



RIVERKEEPER.

December 1, 2008

Michael P. Anderson, P.E., Project Director
New York State Department of Transportation
Tappan Zee Bridge/I-287 Environmental Review
660 White Plains Road, #340
Tarrytown, NY 10591

VIA EMAIL AND BY HAND DELIVERY

Re: **Tappan Zee Bridge/I-287 Environmental Review: Riverkeeper Comments on the "Transit Mode Selection Report, September 2008" and the "Alternatives Analysis for Rehabilitation or Replacement of the Tappan Zee Bridge, September 2008."**

Dear Mr. Anderson:

Please accept the following as Riverkeeper Inc.'s ("Riverkeeper's") comments on the Tappan Zee Bridge/I-287 environmental review documents: "Transit Mode Selection Report, September 2008" (the "Transit Report") and "Alternatives Analysis for Rehabilitation or Replacement of the Tappan Zee Bridge, September 2008" (the "Bridge Analysis Report") (together, "the September 2008 Scoping Documents").¹ Please also consider this letter an additional statement of status as an "interested or affected" person or party under the National Environmental Policy Act ("NEPA") and accordingly, pursuant to the regulations provided by the Council on Environmental Quality at Section 1506.6(b), please notify us of all NEPA related documents, as they become available, and NEPA related meetings, as they are scheduled, which are related to this project. Similarly, please also consider this letter an additional statement of status as an "interested" person or party pursuant to State Environmental Quality Review Act ("SEQRA") regulations at 6 NYCRR Part 617, and accordingly, please send us a copy of all filed SEQRA documents (including additional scoping documents, Draft Environmental Impact Statements, Environmental Impact Statements, and notices) as they become available, and provide notification of all relevant meetings. If there is an additional specific procedure for any state or federal agency which should also be complied with for this status and notification under NEPA, please inform us as soon as possible.

¹ Riverkeeper is a member-supported, not-for-profit organization, dedicated to protecting the Hudson River and its tributaries, the Hudson River corridor and watershed, and to safeguarding the drinking water supply for New York City. Since 1966, Riverkeeper has used litigation, science, advocacy, and public education to end pollution, restore ecological health, and revitalize waterfront use and access.

As we stated in our previously submitted comments of March 31, 2008:²

Due to Riverkeeper's historic environmental and legal involvement with the Hudson River and the communities of the Hudson River Valley, we are extremely concerned about this project and its potential environmental impacts. The environmental, economic and social implications of most of the alternatives presented are enormous and will substantially impact the Hudson River as well as the communities and the environment of Rockland and Westchester Counties. Moreover, as the planning process has now been redesigned to include a "tiering" of major decisions and evaluations, as well as the application of certain sections of the relatively new federal statute, the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users³ ("SAFETEA-LU"), we are also concerned that the process will be practically and legally insufficient, and contrary to the mandates of NEPA and SEQRA.

At this time, we have the following additional comments:

A. The Tiering of the Environmental Review Process is Still Not Adequately Explained or Justified, and Results in a Plan for a Segmented Review.

Riverkeeper does not agree with the claimed legal foundation for the "tiering" and segmentation of the Tappan Zee Bridge/I-287 project. Furthermore, the September 2008 Scoping Documents indicate that the agencies are still not formally committed to completing a full Environmental Impact Statement on certain transit details, station locations and site-specific impacts, which are scheduled to be considered in later analyses.⁴ As more than one New York Court has aptly observed:

[T]he reasons for disfavoring segmentation are twofold. First is the danger that in considering related actions separately, a decision involving review of an earlier action may be 'practically determinative' of a subsequent action The second danger occurs when a project that would have a significant effect on the environment is broken up into two or more component parts that, individually, would not have as significant an environmental impact as the entire project or, indeed, where one or more aspects of the project might fall below the threshold requiring any review.⁵

² A copy of which is attached hereto.

³ Relevant portions of which are codified at 23 U.S.C. §139.

⁴ See Transit Report at S-5, stating: "...details of transit alternatives will be further studied in separate environmental document(s)..." We do note that in contrast, the new Autumn 2008 Newsletter, "Tappan Zee Bridge/I-287 Environmental Review" states that "the second EIS will focus on the integrating the mass transit mode into the communities, including route specifics and location and design of transit stations..." at 1.

⁵ City of Buffalo v. NYSDEC, 707 N.Y.S.2d 606, 612 (2000).

However, we are somewhat gratified that the September 2008 Scoping Documents indicate that the consideration of the transit and bridge options is occurring simultaneously, in contrast to the planned analysis of decision-making announced in early 2008, which had separated the two.

B. The Identification of Transit Station Locations and a Complete Environmental Review of All Impacts from those Stations is Necessary and Legally Required.

We are also somewhat gratified that the 2008 Scoping Documents now provide the public with the “possible”⁶ transit station locations along the corridor (previously only the “alignment” and end points were to be identified at this stage). This will better facilitate proper consideration of all environmental impacts from the project and necessary mitigation measures.

However, the station locations should be firmly identified and examined as soon as possible, and in no event later than in the initial Draft Environmental Impact Statement. Moreover, as noted previously, the agencies must formally commit in all SEQRA and NEPA environmental review documents, to a *full* environmental review process for the station location impacts and any other components relegated to other “tiers” – a mere environmental assessment, “EA” or other documentation which does not rise to the level of an EIS, will not suffice.⁷

C. The Intended Application of SAFETEA-LU is Still Not Explained In Sufficient Detail to Assure the Legally Mandated Public Participation, and Compliance with all Facets of NEPA.

The Department of Transportation and other involved agencies should provide explicit clarification as to when the statute of limitations provisions of the federal statute, SAFETEA-LU will be invoked. Correspondence dated October 3, 2008, from Michael P. Anderson to Riverkeeper, indicates that after the respective Records of Decision, the 180-day Statute of Limitations will apply.⁸ However, the letter goes on to state: “In the event Federal permits are required and issued, the statute of limitations would apply to that action as well, affording numerous opportunities for a challenge throughout the tiering process.”⁹

Clearly, by this point, the New York State Department of Transportation and the other involved federal and state agencies should be able to identify which other permits will be required, as well as the approximate timing and sequence of those decisions. That procedural information should be explicitly presented at this time -- not when any related, parallel or “tiered” decisions are

⁶ Transit Report, at 2-9.

⁷ See Transit Report at S-5, stating: “... details of transit alternatives will be further studied in separate environmental document(s)...” We do note that in contrast, the new Autumn 2008 Newsletter, “Tappan Zee Bridge/I-287 Environmental Review” states that “the second EIS will focus on the integrating the mass transit mode into the communities, including route specifics and location and design of transit stations...” at 1.

⁸ Correspondence from Michael P. Anderson, Project Director, New York State Department of Transportation, to Robert Goldstein and Rebecca Troutman, Riverkeeper, Inc., (October 3, 2008), at 3, a copy of which is attached hereto.

⁹ *Id.*

essentially *faits accomplis* and the mandates of the State Environmental Quality Review Act and the National Environmental Policy Act thereby rendered meaningless.

Also, as we stated previously, the use of the SAFETEA-LU statute of limitations is constrained in this type of tiering. The “savings clause” in Section 6002(k)(2) of SAFETEA-LU states: “Nothing in this section shall be construed as superseding, amending, or modifying the National Environmental Policy Act of 1969 or any other Federal environmental statute or affect the responsibility of any Federal officer to comply with or enforce any such statute.” In choosing to specifically name and protect the National Environmental Policy Act within the text of SAFETEA-LU, Congress spoke clearly: **The mandates of NEPA are not to be undermined in any way by SAFETEA-LU.**

In the text of NEPA itself, Congress spoke directly to the need for a rational, informed, evaluation:

...all agencies of the Federal Government shall - (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man’s environment; ...[and]...insure that presently unquantifiable amenities and values may be given appropriate consideration in decisionmaking...¹⁰

Moreover, as the CEQ regulations provide at Section 1500.1(b) “Purpose”:

NEPA procedures must insure that environmental information is available to public officials and citizens **before** decisions are made **and before** actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA (*emphasis added*).

D. The “Recommendation” to Add Commuter Rail Transit to Cross the Hudson River on the Tappan Zee Bridge is Not Adequately Justified.

The project team announced the “recommendation” of adding Bus Rapid Transit (“BRT”) across the entire corridor and “Commuter Rail Transit” (“CRT”) from Rockland County across the Hudson River to connect to the Hudson Line into Manhattan.¹¹ Regarding the Bus Rapid Transit, we are in agreement that if a new transit mode must be added for the Suffern to Port Chester corridor, that this is the preferred option.

However, the data presentation which supposedly justifies the expensive and environmentally intrusive commuter rail to cross the Hudson, is not clear and convincing, particularly in light of the Access to the Region’s Core project (“ARC”). The publicly available materials on the ARC indicate that that infrastructure project is nearing the completion of its review and approval

¹⁰ 42 U.S.C. §4332.

¹¹ Transit Report at S-5.

process, and has secured large scale funding.¹² This project will provide a “One-Seat” transit ride, and generally improved rail transit from the West of the Hudson regions and Rockland County, into NYC. Accordingly, please present the commuter data in a straightforward, consolidated manner, showing the forecasted demand for the mode, and by what amount the ARC falls short in meeting that demand, so as to justify the construction of a highly expensive and environmentally intrusive commuter rail, and a sufficient bridge capacity to accommodate it.

Additionally we note that in the most recent public meeting on November 21, 2008, in response to a question concerning funding sources, Project Director Michael Anderson stated that the agencies had not yet undertaken the relevant Federal Transit Authority (“FTA”) analysis, referred to as the “cost-effectiveness-index,” for the project. The Transit Report states that the ratings analysis found that the BRT/CRT and BRT alone were “the highest rated performers” and does not differentiate between them as to effectiveness in the main chart.¹³ Accordingly, please clarify why the BRT/CRT option is the preferred option for the recommendation, as opposed to simply the BRT alone, and indicate at what point the FTA analysis will be completed.

E. The Legal Criteria and Standards for the Sweeping Assertion that the Rehabilitation Options for the Bridge are Not “Reasonable” Must Be Fully Explained.

The September 2008 Scoping Documents state that all rehabilitation options have been deemed to be “neither reasonable nor prudent.”¹⁴ Please provide the legal and conceptual standards used to arrive at this critical assertion.¹⁵

F. All Environmental Impacts to the Hudson River, from both Construction and Operation of the Project Must be Thoroughly Identified.

The Bridge Analysis Report states: “Project construction activities that may affect aquatic habitats include placement of fill and the construction of piers, bulkheads and cofferdams.”¹⁶ “Future operational impacts include shading of river habitat and discharges of stormwater from roadway surfaces.”¹⁷ The Bridge Analysis Report also contains a chart addressing impacts which would occur due to the respective options and includes: “Areas of river habitat permanently impacted by piers in acres;” “Area of river habitat temporarily impacted in acres;” “Shading of river bottom in acres;” “Sediment resuspension (number of cofferdams installed);”

¹² See http://www.accesstotheregionscore.com/News_Events.htm.

¹³ Transit Report at 8-5, and Table 8-3, “Summary Performance Ratings.”

¹⁴ Bridge Analysis Report at 79.

¹⁵ See e.g., 40 C.F.R. §1502.14, which among other provisions requires that agencies “[r]igorously explore and objectively evaluate all reasonable alternatives...”; *National Audubon Soc’y v. Dep’t of the Navy*, 422 F.3d 174, 185(4th Cir. 2005).

¹⁶ Bridge Analysis Report at 63.

¹⁷ *Id.*

“Level of in-water acoustic emissions (# of piles);” “Area for encrusting marine growth in acres,” and; “Water quality (acres of deck area).”¹⁸

However, the September 2008 Scoping Documents contain only bare reference to actual species, although the Bridge Analysis report does note that the project area is a “productive estuary” and the project site is within a U.S. Fish and Wildlife Service designated Significant Habitat of the New York Bight Watershed, and up river from a New York State Significant Coastal Habitat.¹⁹

A report commissioned by Riverkeeper and released on May 15, 2008, *The Status of Fish Populations and the Ecology of the Hudson*, produced by Pisces Conservation Ltd., reveals that many Hudson River fish are in serious long-term decline. Of the thirteen key species studied, ten have declined in abundance since the 1980s: including shad, tomcod, bay anchovy, alewife, blueback herring, rainbow smelt, hogchoker, white catfish, weakfish and white perch. Other important species not included in that study, such as the American eel, also show long-term declines. The evidence indicates an increasingly unstable ecosystem and long-term declines for signature Hudson River fish species. The decline of Hudson River fish has serious implications for the health of ocean fisheries, because the Hudson is one of the most important estuaries along the Atlantic seaboard, serving as a critical spawning ground and nursery for many Atlantic species.

Accordingly, Riverkeeper adds the following to the above listed categories of impacts in the Hudson River: Changes in the flow of the Hudson River both during construction and operation; direct impacts to individual fish and species populations in proximity of the project during construction and operation for both “endangered” and “unlisted” species; impacts to all fish species located throughout the river due to interference in spawning, migration or other processes during construction and operation; and impacts to any wetlands which might impact the Hudson River, its tributaries, watershed and species.

G. All Environmental Impacts to the Hudson River, from both Construction and Operation of the Project Must be Avoided or Effectively Mitigated.

Concerning mitigation measures and the Hudson River ecosystem and water resources, the Bridge Analysis Report states:

Overall, Rehabilitation Options would have somewhat lower potential effects on river resources than would Replacement options for the criteria that were evaluated. However, Rehabilitation Options 3 and 4 would have somewhat greater potential for resuspending river sediment during bridge foundation construction than would the other options. Generally, few differences among Rehabilitation and Replacement Options were found and it is expected that

¹⁸ Bridge Analysis Report at 64, and Table 6-3, “Ecological Comparison of Bridge Options.”

¹⁹ Bridge Analysis Report at 63.

potential impacts can be effectively managed by selection of appropriate construction techniques and implementation of suitable mitigation measures.²⁰

Riverkeeper points out that the law does not require that adverse impacts merely be “managed.” Indeed, SEQRA requires a findings statement that:

“...must... certify that consistent with social, economic and other essential considerations from among the reasonable alternatives available, the action is the one that avoids or minimizes adverse environmental impacts to the maximum extent practicable, and that adverse environmental impacts will be avoided or minimized to the maximum extent practicable....²¹

H. Riverkeeper Calls for a Comprehensive Review of All Data Gathered on Species, Habitat, Water Quality and Ecology Located in the Vicinity of the Project Site, and at any other Location which Could Be Impacted by the Project, by all Relevant Agencies.

Riverkeeper urges all involved and interested state and federal agencies, as well as all interested members of the public and scientific community, to carefully scrutinize and evaluate the pertinent environmental data. Riverkeeper commends Governor Paterson for his formal recognition of the deteriorated state of the Hudson River ecosystem and his intentions, announced on May 29, 2008, to rebuild the Hudson River’s critical fisheries. In his press release, the Governor announced “a new set of initiatives aimed at developing a better understanding of the Hudson River estuary ecosystem and restoring several imperiled fish species, including the American shad.”²² Clearly, this project should be examined and planned in light of those initiatives and the underlying environmental themes and issues.

I. Riverkeeper Freedom of Information Law Request.

Pursuant to New York Freedom of Information Law (FOIL), Public Officers’ Law Article 6, Riverkeeper, Inc. requests the following information regarding the animal and plant species, sediments, habitat, ecology, water quality, and any other relevant scientific information gathered by any involved agency, or their consultants, for the purposes of evaluating the potential environmental impacts of this project and potential mitigation measures:

1. Any and all documents, in paper or electronic form (preferably in electronic form), relating to the sampling, testing, and study plans to gather the described information; and

²⁰ Bridge Analysis Report at 65.

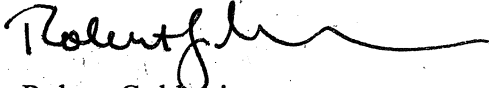
²¹ 6 NYCRR 617.11(d)(5).

²² The full press release is located at http://www.state.ny.us/governor/press/press_0528082.html.

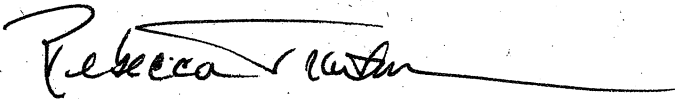
2. Any and all documents, in paper or electronic form (preferably in electronic form), relating to findings, data, reports or conclusions generated by any sampling, testing or studies performed.²³

Thank you for your attention. Please do not hesitate to contact us with any questions or comments at (914) 478-4501.

Sincerely,



Robert Goldstein
General Counsel



Rebecca Troutman
Staff Attorney

²³ As Riverkeeper is a non-profit organization, we also ask that you waive any fees associated with document reproduction.