



MATTHEW J. DRISCOLL, *President and CEO*

July 2, 2014

Ms. Judith A. Enck
Regional Administrator
United States Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Dear Regional Administrator Enck:

At the June 26, 2014 meeting of the New York Environmental Facilities Corporation (EFC), the Board unanimously approved a \$511.45 million, low-interest loan to the New York State Thruway Authority for environmental protection and Hudson River restoration projects related to the New NY Bridge project to replace the Tappan Zee. As steward for New York's Clean Water State Revolving Fund (CWSRF) EFC fully analyzed and considered EPA's June 25, 2014 letter while considering this loan. Because of the importance of this action, I wanted to ensure that EPA is fully informed so that it can continue to assist New York in the successful management of its CWSRF. Therefore, I have summarized below our analysis of the important issues raised by your letter. Section A of this letter presents a general framework for how EPA's letter fits into the overall policies surrounding CWSRF programs. Section B provides preliminary responses to the specific questions in EPA's letter. (EPA's questions are paraphrased and the numbering used in Section B below corresponds to EPA's letter.)

Your letter questioned whether each of the projects under consideration implements the New York-New Jersey Harbor Estuary Comprehensive Conservation and Management Plan (CCMP). Analyzing and answering EPA's specific questions confirmed for EFC that these projects qualify for CWSRF support precisely because they "implement" New York's comprehensive estuary management plan.

A. GENERAL FRAMEWORK

1. **Background.** EPA's June 25, 2014 letter responds to the May 28, 2014 request from EFC and my memo of June 23, 2014 to Administrator McCarthy. EPA's letter describes Thruway's project as "unconventional." However, this characterization should be considered against EPA's position about the inherent flexibility of CWSRF programs. In particular, for the past fifteen years EPA has been urging states to expand the use of their SRF programs to support funding for estuary protection. In an October 1998 Newsletter, EPA stated that "to counteract the serious threats to estuaries across the country, EPA would like to see CWSRF become a major source of funding for estuary protection." EPA 832-F-98-005, October 1998. In March 2007, EPA presented a paper entitled "The Clean Water State Revolving Fund Program: Tapping its Untapped Potential" at a national conference. That presentation and the EPA draft White

Paper, as well as a related EPA work group, urged states to innovate and expand the use of SRFs beyond traditional wastewater plant improvements. The March 2007 EPA White Paper states that as a general matter estuary projects which protect the “propagation of a balanced, indigenous population of shellfish, fish, and wildlife, and allows recreational activities in, and on water . . .” should be eligible for CWSRF support. Accordingly, the Thruway’s loan request should be viewed, at least in part, in the context of EPA’s recognition that estuaries face complex threats which require innovative solutions.

2. The Innovative Use of New York’s CWSRF Does Not Disqualify the Projects.

EPA goes further than just noting that the proposal is “unconventional.” After a passing acknowledgement that the available information identifies a “possible nexus” between the proposed projects and the CCMP, EPA states that “it bears mention that we do not believe New York State has previously used CWSRF for many of the types of estuary projects now under consideration for funding.” EPA’s letter underscores this point by noting “CWSRF dollars have historically been provided . . . to build or upgrade wastewater treatment systems.” By electing to emphasize the ‘unconventional’ nature of the proposed financing, the novelty for the projects and historic practices, EPA shifts the focus away from eligibility for CWSRF financing, or as EPA puts it ‘nexus with the CCMP.’ A complete eligibility analysis was provided by Thruway’s consultant. The conclusions from that analysis are summarized below in some of the responses to EPA’s questions. However, given EPA’s history of encouraging innovation (discussed above) it is inconsistent for EPA to suggest that past practices should constrain future funding decisions.¹ In other words, without more, the fact that a loan is either unconventional or new is not a negative.

B. PRELIMINARY RESPONSES TO EPA’S QUESTIONS

1. How will these projects which are already required to be undertaken pursuant to a permit . . . improve water quality and how do they compare to other estuary projects? Estuary projects are covered by 33 USC 1383(c)(3) and can be financed from the CWSRF program whenever they “implement” a comprehensive estuary management plan. Many of the proposed projects provide benefits to water quality in the estuary. For example, sediments in the river bottom and the mounds exhibit elevated levels of several inorganic contaminants. Removal and proper disposal of these sediments will reduce the overall mass of contamination in the estuary. Likewise lining or armoring the soft sediments of the river bottom with stone will reduce resuspension, local turbidity and possible redistribution of this material throughout the estuary. Thus, even the projects which some see as the most questionable will have benefits for the estuary, including improving water quality. However, improving water quality is not the test for eligibility. Furthermore, the environmental value of the projects was calculated using the same regulatory system EFC uses to evaluate all CWSRF projects.

There are no other exclusive estuary projects listed in the Intended Use Plan. There are several projects which are co-listed as Section 212 and 320 projects. E.g. Nitrogen removal by the Peconic Bay WWTP.

¹ For example, EPA has frequently cited Maine’s Forestry Direct Link Loan Program as an innovative CWSRF. Despite the fact that logging operations have well documented impacts on water quality, Maine apparently uses its CWSRF to support purchase of logging equipment such as harvesters and installation of logging infrastructure such as bridges.

2. How does EFC view these projects in the context of the CCMP because they are in mitigation of adverse environmental impacts associated with construction of infrastructure improvements? Whether an activity or project is in mitigation of another activity or is mandated by a permit, has no bearing on its eligibility for CWSRF financing. Most and perhaps all CWSRF projects involving point sources are required to be undertaken by a permit, order or regulation. Moreover, it is often the case that traditional improvements and upgrades to treatment plants are undertaken to off-set the increased wastewater from development. Indeed, in some sense all wastewater management is intended to mitigate the adverse environmental impacts of development and human activity. So the fact that these projects are required pursuant to a permit for another activity has no impact on eligibility.

3. Why Did the Cost Estimates for the Projects Change? The estimates are based upon the best available information supplied by Thruway and its contractors. These amounts are likely to change as the project progresses. The loan will approve an “up to” amount. EFC’s due diligence on cost eligibility is ongoing and will continue throughout the entire disbursement process.

4. Are the Dredging and Mound Removal Projects Eligible? Yes, for two wholly independent reasons each of which is legally sufficient. As a threshold matter, we seriously question EPA’s suggestion that the “Management of Dredged Materials” section is not part of the final CCMP.² The New York-New Jersey Harbor & Estuary website was checked today. To all appearances the dredged material management element of the plan is included as Section 4 of a document which is “final.” Moreover, the plan states that it was revised in 2011 and is a working document. The publically available document does not seem to support EPA’s suggestion that certain elements of the published CCMP are not final. Regardless of the status of section 4 of the CCMP governing Management of Dredged Materials, Section 3 of the plan calls for reduction of toxic contamination in the estuary. The dredging and mound removal are eligible based upon either the Management of Dredged Materials or Toxic Contamination elements of the CCMP.³

5. Why is the River Bottom Armoring Eligible? Among the stated goals of the CCMP is to minimize erosion and decrease loadings of sediments and pollutants to the Harbor and New York Bight. Armoring is designed to reduce scouring and prop wash from vessels during construction. The available environmental analysis and modeling demonstrates that armoring significantly reduces resuspension of sediments and total suspended solids.⁴

2. Dredging is often considered in CCMPs. For example, a report from the Tampa Bay CCMP includes numerous dredging projects which are use to implement that CCMP. The Gulf of Mexico program also includes regional sediment management as a key estuary improvement goal.

3. There are many examples of similar CWSRF support. For example, we understand that San Francisco Bay used CWSRF funding to implement a project to reduce the introduction PCB impacted soil and sediments.

4. EPA’s SRF program has noted that California supported financing to stabilize creek beds for the Huichica Creek Vineyard Sustainable Agriculture Project. Although complete details are not available, the available project information suggests that this project had objectives which are similar to the armoring project. Likewise, the Puget Sound Action Agenda includes levee maintenance as a CWSRF fundable item.

6. **Why is the Shared Use Path Eligible?** Section 3.5.1 of the CCMP emphasizes the importance of providing access so that residents of the estuary can enjoy “local scenic, natural, cultural, historic and recreational resources.” This section of the CCMP specifically calls for increasing scenic overlooks and pedestrian routes. The shared use path will implement these provision of the CCMP.

7. **Why does EFC Place the Thruway Authority in the Same Funding Category as New York City?** The NYS Thruway Authority was created and exists for the benefit of the people of the State and its properties are held in the name of the people of the State. Accordingly, EFC has attributed the State’s population (>2 million) to the jurisdiction of the NYS Thruway Authority and placed it in Category C of the IUP. Moreover, the Thruway abuts or goes through all 9 metropolitan areas of the State.

8. **Why is the Change to EFC’s Intended Use Plan a Minor Modification?** EFC’s 2014 IUP defines a minor modification as changes that will not affect overall funding levels or priorities. At this late point in the fiscal year EFC has sufficient information to be confident that it can satisfy every commitment made to every project that indicated an interest in moving forward. This provision has been included in each CWSRF IUP submitted to EPA Region 2 since 2009.

Enclosed for your ready reference is a copy of the May 30, 2014 Clean Water State Revolving Fund Technical Memorandum prepared for Thruway by AKRF, Inc. This memorandum contains a complete technical assessment of the nexus between each of the projects and the CCMP. Once you and you staff have had an opportunity to review this letter and the enclosed memorandum, I am ready to schedule a meeting in your offices to address any remaining questions or concerns.

Thank you for your careful attention to matter. I look forward to working with you to ensure that New York’s continues as a national leader in performance, integrity and creativity for CWSRF programs.


Joseph J. Martens
Chair

Enclosures

Cc: Matthew J. Driscoll
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