



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JUN 25 2014

Commissioner Joseph Martens
NYS Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

Dear Commissioner Martens:

This is in response to the May 28, 2014 letter from the New York State Environmental Facilities Corporation (EFC) to the United States Environmental Protection Agency (EPA) regarding projects under consideration that may be undertaken, using Clean Water State Revolving Fund (CWSRF) funds, in connection with the replacement of the Tappan Zee Bridge with the New New York Bridge. You also sent a memorandum to Administrator McCarthy on June 23, 2014 regarding CWSRF funding, and this responds to that as well. Given the significance of the funds at issue, and the need to ensure that the purposes of the established CWSRF are appropriately met by any projects deemed eligible for such financial assistance, we appreciate the opportunity to provide our views. In particular, as discussed below, we want to ensure that the process surrounding this decision is transparent and, given the size, scope, and seemingly unconventional approach to the use of CWSRF, that the parties involved have exercised due diligence, and carefully scrutinized the project details and considered the implications vis-à-vis the legislative purpose of the Clean Water Act.

Additionally, and contrary to some media reports of which I am aware, I wish to clarify at the outset that the EPA has not approved the request of the EFC, as set forth in the May 28th letter. Rather, the EPA is carefully reviewing the request.

As set forth in the May 28th letter, and further referenced in your June 23rd memorandum, the EFC has proposed spending \$511 million in CWSRF funding for 12 projects relating to mitigating the environmental impacts of building the new Tappan Zee Bridge over the Hudson River. The EFC has stated that this request will fund "estuary projects" pursuant to Section 603(c) of the federal Clean Water Act (CWA), which it believes are in furtherance of the existing Comprehensive Conservation and Management Plan (CCMP). While your descriptions of these specific proposed projects are helpful, and identify a possible nexus between them and the CCMP, it bears mention that we do not believe New York State has previously used the CWSRF for many of the types of estuary projects now under consideration for funding.

As you are likely aware, federal CWSRF dollars have historically been provided by the EPA to the State of New York through the EFC so that the EFC can offer low interest loans to local governments, primarily to build or upgrade wastewater treatment systems. As the municipalities pay off these low interest loans, the money is recycled into the state's revolving fund, thereby replenishing it to meet future wastewater treatment needs and other authorized CWSRF purposes. Since 1990, EPA has provided \$4.1 billion to EFC for CWSRF purposes, and the monies have always been used to support wastewater treatment systems.

It is important, therefore, that when EFC considers the merits of each project in connection with determining its eligibility for CWSRF funding, it also recognizes the present and reasonably anticipated future funding needs associated with the repair, replacement, and upgrade of New York's municipal wastewater infrastructure. While the Clean Water Act's enumeration, in Section 603(c)(3), of the types of projects that may receive financial assistance from the CWSRF necessarily provide some flexibility in assessing the purpose of said projects, EFC should carefully scrutinize the proposed projects to ensure that they appropriately further the environmental goals that underlie the State's own intended use plan and CCMP.

As mentioned earlier, our review of the proposed projects described in your May 28th letter and the June 23rd memorandum gave rise to several questions pertaining to eligibility for CWSRF funding. These questions – with additional context – are set forth below for your consideration. While not determinative of the likely eligibility for funding, we would nevertheless value obtaining any additional information you can provide relating to these issues. We also strongly suggest that you, as best you can, address these issues during your own deliberations regarding funding priorities and eligibility.

1. ***How will these projects, which are already required to be undertaken pursuant to a permit issued to the NYS Thruway Authority by the NYSDEC, improve water quality? In addition, it would be helpful to better understand how these projects were prioritized compared to other estuary projects that may be eligible for CWSRF funding.***

Nearly all of the 12 proposed projects are required by the Mitigation Plan that is included in the permit that the NYSDEC issued to the NYS Thruway Authority on March 25, 2013 (<http://www.newnybridge.com/documents/dec-permit/final-permit.pdf>). Please explain the analysis that led New York State to conclude that the funding of these 12 projects is the best and highest use of the \$511 million to advance the improvement of water quality and the betterment of the NY/NJ Harbor and Estuary Program.

2. ***It appears that many of these projects were not of the kind initially contemplated by the Comprehensive Conservation Management Plan (CCMP) that was adopted in 1996. It would be helpful to better understand how EFC views these projects in the context of the CCMP, as they appear to have, as a primary aim, the mitigation of problems created by an ongoing construction project.***
3. ***Given the size of the proposed projects, particularly taken together, it is important to provide greater transparency regarding their estimated costs. It appears that the cost estimates for the individual projects varied significantly within one week, and it would be helpful to understand the basis for such variances.***

EFC provided EPA with two sets of cost estimates – one on June 11, 2014 and the other on June 18, 2014. Some of the cost estimates changed significantly. Some examples in the varying cost estimates include the following:

- the first provided cost estimate of the Gay's Point Restoration project was \$3.6 million; the second provided cost estimate is \$5.7 million;
- the first provided cost estimate of the Piermont Marsh project was \$1 million; the second provided cost estimate is \$2 million; and
- the first provided cost estimate of the stormwater management measures was \$9.4 million; the second provided cost estimate is \$14.4 million.

Because these projects were identified in the March 2013 NYSDEC permit as part of the Mitigation Plan, please explain why the costs are not more definite. Further, please provide financial documentation in support of the \$100,000 cost estimate for the proposed Falcon Nest Box Relocation.

4. *Please provide additional information with regard to the eligibility for CWSRF funding of the Dredging and Mound Removal (\$40.4 million) and the Dredge Material Disposal (\$69.8 million) projects.*

As you know, the draft Management of Dredged Materials section is not part of the final CCMP. Please explain how the \$40.4 million proposed for the Dredging and Mound Removal project and the \$69.8 million proposed for the Dredge Material Disposal project would be eligible for CWSRF funding.

5. *Please provide additional information with regard to the eligibility for CWSRF funding for the River Bottom Armoring (\$29.9 million) project.*

Please explain how the River Bottom Armoring mitigation project is eligible for CWSRF funding, since, based on your description in the May 28 letter, this activity would appear to result in the destruction of benthic habitat.

6. *Please provide additional information with regard to the eligibility for CWSRF funding of the Shared Use Path (\$57.1 million) project.*

Please provide an explanation of the costs of the Shared Use Path project and how it relates to water quality improvement.

7. *Given the previous practice of classifying eligibility for CWSRF on the applicant's population, it would be helpful to clarify how the EFC places the NYS Thruway Authority in the same funding category as New York City, when these mitigation projects will be undertaken in communities with much smaller populations.*

EPA understands that the EFC proposes to spend the \$511 million from the designated pool of monies that had been available for projects in New York City – a municipality that has multibillion dollar needs in the area of wastewater treatment systems. According to New York City's 10-Year Capital Strategy, the New York City Municipal Water Finance Authority is relying on the issuance of a minimum of \$900 million in bonds through funds obtained from EFC through 2017 to help finance its water infrastructure needs. At a minimum, we believe it advisable to consider the likely impacts that funding this project will have on the City's ability to fund its 10-Year Capital Strategy.

8. *Given the size and scope of these projects, it would be helpful to better understand how the EFC has designated this amendment to the Intended Use Plan as a "minor modification" which is not subject to public comment.*

The EFC's first public notification of this request to spend \$511 million on Tappan Zee mitigation was in the June 11, 2014, NYSDEC Environmental Notice Bulletin, which states that "Section 3.6 for the FFY 2014 Intended Use Plan allows minor modifications to the Intended Use Plan through the publication of the notice in the Environmental Notice Bulletin." As stated above, in 2014, EPA is slated to provide \$155 million to the EFC for the entire state. We understand that EFC has referred to the revision of the IUP as a "minor modification," which is not subject to public comment. We further understand that EFC claims that this is a minor modification because it will not change the overall funding for federal fiscal year 2014. EFC has explained that this is because the City of New York has elected to not proceed with projects it had previously said it would pursue in federal fiscal year 2014.

Please explain why this amendment -- for newly announced SRF projects -- is not subject to public comment, and why the EFC would not consider noticing this modification for public comment.

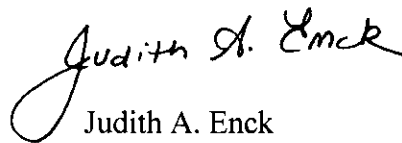
We further note that the EFC's 2014 Final CWSRF Intended Use Plan

(<http://www.nysefc.org/default.aspx?tabid=112>) indicates reserve funds for new 2014 projects of \$1.155 billion, as of October 1, 2013. Please explain what steps you are taking to make these funds available to local governments.

Again, we appreciate your outreach to us concerning the relationship between these proposed projects and the scope of the governing CWSRF regulations and eligibility for funding assistance under that program. We have raised questions and concerns so that the EFC, EPA, and all the relevant stakeholders, can best be assured that any funds spent are appropriate and in furtherance of the specific statutory goals. New York's administration of a strong and reliable CWSRF depends upon its careful stewardship of that fund and scrutiny of proposed expenditures. We remain available to meet with you concerning the issues we have raised, and hope that you fully consider them as you continue to deliberate over these important environmental issues.

Thank you.

Sincerely,



Judith A. Enck
Regional Administrator

cc: Matthew J. Driscoll
Howard A. Zucker
Cesar A. Perales
Francis T. Corcoran
Charles Kruzansky
Vita DeMarchi