

Citizens Campaign for the Environment
Environmental Advocates of New York
New York League of Conservation Voters
NY/NJ Baykeeper
New York Public Interest Research Group
Regional Plan Association
Reinvent Albany
Riverkeeper
Tri-State Transportation Campaign

June 24, 2014

VIA ELECTRONIC MAIL

Members of the Board of Directors
c/o Commissioner Joe Martens, Chair
New York State Environmental Facilities Corporation
625 Broadway
Albany, New York 12207-2997

**Re: Proposal for New York State Environmental Facilities Corporation
to Loan \$511 Million from the Clean Water State Revolving Fund
to the New York State Thruway Authority for its Tappan Zee Bridge
Construction Project**

Dear Members of the Board of Directors:

We write to object formally to the recent proposal by Governor Cuomo and the New York State Thruway Authority (“NYSTA”) for the New York Environmental Facilities Corporation (“EFC”) to provide NYSTA with \$511 million in no-interest and low-interest financing for the New New York Bridge (“Tappan Zee”) construction project.

For the reasons discussed below, our organizations urge the EFC Board of Directors (“Board”) to reject NYSTA’s application on the grounds that such financing of transportation project construction activities would be improper under applicable considerations of both law and good public policy, and stand as a dangerous precedent that could place future Clean Water Act State Revolving Fund (“CWSRF”) grants by the federal government in jeopardy. If you do not intend to reject this proposal, we suggest that you at least delay the vote to allow for scrutiny and input by other involved government agencies, such as the US Environmental Protection Agency, and public stakeholders.

Since its inception, the CWSRF program has served as the nation's largest water quality financing source, helping communities across the country meet the goals of the Clean Water Act by *improving water quality, protecting aquatic wildlife, protecting and restoring drinking water sources, and preserving our nation's waters for recreational use*. In recent years, the CWSRF programs provided, on average, more than \$5 billion annually to fund water quality protection projects for wastewater treatment, nonpoint source pollution control, and watershed

and estuary management. Over the last two and half decades, the CWSRFs have provided over \$100 billion, funding more than 33,320 low-interest loans.¹

While Governor Cuomo's desire to obtain no-interest and low-interest financing for his Tappan Zee Bridge construction project is certainly understandable, any suggestion by the Cuomo administration or NYSTA that such bridge construction expenses can accurately be characterized as fitting within the range of projects suitable for CWSRF funding is insupportable.

Indeed, our organizations are not aware of any instance where CWSRF funding has been made available by EPA, EFC or any state to finance costs associated with transportation infrastructure construction activities, such as the pre-construction dredging or demolition of the current Tappan Zee Bridge, as contemplated by EFC in this case. It is certainly fair to say that a determination by the Board to approve at these sorts of activities by way of the financing plan now under your review would be unprecedented. It would also be entirely improper.

Based upon the limited information that has been made available to the public about this proposal, we understand that the vast majority of the \$511 million loan would be utilized by NYSTA, not for the types of genuine environmentally beneficial projects for which CWSRF funds are appropriately made available,² but rather to finance a portion of the core costs of a transportation project, *i.e.*, general bridge construction and demolition work. These costs would include over \$100 million for construction-related dredging and dredge disposal, \$30 million for "armoring" the 12-foot deep dredged trench with stone and gravel, and \$65 million for demolition and removal of the existing Tappan Zee Bridge.

Indeed, to the best of our knowledge, ***only approximately \$12.5 million of the \$511 million proposed financing would be utilized for genuine environmentally beneficial projects***, and each of those projects has been expressly required as mitigation for the unavoidable adverse environmental impacts associated with the bridge construction and demolition project.

The effort by Governor Cuomo and NYSTA to recast a bridge construction and demolition project (with well-understood and repeatedly admitted adverse environmental impacts, discussed below) as a project that will be ***beneficial*** to water quality in order to justify CWSRF funding³ must be recognized by the board as totally improper and disapproved.

Indeed, we have reviewed a letter to Commissioner Martens from Assembly Members Brennan, Kavanagh and O'Donnell, dated June 19, 2014, which asserts that the Members have "serious doubts" about whether the Tappan Zee Bridge project components that would be funded under this proposal come within the statutory definition of "projects" that may be financed by

¹ See EPA, "Clean Water State Revolving Fund, 25 Years of Investment in Our Nation's Water Infrastructure," available at http://water.epa.gov/grants_funding/cwsrf/cwsrf_index.cfm.

² See Clean Water Act § 603(c), 33 U.S.C. § 1383(c) (2006) [hereinafter "CWA"], "Projects Eligible for Assistance."

³ See Press Release dated June 16, 2014, "Governor Cuomo Announces \$500 Million in EFC Loans to NEW NY Bridge Project," available at <http://www.governor.ny.gov/press/06162014-efc-loans-new-ny>.

EFC.⁴ We share the Assembly Members' stated doubts about EFC's statutory authority to finance the designated components of the Tappan Zee Bridge construction project.

In addition to the Assembly Members' State law concerns, the proposal to fund the project appears to violate DEC regulations, which require that:

“All projects . . . shall be listed on the [Project Priority List] in the [Intended Use Plan]. Projects shall be ranked on the annual [Project Priority List] in accordance with the criteria contained in the priority ranking system scoring criteria set forth under section 649.13 of this Part and the [Intended Use Plan].⁵

Notwithstanding this plain regulatory requirement, our review of the 2014 Intended Use Plan (“IUP”) available on the EFC website⁶ reveals that the original 2014 IUP contained no indication of any intent to provide CWSRF funding to NYSTA for the Tappan Zee Bridge construction project. While we are aware that the 2014 IUP was purportedly amended by EFC just two weeks ago to include the Tappan Zee project, we do not believe such amendment complied with state or federal law because it completely subverted mandatory public participation requirements. In addition, the suggestion in the Environmental Notice Bulletin that adding a \$511 million nontraditional transportation infrastructure project such as the Tappan Zee Bridge to the CWSRF IUP Annual List is a “minor modification to the IUP” is facially erroneous.⁷

As noted above, NYSTA's proposal to utilize CWSRF financing for various project components associated with the construction of the new Tappan Zee Bridge and the demolition of the old bridge would also violate federal law, because such projects are not “projects eligible for assistance” specified in Section 603(c) of the federal Clean Water Act. The project components obviously do not fall within the first two categories set forth in the statute, *i.e.*, they are not “for construction of publicly owned treatment works,” nor do they qualify as “implementation of a management program” established under CWA § 319.⁸

It is our understanding that NYSTA purports to rely upon CWA § 603(c)(3), claiming that the Tappan Zee Bridge project components for which it seeks financing qualify as being “for development and implementation of a conservation and management plan” under CWA § 320. For the vast majority of the funds proposed to be loaned to NYSTA, this is just not true.

While a conservation and management plan exists for the New York/New Jersey Harbor Estuary—*i.e.*, the Comprehensive Conservation and Management Plan (“CCMP”)⁹—the CCMP

⁴ See Public Authorities Law §§ 1285-b, 1281(15).

⁵ 6 NYCRR § 649.3(a).

⁶ New York State 2014 IUP available at <http://www.nysefc.org/Default.aspx?tabid=112>.

⁷ DEC, Environmental Notice Bulletin, June 11, 2014, available at http://www.dec.ny.gov/enb/20140611_not0.html.

⁸ CWA § 1383(c)(1) & (2).

⁹ The CCMP is available at <http://www.harborestuary.org/about-planningdocs.htm>.

was developed and adopted in 1996, so it should go without saying that the NYSTA's Tappan Zee Bridge construction and demolition projects are not intended for the CCMP's "development."

With respect to the "implementation" of the CCMP, the suggestion by NYSTA that an enormous transportation infrastructure project such as the Tappan Zee Bridge construction and demolition can be considered a project "for implementation" of that plan completely fails to pass muster. From a factual standpoint, ***not a single reference to the CCMP can be found in the Final Environmental Impact Statement ("FEIS") for the Tappan Zee Bridge construction project.***¹⁰ Any suggestion that the components of the construction project for which financing is sought, which were all subject to review for their admittedly adverse impacts in the FEIS, are being done "for the . . . implementation" of the CCMP must be rejected.

Just as importantly, ***dredging for the new bridge and demolition of the old bridge are environmentally harmful activities, not beneficial ones.*** In fact, the amount of dredging being done for this project was cut nearly in half from original estimates, in order to **reduce** the adverse impact associated with that dredging. The project EIS says, in this regard, that several of the most prominent activities EFC proposes to pay for with federal funds designed to improve water quality and conditions in the estuary have the potential to do damage to the river:

In-water construction activities such as dredging, armoring of the dredged channel, installation of cofferdams and bulkhead, driving of piles, and demolition of the existing bridge have the potential to affect aquatic biota, including threatened or endangered species, and significant habitat areas of the Hudson River (e.g., Significant Coastal Fish and Wildlife Habitat, U.S. Fish and Wildlife Service [USFWS] Significant Habitats, and Essential Fish Habitat [EFH]) within the study area.

EIS, Page 18-85

Moreover, if the Tappan Zee construction activities now at issue are paid for with federal estuary and clean water funds as now proposed, it will create a precedent, as admitted by EFC in a June 17th telephone conversation with Paul Gally, President of Riverkeeper, that would allow other transportation infrastructure construction projects to receive loans that could take up any and all remaining funds in the state clean water revolving loan fund. This was the exact opposite of the intent of the Clean Water Act State Revolving Loan Program, which was meant to be used not for such projects but for improvements to wastewater treatment infrastructure, habitat improvement projects, and the like.

For the Board to accept the argument that transportation infrastructure construction activities such as new bridge construction dredging and demolition of the current Tappan Zee Bridge are projects for the "implementation of a conservation and management plan," in an effort to shoehorn such activities into the CWA § 603(c) category of "projects eligible for

¹⁰ The FEIS is available at <http://www.newnybridge.com/documents/feis/index.html>.

assistance,” would violate the Board’s obligation to approve CWSRF financing only for projects that are legitimately eligible for such funding.

In addition to the above-described violation of federal law, the proposal would also run afoul of EPA regulations. For example, EPA regulations require that the State’s IUP contain a list of the “national estuary protection activities under sections . . . 320 of the Act that the State expects to fund from its SRF,”¹¹ and that the IUP “must be subjected to public comment and review before being submitted to EPA.”¹² As noted above in the State law discussion, review of the 2014 IUP available on the EFC website¹³ reveals no indication of any intent by EFC to provide funding to NYSTA for the Tappan Zee Bridge construction project. The need for public review and comment on such a proposal should be readily apparent to the Board given the unprecedented and enormous amount of the proposed loans and the obviously nontraditional nature of the projects for which financing is sought. For these reasons, even if the Board might be inclined to approve financing for components of the Tappan Zee project, it should include a proposal to do so in its 2015 IUP, provide an opportunity for public notice and comment on such proposal, and carefully consider all public comments received before it proceeds to a vote.

A vote by the Board to approve the current proposal to provide financing to NYSTA for various components of its Tappan Zee construction project would violate New York State and federal law. We urge the Members of the Board to vote against the proposed financing or, at a minimum, to delay a vote and allow sufficient opportunity for EPA and all public stakeholders to carefully consider the proposal and be heard.

* * *

In addition to the concerns raised above, we also share the important concerns raised in the Assembly Members’ June 19, 2014 letter to the Board, *i.e.*, (1) that EPA should be given ample opportunity to provide written guidance to the Board before its vote on the proposal; (2) that funds allocated for CWSRF uses within the City of New York should not summarily be diverted by EFC for use outside the City; (3) that even if federal and/or state law did not require public notice and comment on such a significant nontraditional financing proposal (which they do), as a matter of public policy, EFC should not be a party to rushing such a proposal to a “hurry-up” vote without independently assuring that its action will be legal and that it has satisfied fair principles of public notice and comment and due process.

The Assembly Members also correctly noted in their June 19 letter that:

According to the 2013 Report Card for America’s Infrastructure, published by the American Society of Civil Engineers, the State of New York has reported \$27 billion in drinking water infrastructure needs and \$29.7 billion in wastewater

¹¹ 40 C.F.R. § 35.3150(b)(1)(ii).

¹² 40 C.F.R. § 35.3150(a).

¹³ New York State 2014 IUP available at <http://www.nysefc.org/Default.aspx?tabid=112>.

infrastructure needs over the next 20 years. We are very concerned that the diversion of this funding to build a new bridge will have an adverse impact on current and future sewage and water treatment projects in NYC.¹⁴

We understand that NYSTA and representatives of EFC have been arguing to stakeholders that providing financing to NYSTA in the amount of \$511 million in 2014 will have no effect on funding for legitimate water quality projects such as POTW upgrades and combined sewer overflow abatement. If that is the case, it seems to us that the CWSRF mechanism must be broken, because it would mean that ***New York State has approximately \$57 billion in drinking and wastewater infrastructure needs and cannot drum up enough worthy projects to take up available funding reserves totaling only a small fraction of this amount.***

Just last month, leaders in 126 Hudson Valley cities, towns and villages responded to a survey on infrastructure issues¹⁵ by expressing significant concern over the state of their water infrastructure. In fact, 60% of them consider their water infrastructure as “needing work in the next three years” or “at risk of imminent failure.”¹⁶ Many of these leaders expressed concern that these limitations are constraining economic development opportunities and that new development would overtax already strained systems:

Our sewer plant needs to be expanded or a second plant needs to be built. Currently we are under a consent order with DEC and new hook ups are not allowed. This has caused a complete stop of all economic development in our town. Further our town has significant wetland issues which cause septic failures on a regular basis. Residents want to connect to the system but we are restricted. The infrastructure issue is real for us and it is a multimillion dollar problem.
-Town of Coxsackie Supervisor Alex Betke. [Patterns Report at p.2]

Something clearly is wrong when municipality after municipality admits publicly their difficulties with respect to aging wastewater infrastructure and the inability to pay for upgrades, yet EFC feels it can divert clean water infrastructure funding to bridge construction activities. Instead of seeking to fund transportation construction project activities with CWSRF money, EFC should be trying to figure out exactly how to help needy municipalities around the state to access funds that were intended by Congress and EPA to assist them with water quality infrastructure requirements.

Finally, we are very concerned that a decision by the Board to fund a transportation project with CWSRF funds could be utilized by certain members of Congress to support

¹⁴ The 2013 Report Card for New York State is available at <http://www.infrastructurereportcard.org/a/#p/state-facts/new-york>.

¹⁵ Hudson Valley Pattern for Progress, *Infrastructure Planning and Investment: A Widening Gap*, May 2014, available at <http://pattern-for-progress.org/sites/default/files/2014%20Infrastructure%20report%20FINAL.pdf>.

¹⁶ Id., at 2.

continued attacks on the federal CWSRF program. It is no secret that many members of the current Congress wish to dramatically slash EPA's budget, and evidence of such misuse of CWSRF funding earmarked by Congress for genuine water quality projects could be just the ammunition clean water adversaries seek to more effectively attack the state revolving fund program. The Board should take time to consider these potentially serious implications of its actions before it votes to approve the misuse of funds that have been federally designated for water quality infrastructure and allows them to be diverted to what is inarguably a transportation project.

Conclusion

This proposal is scheduled for a vote by the EFC board four business days after it was first made public, perhaps because its proponents are aware that it does not pass muster and that any real scrutiny by other involved government agencies and public stakeholders would be fatal to its chances of approval. The Members of the Board should refuse to allow the EFC process to be misused in this way.

Based on all of the foregoing, the Organizations respectfully urge the EFC Board of Directors to reject this illegal and unprecedented proposal to finance construction components of a transportation project with CWSRF loans. At a minimum, the Board should elect to delay a vote on the proposal as discussed above.

Respectfully yours,

/s/ Adrienne Esposito

Adrienne Esposito

Citizens Campaign for the Environment



Peter Iwanowicz

Environmental Advocates of New York

/s/ Debbie Mans

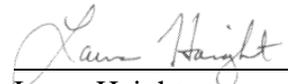
Debbie Mans

NY/NJ Baykeeper

/s/ Marcia Bystryn

Marcia Bystryn

NY LCV



Laura Haight

NYPIRG

/s/ Robert Yaro

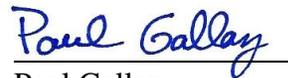
Robert Yaro

Regional Plan Association

/s/ John Kaehny

John Kaehny

Reinvent Albany



Paul Gallay

Riverkeeper

/s/ Veronica Vanterpool

Veronica Vanterpool

Tri-State Transportation Coalition

cc: (all via email)

- A. Cuomo, NYS Governor
- C. Schumer, U.S. Senate
- K. Gillibrand, U.S. Senate
- N. Lowey, U.S. House of Representatives
- A. Stewart-Cousins, NYS Senate
- D. Carlucci, NYS Senate
- L. Krueger, NYS Senate
- J. DeFrancisco, NYS Senate
- J. Brennan, NYS Assembly
- B. Kavanagh, NYS Assembly
- D. O'Donnell, NYS Assembly
- T. Abinanti, NYS Assembly
- E. Jaffee, NYS Assembly
- B. de Blasio, NYC Mayor
- M. Mark-Viverito, NYC Council Speaker
- R. McCarthy, EPA HQ
- N. Stoner, EPA HQ
- J. Enck, EPA R2
- T. DiNapoli, NYS Comptroller
- E. Schneiderman, NYS Attorney General
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