water state revolving fund to help consolidate struggling systems,¹⁶⁵ and it restricts program funding to local governments.¹⁶⁶

Florida. In response to consumer complaints against the Florida subsidiary of Aqua America,¹⁶⁷ state senator Alan Hays introduced a bill in the 2012 legislature that would impose financial penalties on large investor-owned water companies for poor performance, among other things.¹⁶⁸ (In March 2012, the state legislature unanimously passed an amended version of the bill that created a study committee on investor-owned water utilities.¹⁶⁹)

Illinois. The state requires that the purchasing municipality maintain a sufficient workforce at the system by first offering jobs to the system's pre-existing workers with equivalent or greater compensation for at least 30 months after the change of ownership.¹⁷⁰ In the event that the workforce is smaller under public ownership, the private utility must develop a transition plan for the remaining system workers to mitigate job losses by offering voluntary severance, early retirement, out placement or other benefits.¹⁷¹ The state also requires the purchasing municipality to recognize the existing labor union.¹⁷²

Michigan. The state requires all privately owned utilities to agree to transfer the ownership and operation of their systems to local governments or public entities when connection to a publicly owned system becomes practicable.¹⁷³

Washington. The state has a water system acquisition and rehabilitation program that provides grants to publicly owned water utilities to help purchase and improve troubled water systems.¹⁷⁴

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