

**SEWERAGE & WATER BOARD GOVERNANCE CHANGE, DECEMBER 8, 2018**

**IN BRIEF**

**What am I voting on?** On December 8, New Orleans voters will decide whether to change the board composition of the Sewerage and Water Board (S&WB) by amending the City’s home rule charter. As shown in the chart below, the amendment would remove one mayor-appointed citizen member and add a City Council representative to the board. The representative may be either the chair of the council’s public works committee, a committee member appointed by the chair, or a civil engineer appointed by the chair. Any appointee would serve at the pleasure of the chair. The total board size would remain at 11 members.

In addition, voter approval of the charter amendment would determine whether certain other changes to State law would take effect. These would require one of the mayor-appointed board members to be a retired civil engineer, reset all board members’ terms, strengthen the S&WB’s reporting to the council, and require that the S&WB update elected officials on its power and pumping capacities before major weather events.

**Why is this on the ballot?** The State Legislature proposed the changes to the S&WB board composition in response to citizens’ concerns about S&WB performance in managing widespread flooding during heavy rains in 2017. It came to light that S&WB power and pumping failures contributed to the flooding. Some observers contend that had council members been on the board, they might have raised concerns about the drainage system sooner. The proposed board changes require a public vote because the S&WB board composition is set forth both in State law and the City charter.

**HOW THE CHARTER AMENDMENT WOULD ALTER S&WB BOARD COMPOSITION**

**CURRENT SEWERAGE & WATER BOARD**



**PROPOSED SEWERAGE & WATER BOARD**





## IN BRIEF: HIGHLIGHTS AND BGR POSITION

### SEWERAGE & WATER BOARD GOVERNANCE CHANGE DECEMBER 8, 2018 BALLOT

#### REPORT HIGHLIGHTS

- Voters last changed the S&WB board composition in 2013, when they eliminated the seats of the three City Council members then serving on the board. The move was part of a set of S&WB governance reforms intended to reduce politics at the board level. In 2011, BGR found that the presence of elected officials allowed politics to influence the board's proceedings. On multiple occasions, the mayor and the three council members opposed rate and tax proposals. That opposition contributed to a history of underfunding of the S&WB that transferred costs and risk to future generations of citizens.
- Supporters of the proposed amendment do not view a single council representative as a return to past governance problems that occurred when three council members served on the board. Rather, they highlight its potential to enhance oversight, public accountability and citizen representation at the board level. Supporters see it as a way to help restore public trust in the agency.
- Supporters add that the council could gain a greater understanding of the S&WB's needs, while providing an independent check-and-balance on board decision making.
- BGR notes that the council has recently taken steps to strengthen its regulatory oversight of the S&WB, which calls into question the necessity of the amendment for achieving greater S&WB oversight, communication and accountability.
- The amendment would reintroduce some risk of council politics into S&WB governance, albeit to a lesser extent than citizens experienced before the 2013 governance reforms. This risk exists even with an appointed engineer, who would serve at the pleasure of the public works committee chair.
- Because the council's public works committee oversees the S&WB, the amendment would create a conflict of interest for any member of that committee serving on the S&WB. The council member would be responsible for overseeing actions personally taken as a board member. Maintaining independence is a key objective of utility regulators.
- The alternative of appointing an engineer to fill the seat would minimize the potential conflict of interest, while adding to board expertise. However, voters do not know how the council will implement the amendment over time.
- The composition of the board is set forth both in State law and in the City charter, thus the only way it can be amended is by charter amendment. However, the Legislature could have enacted the other changes, including the reporting requirements, without a charter amendment.

#### BGR POSITION

**AGAINST.** Despite the proposition's intentions of making the S&WB more effective and accountable to citizens, its risks outweigh its potential benefits. Direct participation on the board by a council member would create a conflict of interest with the council's regulatory oversight role and potentially increase political decision making at the board level. While this risk would be reduced by the appointment of an engineer to fill the new seat, there is no guarantee this would occur. As an alternative to the amendment, BGR urges policy makers to continue to strengthen the City Council's regulatory oversight over the S&WB. Stronger council regulation of the S&WB would produce the same benefits – better oversight, communication and accountability – that motivated the proposed charter amendment.

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## INDEPTH: SEWERAGE & WATER BOARD GOVERNANCE CHANGE

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### INTRODUCTION

On December 8, 2018, New Orleans voters will decide whether to change the board composition of the Sewerage & Water Board (S&WB) by amending the City's home rule charter. The amendment would remove one citizen member and add a City Council representative to the board, who may be the chair of the council's public works committee, a committee member appointed by the chair, or a civil engineer appointed by the chair. It would also trigger changes to State law to mandate board expertise and enhance S&WB reporting to the City Council.

The purpose of this report is to help voters make an informed decision on the proposed charter amendment. It explains the amendment and provides relevant background information. The report then analyzes the arguments for and against the amendment, in furtherance of BGR's mission of promoting informed public policy making for the improvement of government in the New Orleans metro area. It concludes with BGR's position on the proposed amendment.

### OVERVIEW OF THE PROPOSITION

The current board of directors of the S&WB is composed of 11 members:

- The mayor
- Two citizen members of the Board of Liquidation, City Debt, appointed by the mayor on the recommendation of that board
- Eight citizens recommended by an independent selection committee and appointed by the mayor with the advice and consent of the City Council

As shown in Chart A, voter approval of the charter amendment would eliminate one of the mayor's eight citizen appointments and instead allow certain City Council representation on the board. Specifically, the amendment would allow one of the following to serve on the S&WB: the chair of the City Council's Public Works, Sanitation and Environment Committee (Public Works

Committee Chair), a committee member appointed by the chair, or a civil engineer appointed by the chair. Any appointee would serve at the pleasure of the chair. The total board size would remain at 11 members.

Because both State statutes and the City charter determine the agency's board composition, any change requires action by the Legislature and New Orleans voters. Voter approval of the charter amendment would trigger a corresponding change in State law.<sup>1</sup> The new board composition would take effect January 1, 2019. If voters reject the amendment, the board composition would remain as it is today.

In addition, voter approval of the charter amendment would determine whether certain other changes to State law would take effect on January 1, 2019.<sup>2</sup> These proposed changes would:

- Require one Board of Liquidation or mayor-appointed citizen member to be a retired civil engineer.
- Reset the staggering of board members' terms. The act would terminate the terms of all current members of the S&WB's board of directors as of January 1, 2019, but allow them to remain in office until the new board is seated according to the revised board composition law. Terminated members would be eligible for reappointment to a new term on the board.
- Establish a specific deadline for the S&WB to provide the council with quarterly reports on operations as required by existing law, and expand the required content of those reports to include "the identity and detailed information on the status of all projects and all improvements made since the close of the last quarter."<sup>3</sup> It would also require the S&WB executive director to appear before the council to explain any failure to submit reports in a timely manner.
- Require the S&WB's executive director, joined by either the mayor or the City's chief administrative officer, to present the quarterly report

**CHART A. HOW THE CHARTER AMENDMENT WOULD ALTER S&WB BOARD COMPOSITION**

**CURRENT SEWERAGE & WATER BOARD**



**PROPOSED SEWERAGE & WATER BOARD**



to the council at a meeting dedicated to public works.

- Require the S&WB to send a report by electronic mail to update members of the Orleans Parish legislative delegation and the City Council on the status of pumping and electrical power and available manpower (1) no later than 24 hours before a hurricane enters the Gulf of Mexico and (2) no later than 48 hours after the National Weather Service issues a flood watch or warning, or a thunderstorm watch or warning, for any part of Orleans Parish. No similar legal requirement exists at present.

**BACKGROUND AND CONTEXT**

This section discusses the origin of the proposed amendment. It also places the proposed changes in the context of the S&WB’s current board governance structure and the City Council’s relationship to the S&WB.

**Origin of the Amendment**

The proposed amendment changing the board and its accountability to the City Council emerged in response

to the widespread flooding during heavy rains in 2017. It came to light that S&WB power and pumping failures contributed to the flooding. Those deficiencies first emerged in hearings before the City Council after the August 5, 2017, flooding. Subsequent studies confirmed these findings.<sup>4</sup>

The August flooding led to a complete turnover of top management and a year of interim managers appointed by the previous and current mayors. Some board members resigned, and the board ceded much control to the interim management teams. Those teams undertook an effort to stabilize and restore the S&WB’s power generation and pumping capacity in preparation for this year’s hurricane season. The board has resumed its monthly committee meetings, and appointed a new permanent executive director, who began work in September 2018.

Supporters of the amendment contend that the board of the S&WB did not do enough to hold executive management accountable prior to the August 2017 flooding. They assert this contributed to the agency’s failure to properly maintain and operate its drainage system. They also observe that the S&WB’s executive management failed to communicate the seriousness of the

situation to the council and the public at large. Some have suggested that had council members been serving on the board, they might have raised concerns about the drainage system's problems sooner. They point to council members' direct accountability to their constituents and the consequences that elected officials face for inferior delivery of City services.

As citizens are aware, the agency still faces numerous challenges with its infrastructure, operations and finances. Among other things, these include: shoring up its cash reserves to remain in compliance with covenants on its outstanding bonds; correcting problems with its billing system; addressing gaps in personnel; and identifying ways to fund drainage system needs.

### **S&WB Board Governance Today**

The mayor is the president of the 11-member board of directors. As noted above, the other 10 members consist of two Board of Liquidation members, appointed by the mayor on the recommendation of that board, and eight citizens, who are recommended by an independent selection committee and appointed by the mayor with the advice and consent of the City Council. The appointees can be removed only for cause as provided in City law.<sup>5</sup> Otherwise, each appointee serves a four-year term and can be reappointed. State law limits appointees to two consecutive terms.

All board members must have their domicile, or permanent residence, in New Orleans, and they must be registered voters. In addition, the 10 appointed members must include a representative from each of the five council districts. The others can reside anywhere in the city. State law further stipulates that board members "shall reflect the racial and gender diversity of the population of the city of New Orleans to the extent practicable."<sup>6</sup>

The eight citizen members are New Orleans residents who apply for nomination. An external Sewerage and Water Board Selection Committee reviews their applications. This committee consists of 10 representatives from New Orleans universities and colleges, chambers of commerce, and the Urban League of Greater

New Orleans. The Selection Committee sends a list of three names for each vacant position to the mayor. The mayor must choose from the list. If the mayor fails to make a selection within 60 days, the Selection Committee submits its list to the City Council for selection and approval.<sup>7</sup>

State law requires nominees for the eight citizen seats to have experience in "architecture, environmental quality, finance, accounting, business administration, engineering, law, public health, urban planning, facilities management, public administration, science, construction, business management, community or consumer advocacy, or other pertinent disciplines."<sup>8</sup>

In addition to imposing general experience requirements, State law requires that two of the 10 appointed members be "consumer advocates with community advocacy or consumer protection experience or experience in a related field."<sup>9</sup>

Voters last amended the S&WB's board governance laws in 2013. Those changes grew out of a community-wide reform effort, which BGR supported with a 2011 report on S&WB governance and subsequent releases.<sup>10</sup> Although the final reforms differed from BGR's recommendations, as discussed below, BGR supported the changes both during the legislative session and when voters amended the City charter in October 2013.<sup>11</sup>

### **City Council's Relationship to S&WB**

The S&WB is an autonomous board established in State law in 1899 to construct, control, maintain and operate the city's water, sewerage and major drainage systems.<sup>12</sup> From 1899 to 2013, three City Council members served on the S&WB, with the exception of a short-lived State takeover attempt in the mid-1930s.<sup>13</sup>

The S&WB is a separate governmental unit from the City, although there are common linkages. These include the mayor serving as board president and the division of responsibility for New Orleans' drainage system between S&WB and the City's Department of Public Works. The agency manages its own operations and budget. Howev-

**“The agency manages its own operations and budget. However, it has no control over its revenue sources. It depends on the City Council for approval of its water and sewerage rates and drainage property taxes. As a result of this governance structure, there is a misalignment of power and responsibility.”**

er, it has no control over its revenue sources. It depends on the City Council for approval of its water and sewerage rates and drainage property taxes.<sup>14</sup> As a result of this governance structure, there is a misalignment of power and responsibility. BGR found in 2011 that this misalignment contributed to decades of funding problems for the S&WB. With no responsibility for the operations of the S&WB and political pressure to keep rates low, the council delayed or killed rate increases on multiple occasions, despite the S&WB’s pressing needs.<sup>15</sup>

Meanwhile, the presence of elected officials on the board allowed politics to influence the board’s proceedings. On multiple occasions, the mayor and council members opposed rate and tax proposals at the board level.<sup>16</sup> Their objections discouraged other proposals from coming forward or foreshadowed the outcome of a council vote, short-circuiting the process before it even began. The recurring opposition to funding proposals at the council and board levels prevented the S&WB from following the best practice of regular, moderate funding increases to keep up with operating and maintenance costs and make capital investments to sustain its infrastructure.<sup>17</sup> Instead, BGR found a pattern of erratic, crisis-driven funding decisions which undermined the adequacy of the S&WB’s water, sewerage and drainage systems and shifted costs to future generations of ratepayers and taxpayers.

In 2011, BGR recommended removing all of the board’s elected officials and making the S&WB a more financially independent utility but with stronger City Council oversight. In 2013, the State Legislature adopted a set of governance reforms that included removing the three council members, but not the mayor, from the board. Retaining the mayor on the board did not align with BGR’s original recommendation or completely eliminate politics from the board, but it did improve on the existing board structure by placing responsibility and public accountability more squarely with the mayor and the mayor’s appointees.<sup>18</sup> To strengthen the appointed

membership of the board, the Legislature also imposed experience requirements, established an independent nomination process, shortened the term length and set a two-term limit. Voters approved the charter amendment necessary to implement the reforms in October 2013. The vote triggered a new State law requiring the S&WB to make quarterly reports to the City Council on its contracts, performance metrics and other matters.<sup>19</sup>

From 2014 until the August 2017 floods, the S&WB did little to fulfill its new reporting requirements to the council. The council received criticism for its lax oversight.<sup>20</sup> During the same period, the council’s Public Works Committee held only a handful of meetings relative to the S&WB.<sup>21</sup>

Since the August 2017 floods, the City Council has increased its oversight of the board. In January 2018, council members passed an ordinance reinforcing the S&WB’s reporting requirements in existing State law.<sup>22</sup> More recently, members of the council’s Public Works Committee wrote a letter to the S&WB in which they outlined in detail what they would expect from the S&WB’s quarterly reports.<sup>23</sup> The council also produced a resolution demanding the timely submission of the reports as prescribed in the council’s letter.<sup>24</sup>

In September 2018, the City Council took another step toward more formal regulation of the S&WB. The council voted unanimously to initiate a selection process for an independent utility consultant to advise it on S&WB matters.<sup>25</sup>

However, due to the operational independence of the S&WB from the City, the council cannot force the S&WB to make specific changes.<sup>26</sup> A case in point was the council’s recent objections to the S&WB’s resumption of water shutoffs for nonpayment. Although council members unanimously opposed the policy, they have no legal power to revoke it.<sup>27</sup>

ON THE BALLOT: SEWERAGE & WATER BOARD GOVERNANCE CHANGE, DECEMBER 8, 2018

Table 1 compares the proposed governance changes to the current and prior governance structures. It summarizes key features of the agency’s governance, including: number of board members; board composition; citizen members’ method of appointment, terms and term limits, and experience requirements; and City Council regulation and oversight.

**TABLE 1: PAST, PRESENT ... AND FUTURE?**

*Changes to Key Features of S&WB Governance*

	Prior to the 2013 Reforms	Present Structure	Proposed Structure (changes in bold)
<b>Number of Board Members</b>	13	11	11
<b>Board Composition</b>	Mayor  3 City Council Members  2 Board of Liquidation  7 Citizen Members	Mayor  2 Board of Liquidation  8 Citizen Members	Mayor  <b>1 Council Representative</b>  2 Board of Liquidation  <b>7 Citizen Members</b>
<b>Method of Appointment of Citizen Members</b>	All appointed by Mayor with advice and consent of City Council	Same, but mayor must select from among nominees proposed by an independent selection committee.	Same
<b>Terms and Term Limits of Citizen Members</b>	9 years with no term limits	4 years, with a limit of two consecutive terms	Same
<b>Experience Requirements of Citizen Members</b>	None	Experience required in architecture, environmental quality, finance, accounting, business administration, engineering, law, public health, urban planning, facilities management, public administration, science, construction, business management, community or consumer advocacy, or other pertinent disciplines	Same
<b>Requirements of All Appointed Members</b>	At least one appointee must represent each of the five City Council districts.	Same, with additional requirement that two appointees must be consumer advocates with community advocacy or consumer protection experience or experience in a related field.	Same, with additional requirement that one appointed member must be a <b>retired civil engineer</b> .
<b>City Council Approval of Water and Sewerage Rates</b>	City Council approves the S&WB’s proposed rate schedules	Same	Same
<b>City Council Approval of Drainage Taxes</b>	City Council levies drainage taxes on behalf of S&WB	Same	Same
<b>S&amp;WB Reporting to City Council</b>	Annual financial report	Annual financial report plus quarterly reports on operations	Same, with <b>expanded content</b> and <b>specific deadlines</b> for the quarterly reports. <b>S&amp;WB executive director, joined by either the mayor or the City’s chief administrative officer, must present the report to the council.</b> State law would also require <b>new reporting on S&amp;WB readiness for storms.</b>

Sources: La. R.S. 33:4071 et seq. (pre-2013 and current law), and La. Acts 2018 Reg. Sess., No. 366.

## ANALYSIS

Supporters, including the bill's author, do not view the proposed amendment as a panacea for the many problems the S&WB faces today. Rather, they frame it as a step toward more effective board oversight, communication and accountability for the S&WB. They also view it as a way to help restore the public's trust in the agency.<sup>28</sup>

In the context of these objectives for the amendment, the remainder of BGR's analysis will focus on the following questions:

- Is the charter amendment necessary?
- How will the amendment affect citizens?
- How will the amendment affect local government?
- Is the charter the proper vehicle for achieving the desired outcomes?

In April 2018, BGR opposed an earlier version of the governance changes primarily because of the risks posed by reintroducing council representation to the S&WB's board of directors.<sup>29</sup> Subsequently, the Legislature amended the bill, and it passed unanimously in both the house and the senate. Because the current proposition differs in a number of ways from the version BGR previously opposed, BGR provides this updated analysis.

### Is the Charter Amendment Necessary?

BGR agrees with supporters' objectives of greater oversight, communication and accountability for the S&WB. However, BGR has raised concerns about the necessity of reintroducing council representation on the governing board as the means of pursuing them.<sup>30</sup> Here, BGR evaluates whether the charter amendment is necessary to achieve the stated goals.

Supporters of the charter amendment view council representation on the board as necessary to keep the council better informed of the S&WB's issues and needs and to bring about change at the agency. Whether through board service by a council member or an appointed en-

gineer, the council would gain a better familiarity with S&WB issues.

Supporters say the council's current regulatory authority over the S&WB is too limited. With the notable exception of withholding approval of rate and tax increases, the council generally lacks authority to force the S&WB to take specific actions. While State law requires quarterly reports to the council, the S&WB faces no penalties if it does not produce them in a timely manner. Passage of the amendment would trigger stricter deadlines and mandatory appearances before the council's Public Works Committee, as well as mandatory notifications related to drainage system readiness for storm events. If the S&WB does not submit the quarterly reports in a timely manner, then the S&WB executive director must explain the failure to the Council in person at its next regularly scheduled meeting. Combined with the board seat, the stricter reporting requirements would strengthen the council's voice in S&WB matters.

During the 2018 legislative session, BGR urged policymakers to improve City Council oversight of the S&WB within the existing structure as an alternative to council representation on the board. The Legislature can enhance S&WB reporting to the council independent of a charter change. Furthermore, the council could access information presented to the board through direct monitoring of, and presence at, the S&WB's public meetings by a City Council member or a designee.

BGR notes that since August 2017, the council has strengthened its oversight role through the powers it already has. In September 2018, council members took a significant step by seeking proposals from independent utility consultants to advise the council on S&WB matters. This step aligns with BGR's 2011 recommendation for the council to develop a comprehensive, ongoing regulatory process.<sup>31</sup> The current Public Works Committee Chair told BGR that the council's regulatory efforts will persist regardless of whether the amendment passes. He also expressed his desire to institutionalize and sustain the increased oversight that the council is putting in place.

More rigorous oversight would introduce a new level of transparency and accountability to public officials and citizens. It would also better inform the full council, instead of a single member, about the S&WB's issues and needs. This would help to prepare the council to consider future funding decisions.

BGR also notes that council participation on the governing board of a public utility is not essential to strong performance. BGR reviewed the board structures of 10 high-performing independent water utilities. Seven were composed exclusively of appointees. Only three had an ex officio member, and in all three cases it was the mayor. No members of a local governing body (e.g., a city council) sat on any of the 10 boards.<sup>32</sup>

The alternative path of strengthening the council's regulatory structure calls into question the necessity of the amendment for achieving greater S&WB oversight, communication and accountability.

### How Will the Amendment Affect Citizens?

From the perspective of citizens, supporters say a council representative on the S&WB could bring citizens' concerns more directly into executive decision making at the S&WB. They explain that the amendment creates a direct conduit for the inclusion of citizen priorities and perspectives. They believe this would make the board more accountable than it is at present both to the City Council and to New Orleans' citizens.

Moreover, supporters view the enhanced reporting requirements that voter approval would trigger as important steps forward to improve the S&WB's public accountability. Since the 2017 floods, citizens are demanding transparency and more effective communication, especially when public safety is at issue. The long-running billing crisis has exacerbated citizens' concerns.

Currently, the mayor is the only elected official on the board. Supporters say that a council representative would be another avenue for bringing citizens' concerns to the board's attention. Residents may also be more familiar with contacting their council member than the

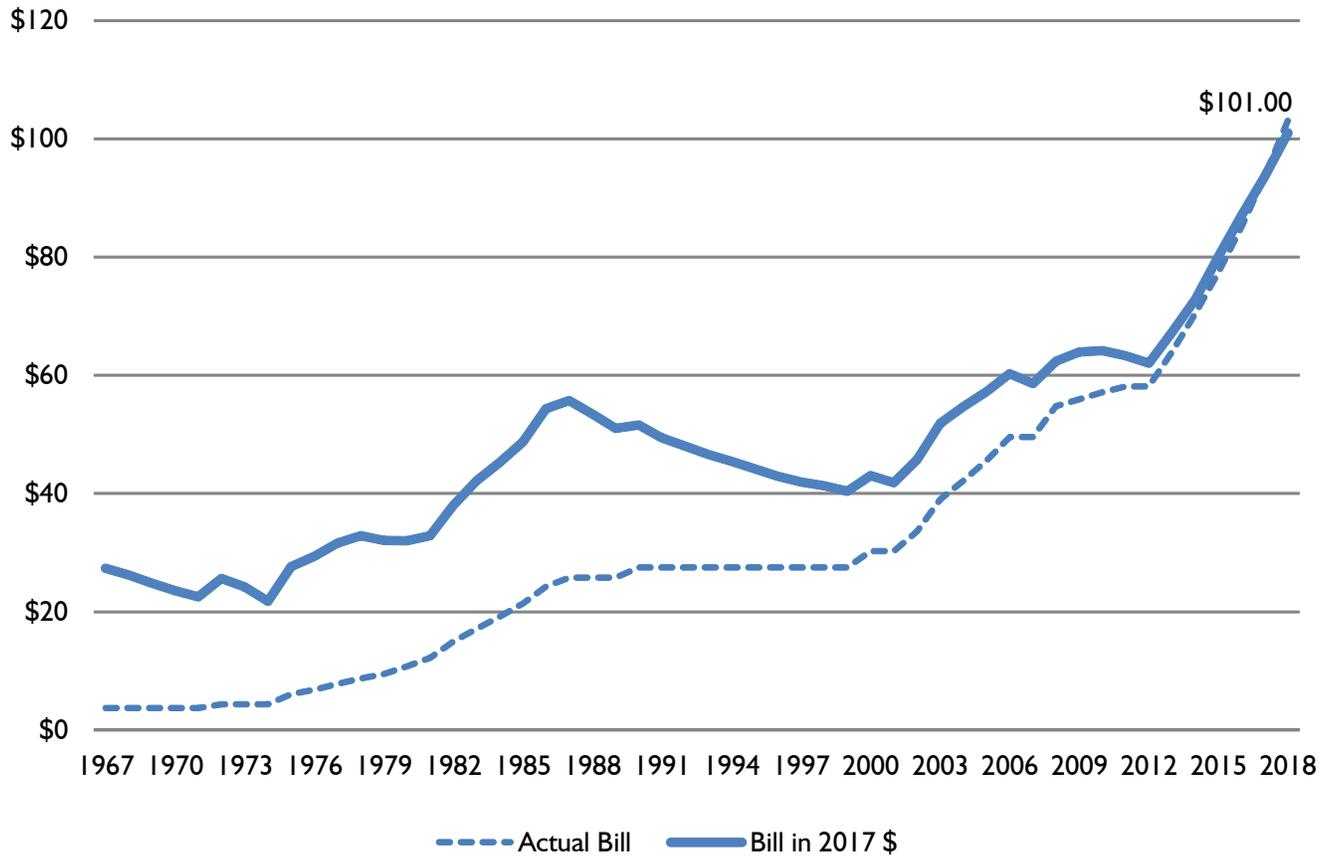
mayor or an appointed board member. Supporters also say expanding a direct line of public communication and accountability could help to win back the public's confidence in the S&WB.

BGR maintains its view that direct participation on the board by a council member can create governance problems. Before the 2013 reforms, BGR found that the presence of elected officials did not result in a more accountable and responsible S&WB. To the contrary, it allowed City politics to affect board decision making. Elected officials' recurring opposition to funding proposals at the board level contributed to a pattern of erratic, crisis-driven funding decisions.

For example, for a 20-year period from early 1987 to late 2007, water rates increased only twice. This was due in part to opposition from the board's elected members to implement rate increases already approved by the council.<sup>33</sup> For a 14-year period running from early 1986 to early 2000, sewerage rates did not change at all, and customer charges declined relative to inflation. Again, this was largely due to elected officials on the S&WB board exerting pressure to delay requests for rate increases.<sup>34</sup> These long periods of inactivity were preceded and followed by multiple years of double-digit increases. Chart B illustrates the pattern as seen in the average residential water and sewer charges billed from 1967 to 2018. This pattern transferred costs and risks to future generations of citizens, and deviated from the best practice of regular, moderate funding increases to keep up with rising costs and make regular investments to sustain critical infrastructure.

The drainage system has not gained a new revenue source since 1982, and 10 years later it actually lost one of the taxes that supported it. The S&WB has since faced opposition to funding proposals for its drainage system. In 1998, the City Council deferred indefinitely a request from the S&WB for a drainage service fee.<sup>35</sup> In 2010, the S&WB asked the City Council to roll forward the millage rates for its drainage property taxes, which the mayor and council ultimately rejected.<sup>36</sup> As shown in Chart C, the S&WB's drainage taxes generate less revenue today than they did in the 1980s on an inflation-adjusted basis.

**CHART B: S&WB WATER AND SEWER CHARGES FOR AN AVERAGE RESIDENTIAL CUSTOMER, 1967 TO 2018**



Note: The chart assumes a residential customer using a 5/8" meter and consuming 6,000 gallons a month.

BGR calculations based on historical S&WB water and sewer rate schedules. Presentation in 2017 dollars is based on the change in the Consumer Price Index - All Urban Consumers.

Supporters of the amendment do not view a single council representative as a return to the past governance problems that occurred when three council members served on the board. Further, the Public Works Committee Chair may select an engineer as the representative, instead of himself or another committee member. The chair could remove the appointee at any time for any reason. Supporters say this would allow the committee chair to take immediate action based on his assessment of the appointee's performance.

Ultimately, supporters view the amendment as an efficient way to provide the council with more information about the S&WB and then deliver that information to citizens. They also see it as a way to better address citi-

zens' concerns in S&WB decision making. However, the amendment would reintroduce some risk of council politics into S&WB governance, albeit to a lesser extent than citizens experienced before the 2013 governance reforms. This risk exists even with an appointed engineer, who would serve at the pleasure of the Public Works Committee Chair.

### How Will the Amendment Affect Local Government?

From the perspective of local government, supporters say the proposed amendment would provide a stronger link between the City Council and the S&WB. They observe that regardless of how the Public Works Committee Chair decides to fill the new board seat,

the City Council would gain greater insight of the board’s functioning and needs. The enhanced reporting requirements triggered by the amendment would supplement the council’s more engaged oversight today. Further, the presence of a council representative on the S&WB will create accountability for performance at the council level. Council members also have access to the resources of their offices, which a volunteer board member does not.

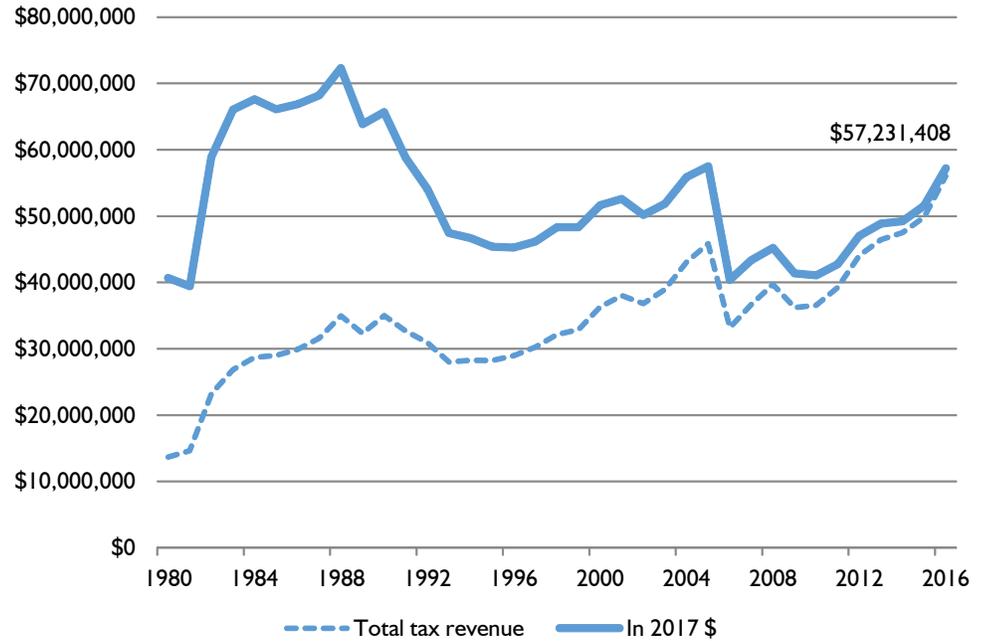
Supporters further say that a council member or representative on the board could serve as a check-and-balance in board decision making, providing an independent voice among a group consisting of the mayor and her appointees. This arrangement might encourage healthy dialogue and disagreement toward better outcomes and enhance the amount of information provided to the public.

In BGR’s view, the amendment’s potential to improve local government would vary depending on who fills the new board seat, which is currently unknown.

*Direct Council Participation.* Supporters say a council member on the board would gain an understanding of the S&WB’s needs and communicate them to the council. In the opposite direction, the council member would bring to the boardroom a broader perspective on citywide tax burdens that the S&WB should take into account in considering its funding requests.

Additionally, some supporters see a significant benefit to the Public Works Committee Chair serving on the board. They reason that the Chair would gain understanding of the exigencies of the S&WB’s circumstanc-

**CHART C: S&WB DRAINAGE TAX REVENUE, 1980 TO 2016**



BGR calculations based on S&WB comprehensive annual financial reports.

es and may act as an effective advocate for the S&WB at the council level. As a board member, the Chair could request directly the information that the S&WB might otherwise present at Public Works Committee meetings, making for a more efficient flow of information. Further, the Chair’s presence at the board level would place some responsibility on the council for the performance of the S&WB. Supporters say this could lead to a more collaborative relationship than the council and the S&WB have at present.

However, because of the council’s oversight role, the amendment would create a conflict of interest for any council member serving on the S&WB. The council member would be responsible for overseeing actions personally taken as a board member. Thus, the member’s fiduciary duty to the board could run contrary to that member’s regulatory responsibility on the council. As discussed above, this conflict of interest created problems in the past, most notably in funding decisions. Additionally, some observers note that direct council participation on the S&WB could work against the City Council’s goal of stronger S&WB oversight. The S&WB

“ [B]ecause of the council’s oversight role, the amendment would create a conflict of interest for any council member serving on the S&WB. The council member would be responsible for overseeing actions personally taken as a board member. Thus, the member’s fiduciary duty to the board could run contrary to that member’s regulatory responsibility on the council. ”

may assert that a council representative on the S&WB, and the direct access to S&WB information this creates, diminishes the need for dialogue with the council. Therefore, rather than complementing the council’s oversight role, the amendment could undermine it. This potential outcome also speaks to the risk of conflating the roles of the regulator and the regulated entity.

Maintaining independence is a key objective of utility regulators.<sup>37</sup> As shown above, past behavior of City Council members serving on the S&WB indicates their dual roles created a conflict of interest and contributed to the chronic underfunding of the S&WB. Supporters do not view any potential conflict as significant. Some note that City Council members serve on other boards and commissions alongside the mayor and mayoral appointees whom the council approves.<sup>38</sup> In some cases, those same council members must vote on City appropriations to the boards on which they sit. However, the magnitude of the S&WB’s water, sewerage and major drainage systems underscores the need for a clear division in the roles and responsibilities of the council and the agency to minimize the potential for compromised board service.

Another problem with returning a council member to the S&WB is the risk of inadequate board participation. Council members face many other demands on their time, which could practically limit their board service. Before the 2013 reforms, BGR found that council members tended to have poor attendance at S&WB monthly board meetings. Their attendance at S&WB committee meetings, where board members discussed critical finance, operations and infrastructure issues in detail, was even worse.<sup>39</sup> Since the removal of council members from the board, there has been an appreciable change in attendance. From 2014 to present, the majority of appointed board members achieved best practice

standards for attendance of board meetings, resulting in a quorum at all board meetings.<sup>40</sup> A single council member with competing interests, constituencies and demands may be unable to provide the careful, coordinated watch that the complexity of the S&WB’s operations, infrastructure and finances demands.

*Appointment of an Engineer.* If the Public Works Committee Chair chooses instead to fill the new seat with an engineer, this decision might minimize the potential conflict of interest and the workload concerns. In addition, it would ensure the new director brings relevant expertise to the board.

However, the proposed amendment does not clearly define the selection process for the council’s appointee, nor has the council adopted any guidelines. The amendment does not require any outside vetting of the Public Works Committee Chair’s nominee, or even confirmation by fellow council members. This stands in contrast to the independent nominating and approval process for mayoral appointees to the S&WB defined in State law.

The current Public Works Committee Chair told BGR that he has not decided how to fill the seat, if approved by voters. He said that the language of the amendment is silent as to whether other council members would need to approve his decision. Further, some interpret the amendment as creating a right of first refusal by another council member serving on the committee before the Chair moves to select an engineer. Although the current Chair wants to set a strong precedent for the full council’s involvement in any selection decision, future chairs could alter that precedent.

In sum, the ultimate effect of the proposed amendment on local government depends on its execution. While it could strengthen the City Council’s position relative to

the S&WB, it also creates the risk of introducing governance problems at a precarious time for the S&WB. For example, a council member would be responsible, as a regulator, for overseeing actions personally taken as a board member. The alternative of appointing a civil engineer to fill the seat would minimize the potential conflict of interest while adding to board expertise. However, voters do not know how the council will implement the amendment over time.

### **Is the Charter the Proper Vehicle for Achieving the Desired Outcomes?**

As outlined above, voter approval of a charter amendment is necessary to change the composition of the S&WB's board of directors. The Legislature, acting on its own, cannot accomplish this because the board's composition is set forth in both State statutes and in the City charter. However, the Legislature could have enacted the new reporting requirements without conditioning them on voter approval of a charter amendment.

Overall, the current condition of the S&WB demands significant improvement and stronger public accountability. Even the charter amendment's strongest supporters view it only as a step toward that goal, and not a comprehensive solution to the S&WB's many problems. Supporters of the proposed amendment say that City Council participation on the board, either directly or through an appointee, would provide enhanced board oversight, public accountability and citizen representation. The member would provide an independent check-and-balance in board decision making. Further, by allowing only one council member instead of three to return to the board, the proposed amendment does not pose the same degree of risk as the governance structure prior to 2014.

Despite these advantages, the amendment would reintroduce a conflict of interest with the council's regulatory role and the risks of political decision making and weak board attendance. These factors could undermine accountability gains. The alternative to direct council participation on the board – the appointment of a civil engineer to serve – could reduce, but not entirely

eliminate, those risks. While the reporting requirements would strengthen the City Council's oversight role, the Legislature and the council could achieve this without the charter amendment.

### **BGR POSITION**

**AGAINST.** Despite the proposition's intentions of making the S&WB more effective and accountable to citizens, its risks outweigh its potential benefits. Direct participation on the board by a council member would create a conflict of interest with the council's regulatory oversight role and potentially increase political decision making at the board level. While this risk would be reduced by the appointment of an engineer to fill the new seat, there is no guarantee this would occur. As an alternative to the amendment, BGR urges policy makers to continue to strengthen the City Council's regulatory oversight over the S&WB. Stronger council regulation of the S&WB would produce the same benefits – better oversight, communication and accountability – that motivated the proposed charter amendment.

**ENDNOTES**

- 1 The S&WB’s board composition is found in La. R.S. 33:4071.
- 2 See La. Acts 2018 Reg. Sess., No. 366. Section 1 of Act 366 contains all substantive changes currently proposed to State law, such as board composition and reporting requirements. Section 3(A) of the act states: “The provisions of Section 1 of this Act shall take effect and become operative on the first day of January following an election at which a majority of the voters of the city of New Orleans approve an amendment to Article V, Chapter 3, Section 5-301 of the home rule charter of the city to change the composition of the Sewerage and Water Board of New Orleans to provide the identical composition of the board as contained in this Act.”
- 3 La. Acts 2018 Reg. Sess., No. 366, would set the deadline as “no later than the first day of the second month following the close of each calendar quarter.”
- 4 ABS Group, *City of New Orleans Stormwater Drainage System Root Cause Analysis Draft Report*, August 2018, pp. 3 and 53.
- 5 Home Rule Charter of the City of New Orleans, Sec. 9-104(2) states, in pertinent part: “A member of a board may be removed by the appointing authority, provided that such removal shall be only for reasonable cause set forth in writing. Any member so removed shall have reasonable opportunity to be heard publicly before the Council, and in such event the removal shall be effective only if approved by a majority of the Council.”
- 6 La. R.S. 33:4071(A)(6).
- 7 La. R.S. 33:4071(A)(2).
- 8 La. R.S. 33:4071(A)(3).
- 9 La. R.S. 33:4071(A)(1)(d).
- 10 See Bureau of Governmental Research (BGR) publications entitled: *Making the Waterworks Work: Fixing the Sewerage & Water Board’s Governance Problems*, October 2011; *The S&WB Infrastructure Bonanza: Is Good Governance Part of the Deal?* February 29, 2012; *S&WB Rate Increases and Reform, Hand in Hand*, October 16, 2012; *BGR Backs Mayor’s S&WB Reform Proposals, Suggests Improvements*, December 10, 2012; *S&WB Reforms: Creating a Strong Nomination Process*, April 26, 2013; *S&WB Governance Reform: The Next Steps Forward*, May 7, 2013; Open Letter to Members of the Louisiana State Legislature, May 31, 2013; and *On the Ballot: October 19, 2013*. All of these publications are available at [www.bgr.org](http://www.bgr.org).
- 11 Letter from Bureau of Governmental Research to Members of the Louisiana Legislature, May 31, 2013; BGR, *On the Ballot: October 19, 2013*.
- 12 La. R.S. 33:4071 et seq.
- 13 For information on the origin of the S&WB, see Kolb, Carolyn Goldsby, *At the Confluence of Science and Power: Water Struggles of New Orleans in the Nineteenth Century*, a dissertation submitted to the graduate faculty of the University of New Orleans, May 2006. The Huey Long-controlled State Legislature passed Act 36 of 1934, upheld by the Louisiana Supreme Court in 1935, to shift majority control of the S&WB board to the Governor. The act reduced council representation on the governing board from three to one. Following Long’s assassination in 1935, the State and City reached an agreement to restore the prior board structure through Act 229 of 1936.
- 14 State law requires that the S&WB “shall fix the rates” to be charged to water and sewerage system customers, but the rates “shall not become effective unless and until approved” by the Board of Liquidation and the City Council. La. R.S. 33:4096(A) and 33:4121(A). The council’s authority to approve water and sewer rates dates back to 1958, while the Board of Liquidation’s dates back to 1954. For a history of S&WB rate-making authority, see BGR, *Making the Waterworks Work*, pp. 5-6.
- 15 For a detailed discussion of council actions that contributed to the S&WB’s chronic underfunding from 1967 to 2011, see pages 6-8 of BGR, *Making the Waterworks Work*. Examples include: three years of council delays in the early 1970s on a proposed sewerage rate increase to address rising costs due to inflation and more stringent federal regulations for sewage treatment; three rejected water rate increases in the 1970s that led the S&WB to exercise its authority to raise rates unilaterally to meet existing debt obligations; a lengthy delay in the late 1990s on a sewerage rate increase to fund system repairs required by a federal consent decree; indefinite deferral of a drainage service fee request in 1998; and rejection of a 6.16-mill roll-forward of the S&WB’s drainage millages in 2010, which caused S&WB to permanently lose that capacity to increase its existing millages. The S&WB had recommended approval of the roll-forward, but without the support of the mayor or the three council members on the board.
- 16 As BGR discusses in more detail in its 2011 report, elected officials’ opposition at the board level contributed to the S&WB’s history of chronic underfunding. For example, the S&WB did not raise sewerage rates during a 14-year period from 1986 to 2000. In the interim, the U.S. Environmental Protection Agency filed a lawsuit alleging environmental violations relating to the sewerage system. It added the City as a party to the lawsuit primarily on the basis that the City, including the mayor and council, had failed to authorize increases to pay for needed repairs and could continue to do so. In another example, it took the S&WB 18 years to fully implement a five-year series of water rate increases approved by the City Council in 1984. After the first three increases, elected officials on the board opposed further implementation. They argued that citizens should not bear higher water rates during the economic downturn in the late 1980s. The fourth

increase did not occur until 1990 and the fifth took until 2002. During the 18-year stretch, the water system further deteriorated in the face of rising operating costs and advancing age. The board received repeated warnings from its financial consultants that the system needed additional rate increases. See BGR, *Making the Waterworks Work*, pp. 6-8.

- 17 BGR, *Making the Waterworks Work*, p. 6.
- 18 BGR, *BGR Backs Mayor's S&WB Reform Proposals, Suggests Improvements*, December 10, 2012, p. 2.
- 19 La. R.S. 33:4091(B) and (C).
- 20 Hammer, David, "City Council shares blame in S&WB failures," *WWL-TV*, December 27, 2017.
- 21 BGR reviewed meetings of the City Council's Public Works Committee between January 2014 and July 2017. During this period, the S&WB presented on eight occasions. Five of these presentations related to the S&WB's quarterly reporting requirements.
- 22 New Orleans City Council, Ord. 27,654 M.C.S., adopted January 11, 2018.
- 23 Joint Letter from New Orleans City Council members to the Sewerage and Water Board, May 10, 2018.
- 24 New Orleans City Council, R-18-182, adopted May 24, 2018.
- 25 New Orleans City Council, "Council Approves Motion Initiating RFQ Process to Retain Sewer, Water and Drainage Consulting Services," press release, September 20, 2018.
- 26 See S&WB, Comprehensive Annual Financial Report for the year ending December 31, 2016, p. I-2.
- 27 New Orleans City Council, R-18-375, August 23, 2018.
- 28 See testimony of Senator J.P. Morrell, Louisiana House Committee on Municipal, Parochial and Cultural Affairs, April 18, 2018.
- 29 BGR, *City Council Members Should Regulate, Not Govern, S&WB*, April 9, 2018; BGR, Public Comment at the Louisiana House Committee on Municipal, Parochial and Cultural Affairs, April 18, 2018.
- 30 Ibid.
- 31 In its 2011 report *Making the Waterworks Work*, BGR recommended on page 20 that the City Council "should develop a comprehensive, ongoing process for regulating the S&WB, which includes reviewing the S&WB's strategic and financial plans and reports, and regularly monitoring the S&WB's performance."
- 32 The utilities are the same 10 cited in BGR, *Making the Waterworks Work*, p. 15. BGR did not find any changes to their board structures since the 2011 report.
- 33 BGR, *Making the Waterworks Work*, pp. 6 and 8.
- 34 Ibid., pp. 6 and 7.
- 35 For additional discussion of the 1998 drainage fee proposal, see BGR, *Beneath the Surface: A Primer on Stormwater Fees in New Orleans*, February 2017, p. 8.
- 36 For further discussion of these proposals, see BGR, *Making the Waterworks Work*, p. 8.
- 37 Beecher, Janice A., *The Prudent Regulator: Politics, Independence, Ethics, and the Public Interest*, Energy Law Journal, Vol. 29:577 at 607. See also Baietti, Aldo, William Kingdom, and Meike van Ginneken, *Characteristics of Well-Performing Public Water Utilities*, Water Supply and Sanitation Working Notes No. 9, The World Bank, 2006, p. 25.
- 38 Examples include the New Orleans Recreation Development Commission, which has one council member, and the Board of Liquidation, which includes both council members at large.
- 39 See BGR, *Making the Waterworks Work*, p. 16. Only two of the seven council members serving on the board in the five-year period that BGR reviewed from 2007 to 2011 achieved the best practice of attending 75% or more of board meetings. In contrast, appointed members averaged 83% attendance during the same period.
- 40 BGR calculations using minutes from S&WB board meetings. Between January 2014 and March 2018, average attendance at board meetings was 79%. Only four of 23 board members averaged below 75% attendance during this period.

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