



## **Review of Public Complaint**

# **Board of Directors of the Environmental Facilities Corporation**

November 20, 2014

PC-2014-02

## **The Complaint**

The Authorities Budget Office (ABO) is empowered by its governing statute to “initiate formal investigations in response to complaints or appearances of non-compliance by an authority” (Section 6(2)(d) of Title 2 of the Public Authorities Law).

On July 16, 2014 the ABO received a written complaint requesting that it review the conduct of the board of directors of the New York State Environmental Facilities Corporation (EFC) to determine if the board committed potential violations of the Public Authorities Law. A copy of the complaint is attached to this report as Appendix I.

The complaint suggested that the EFC board of directors may have acted inappropriately when it voted to authorize a \$511.45 million loan from the Clean Water State Revolving Loan Fund (CWSRF) to the New York State Thruway Authority (NYSTA) for purposes associated with construction of the “New New York Bridge”, the replacement for the current Tappan Zee Bridge. The complaint raises concerns that the EFC board failed to exercise independent judgment and the necessary diligence and care when it authorized the use of CWSRF funds to pay for elements of the NYSTA bridge project that the complainants believe did not qualify for funding under the federal Clean Water Act. In addition, the complaint argues that the board authorized the loan in violation of its own policies and loan practices.

## **Scope of the Review**

As part of its review, the ABO met with the complainants, EFC board members, and EFC, NYSTA and Division of the Budget staff. The ABO also spoke with the Regional Administrator of the Environmental Protection Agency (EPA), reviewed the minutes of EFC board meetings and Policy Committee meetings for 2013 and 2014, reviewed correspondence between EFC and the EPA, reviewed information on the CWSRF program and loan application process, and examined documents related to the NYSTA bridge project prepared by NYSTA and EFC staff and presented to EFC directors. The ABO limited its review to the role of the EFC board in authorizing the CWSRF loan. The ABO made no attempt to determine if the proposed CWSRF loan met Clean Water Act standards.

Individuals were not placed under oath, no subpoenas were issued, and the information obtained by the ABO was voluntarily provided or gathered through a review of public records. This report is based on and reflects only the information and documents known to the ABO at the time it was written.

Appendix II provides examples of the core questions posed to EFC board members.

## **Governance Structure of the Environmental Facilities Corporation**

EFC is a financing agency. Its mission is “to provide low-cost capital and expert technical assistance for environmental projects.” To carry out this mission, EFC is governed by a seven member board of directors. Three directors are ex officio: the Commissioner of the Department of Environmental Conservation, who serves as the EFC Chair; the Commissioner of Health; and the Secretary of State. Four directors are appointed by the Governor, subject to Senate confirmation, and serve six year terms.

The three ex officio directors “may, by official proxy...designate an officer in their respective department to perform, in their absence, their respective duties” as a director. Such a designee would have the full rights and duties of a board member.

Currently, one of the four positions appointed by the Governor is vacant. This position was vacant during the entire period the CWSRF loan to NYSTA was under discussion.

## **The Clean Water State Revolving Fund**

New York State’s Clean Water State Revolving Fund (CWSRF) is authorized by state law to provide financial assistance to eligible projects under the Federal Water Pollution Control Act. It is jointly administered by the Department of Environmental Conservation and the Environmental Facilities Corporation (EFC). The CWSRF “provides low-interest rate financing to municipalities to construct water quality protection projects such as sewers and wastewater treatment facilities”, up to the full cost of the project. The CWSRF’s short-term financing program has an interest free component. EFC states that the “goal of the CWSRF is to fund projects whose purpose is to preserve, protect, or improve water quality.”

The types of projects that qualify for CWSRF loans include:

1. Point Source Projects, such as the construction or rehabilitation of sewer or wastewater treatment facilities.
2. Non-Point Source Projects, such as storm water management and the closure of landfills.
3. Habitat preservation and restoration projects that protect marine life within the New York/New Jersey Hudson River Estuary.

To qualify for a CWSRF loan, both the applicant and the project must meet eligibility criteria. After a project is evaluated and determined eligible by EFC staff, it is included on the Intended Use Plan (IUP). The IUP is prepared annually by EFC, but may be revised throughout the year. The IUP, as well as the manner in which it is revised, is subject to public review and comment. The IUP identifies how CWSRF funds will be used, and includes a description of all eligible projects.

Inclusion on the IUP Annual Project Priority List allows the project owner to submit an application to EFC for financing. EFC board approval is an authorization for EFC staff to process the loan. Generally, the board delegates to staff the responsibility to negotiate

the terms and conditions of the loan, but the board's authorization may specify those terms. The board typically receives a one page summary of each project in advance of its authorization.

To finance the transaction, EFC may purchase the general obligation bonds, revenue bonds, and notes of the loan recipient in a negotiated sale, and use its credit as collateral.

### **The Proposed CWSRF Loan**

The New York State Thruway Authority (NYSTA) applied to EFC for a CWSRF loan to fund those elements of the bridge project intended to protect the water quality of the Hudson River associated with the construction of the new bridge and the demolition and removal of the current Tappan Zee Bridge -- such as the restoration of natural habitats and the management and disposal of any toxic contamination caused by the construction. While all parties recognized that the loan would be a unique and creative use of the CWSRF, both NYSTA and EFC considered the loan appropriate since it would reimburse only for those costs that aligned with the environmental protection goals of the Comprehensive Conservation Management Plan (CCMP) for the New York/New Jersey Estuary. The estuary encompasses the New York harbor and the Hudson River north to the City of Troy.

## **Presentation of NYSTA Proposal to EFC Board**

EFC board members told the ABO that the proposal to fund a portion of the costs of the NYSTA bridge project through a CWSRF loan was first presented to them at two meetings of the EFC Policy Committee in August 2013. The Policy Committee is a committee of the whole comprised of all board members. The ABO confirmed that the dates of these meetings were August 14 and August 27.

The August 14, 2013 meeting was conducted in executive session. NYSTA staff briefed the EFC board on the need for the new bridge, the design elements of the project, NYSTA's procurement process and a proposed repayment model based on a systemwide plan of finance.

At this meeting EFC staff presented its analysis of the eligibility of certain project elements for CWSRF financing, including the compatibility of the environmental remediation elements of the NYSTA bridge project with the Comprehensive Conservation Management Plan (CCMP) for the New York/New Jersey Estuary. EFC staff presented details on the credit worthiness of NYSTA and the basics of a plan of finance, the terms of which included the purchase of NYSTA securities by EFC. This was typical of a CWSRF loan.

The three appointees of the Governor attended the meeting (one by videoconference). The designees of the Health Commissioner and the Secretary of State also attended. The Commissioner of the Department of Environmental Conservation (and EFC Chair) was not present or represented at the meeting.

Participants characterized the meeting as "preliminary", "conceptual" and "exploratory" and not a decision-making meeting since NYSTA was not prepared at that time to apply for the loan.

On August 27, 2013 EFC staff again met with the EFC board in executive session to provide a more detailed analysis of the eligibility of certain project elements for CWSRF funding and their compatibility with the goals and objectives of the CCMP, as well as the NYSTA bridge project's scope and potential financing. This meeting did not address the structure or terms of a CWSRF loan or NYSTA's financial position. The meeting was attended by two board members appointed by the Governor (one by videoconference) and the designees of the three ex officio members. The third appointed board member participated by teleconference. Representatives of NYSTA were also present.

EFC board members told the ABO that they were not presented with a NYSTA application for bridge project funding at either of these meetings.

EFC board members informed us that they did not receive any NYSTA bridge project status reports or financial updates from staff between August 27, 2013 and May 1, 2014. More than one board member acknowledged that there was little to no interaction among board members or with staff on the NYSTA bridge project during this time.

### **Actions Leading Up to the June 26 Vote Authorizing the CWSRF Loan**

A timeline of key events from August 2013 leading up to the June 26, 2014 board meeting is included in this report as Appendix III.

**May 1, 2014:** On May 1, 2014 the EFC board planned to hold a brief Policy Committee meeting. Following the meeting, the board was to visit the NYSTA bridge project site, after which it was to hold a question and answer session with NYSTA and EFC staff. On April 30, the site visit was cancelled due to expected inclement weather. Instead of the planned Policy Committee meeting, the available board members held a “discussion meeting” at EFC offices the morning of May 1, 2014. Since there was no quorum present this meeting was not subject to Open Meetings Law or required to be open to the public.

This was the first meeting organized for the board to discuss the NYSTA bridge project since August 2013. Two appointed board members and one designee apparently attended the meeting. When asked about this meeting, board members did not provide direct and substantive answers. Participants did not recall who was present at the meeting and indicated that attendance or meeting minutes were not taken. Neither the board members nor EFC staff provided the ABO with any personal meeting notes. None of the three board members recalled chairing the meeting or why it was scheduled for May 1 after an eight month hiatus (particularly since a regular board meeting was scheduled for May 8). None of these members offered an explanation for why presentations were made by EFC and NYSTA staff in the absence of a quorum.

The meeting was characterized by EFC and NYSTA staff as an opportunity to re-engage the board and re-state the need for a Tappan Zee replacement bridge, discuss the implications of a loan on other potential CWSRF projects in New York City (the CWSRF allocation from which a loan would be made) and the continued eligibility of certain project elements for funding, as well as to discuss the basics of the NYSTA financing plan and credit strength.

This was the final meeting at which board members discussed the NYSTA bridge project and NYSTA’s credit worthiness prior to the June 26, 2014 meeting to authorize the loan. Yet, the ABO was unable to document who attended or participated in the meeting, what exchanges occurred, what issues related to the loan were discussed, or if decisions were reached or directives issued on how to proceed with the loan proposal.

**May 20, 2014:** In the first of a series of interactions, EFC staff met with EPA officials in Washington to explain the NYSTA bridge project and to make the case that elements of the project met Clean Water Act and CWSRF eligibility requirements. EFC staff arranged the meeting to inform EPA of the intended innovative and creative use of the loan funds and to solicit EPA’s views on the proposal. EFC did not believe EPA project approval was necessary. We understand from board members that this meeting was initiated by EFC

without the prior knowledge of the board. According to the EPA Regional Administrator, EFC was told by EPA officials that they should meet with regional officials, since regional offices are responsible for reviewing and approving the use of CWSRF funds for local clean water related projects.

**May 28, 2014:** EFC General Counsel wrote to the Chief of the State Revolving Funds Branch at EPA headquarters in Washington, DC. This letter restated EFC's position that certain project elements are eligible for a CWSRF loan and asked that EPA consider this proposal and provide EFC with its views by June 15, 2014.

**May 30, 2014:** NYSTA submitted its formal project application to EFC. Attached to the required Project Listing Form was a Technical Memorandum prepared by NYSTA's consultants which articulated NYSTA's case for the eligibility of certain project elements for CWSRF funding and the projected reimbursable cost for each element. Pursuant to EFC procedures, this project listing form should have been submitted by February 1, 2014 to be eligible for a loan in federal fiscal year 2013-14. EFC staff also acknowledged that this submittal served as the CWSRF financing application. In accordance with EFC procedure, this application is to be submitted after the project is approved and included on the IUP.

**June 11, 2014:** The NYSTA bridge project was added to the IUP Annual Project Priority List and included in the Department of Environmental Conservation's Environmental Notice Bulletin (ENB). This was the first public notice that NYSTA was applying for CWSRF funding.

**June 16, 2014:** The Governor's press office issued a release that announced the EFC board would be making \$511.45 million in low-cost loans to NYSTA for environmental protection and Hudson River restoration elements of the NYSTA bridge project. The announcement did not categorically state that the board had voted to authorize this loan.

The EFC press office understood that the press release was issued on June 16 in response to a media report that the "New New York Bridge" project was added to the Annual Project Priority List of the IUP. The EFC press office stated that the press release was intended to explain the NYSTA bridge project to the public and the press in advance of EFC's June 26 board meeting.

The EFC press office had, as a matter of routine, started to draft an announcement in the days before the board meeting in anticipation that a press release would be issued immediately after the board authorized the loan on June 26. It was this draft that served as the basis for the June 16 press release. The EFC press office told the ABO that the mention of the board making the loan to NYSTA was in the draft June 26 announcement, and its inclusion in the June 16 press release was portrayed by EFC as an oversight that should have been deleted.

When questioned, EFC board members indicated they had been unaware of the press release prior to the vote. Board members stated that their position on the loan authorization was not or would not have been influenced by prior knowledge of the press

release. The EFC press office confirmed that its usual practice is not to distribute press releases to board members and that this announcement was not shared with the board.

The press release is Appendix IV of this report.

**June 23, 2014:** The EFC Chairman wrote a memorandum to the EPA Administrator in Washington addressing concerns raised in their phone conversation of the prior week. Once more, EFC presented its case that the loan of CWSRF moneys to NYSTA is a creative and eligible use of funds that would achieve environmental and infrastructure objectives.

**June 25, 2014:** The EPA Region 2 Administrator responded to the EFC board chair and intentionally copied each board member (excluding designees). This letter was the official EPA response to EFC's May 28, 2014 letter and the Chairman's memorandum of June 23, 2014. (See Appendix V for all EFC/EPA correspondence)

Based on our interviews with EFC board members, the receipt of this letter on June 25 marked the first time they received any written documentation describing firsthand the concerns raised by EPA in prior discussions and correspondence. Previous to receiving this letter the board relied on staff characterizations of these meetings.

In this letter the Regional Administrator wrote that "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." This letter also states that prior correspondence "gave rise to several questions pertaining to eligibility for CWSRF funding."

The Regional Administrator requested that EFC provide additional information and address eight specific questions in an effort to better understand the analysis EFC staff undertook to conclude that the project elements were eligible for CWSRF funding.

The Regional Administrator informed the ABO that the letter was sent to the entire board so that each member would be fully informed of EPA's concerns and to convey that EPA was troubled by the fact that the use of CWSRF funds for the NYSTA bridge project had not been subject to a required public comment period.

**June 26, 2014 Board Meeting:** This is the only board meeting that was held to discuss the NYSTA bridge project at which all appointed board members, ex officio members or their designees were present – although one appointed board member participated by videoconference (See Appendix VI for a record of board member attendance).

At this public meeting the EFC board voted 6-0 to authorize the \$511.45 million CWSRF loan. This action represented the first step in the loan approval process. The NYSTA board was required to authorize NYSTA to accept the loan and the loan had to be approved by the Public Authorities Control Board (PACB). EFC and NYSTA staff had to negotiate agreement on the terms and conditions of the repayment plan, and finally, the

repayment contract needed approval from the Office of the State Comptroller. Only then could the loan actually be made to NYSTA.

This was the first public meeting at which the use of \$511.45 million in CWSRF funding was acknowledged. At the meeting EFC staff made a presentation to the board (similar to the presentations made at the August 2013 Policy Committee meetings) that outlined EFC's general authority to use CWSRF moneys for this project and its compatibility with the objectives of the Comprehensive Conservation Management Plan. There was no discussion of NYSTA's credit worthiness or capacity to repay the loan. A copy of the project application received from NYSTA on May 30, 2014 was not shared with the board.

One board member shared with us "surprise" that EFC staff did not present a stronger rebuttal to arguments raised by opponents of the loan or that the vote was not postponed. Prior to authorizing the loan the board did not raise concerns about the EPA letter, express interest in a fuller discussion of the EPA's concerns, or suggest a meeting with EPA Region 2 officials.

At the same time, each of the board members told the ABO that they had no contact with anyone representing the Governor on this issue and no effort was made to pressure or influence their vote.

### **Responsibilities of the EFC Board**

Each member of the EFC board of directors, as required by Section 2824 (1)(h) of the Public Authorities Law, signed an "Acknowledgement of Fiduciary Duties and Responsibilities". This document affirms that the director will perform his/her duties and responsibilities to the best of their abilities; make reasonable inquiry of management and others with knowledge and expertise to inform their decisions; exercise independent judgment; and attend board and committee meetings and engage fully in the board's decision-making process (A copy of this Acknowledgement is Appendix VII). This review found instances where the board's actions did not appear to meet these standards.

**Open Meetings Law:** The underlying legal premise of Article 7 of the Public Officers Law (Open Meetings Law) is that all meetings of public bodies are to be conducted in public. The public body may conduct an executive session only for those limited purposes enumerated in Section 105 of the Law. One such enumerated purpose (and the justification used by the EFC board) is to discuss "the proposed acquisition of securities, or sale or exchange of securities held by such public body, but only when publicity would substantially affect the value thereof" (emphasis added).

The documentation reviewed by the ABO and information provided by those interviewed appear to show that the board did not comply with Open Meetings Law requirements.

On August 14, 2013 and August 27, 2013 the EFC Policy Committee met in executive session. These meetings were described as "conceptual" or "exploratory" and convened to discuss such topics as the need for a Tappan Zee replacement bridge; the project's environmental review and procurement process; the winning contract design; the project costs; NYSTA's general plan of finance; and EFC's staff analysis of the eligibility of certain

project elements for the CWSRF loan. None of these issues are included in the purposes enumerated in Section 105 that allow for executive session.

The discussion regarding NYSTA's general plan of finance included EFC's potential purchase of NYSTA bonds through a negotiated sale. This is typical of EFC financing under the CWSRF program. Since the purchase of NYSTA bonds would be negotiated with EFC and backed by EFC's collateral, it is unlikely that the public disclosure of the bond sale would substantially affect its value. Therefore, such a discussion would not meet the justification for executive session.

The board and EFC staff are expected to know that the discussion of topics not germane to those purposes enumerated in Open Meetings Law must be discussed in open and public meetings. Meeting in executive session resulted in a lack of transparency and disclosure. This lack of transparency and disclosure by the board is an underlying cause for the complaint.

**Intended Use Plan:** Pursuant to federal regulations, the Intended Use Plan (IUP) must be prepared annually and must be subject to public comment and review before being submitted to EPA. EPA must receive the IUP prior to the award of the grant. The IUP project list may be amended during the year under provisions established in the IUP.

The NYSTA project was added as a minor modification to the IUP. EFC procedures allow for minor modifications and amendments to the Final IUP through a notice in the Environmental Notice Bulletin. Section 35.3150(c) of the Code of Federal Regulations (CFR), "Amending the Intended Use Plan (IUP)", states that the IUP project list may be changed during the year under provisions established in the IUP so long as the projects have been previously identified through the public participation process.

At the time the NYSTA project was added to the IUP, the potential use of CWSRF funds for this project had not been subject to public comment. EFC contended that inclusion of the NYSTA project as a minor modification to the IUP was appropriate since it did not jeopardize access to funding for any other already listed subsidized project. This argument, however, does not address the requirement of Section 35.3150(a) that all eligible projects must be subject to an initial public comment period before the loan is disbursed. Section 35.3150 of the CFR is the official regulation governing the CWSRF.

Our review found that the board did not question why the project was added to the IUP on June 11, 2014 and why the public was denied a comment period. The ABO received no explanation why the board did not obtain adequate assurance that required procedures and federal requirements were followed given the unique nature of the proposed financing.

**Protection of Assets:** The NYSTA bridge project has been described as a "creative", "innovative", and "unique" use of the CWSRF. For this reason, EFC staff had a number of communications with EPA seeking its support, which it does not do routinely for other CWSRF projects. Yet, in many ways the board treated this as a routine project.

Board members expressed the opinion that the board generally looks to approve all proposed CWSRF loans. In effect, we were told that the default vote was “yes” unless staff presented the board a compelling argument against approving an application. Board members stated that they approve every qualified project. A review of board meeting minutes showed that the average public board meeting in 2014 (other than the June 26 meeting) concluded in less than 35 minutes (including time spent in executive session), although the board considered and approved at least 37 loan proposals, bond authorizations and bond refinancings. Board members acknowledged that such approvals are routine with little discussion or debate on projects prior to adoption of resolutions.

Similar to other loan proposals under consideration, we were told the board only received a summary of the NYSTA bridge project from staff. As with any other project, the updated fact sheet was provided to the board a few days prior to the June 26 vote. Also, as is EFC board practice, the board did not receive or review the project application that was submitted by NYSTA on May 30, 2014 or the terms of the loan repayment. As with other loans, repayment terms were to be negotiated by staff after the loan was authorized.

Consistent with normal practice, the board relied on a staff analysis of the project. Board members indicated that they were satisfied with the legal and program analysis that was done and added that staff analysis had never proven to be unreliable. The board did not raise concerns about the legal justification for the loan and board members were satisfied that authorization of the loan was consistent with EFC’s mission. Certain board members tended to raise more questions than others, but those questions were often to clarify how the loan would be used to reimburse specific elements of the project rather than to settle broader legal or programmatic issues.

Board members indicated that they discussed the project and sought the views of outside experts available to them personally and individually, such as agency counsels and program staff, academics and environmental advocates, which is expected of board members.

The Acknowledgement of Fiduciary Duties and Responsibilities calls for directors to perform their duties with proper diligence and care and to be fully engaged in the decisionmaking process. Yet, the June 26, 2014 board meeting was the only meeting on the project attended by the board chair. Another board member only participated in board meetings by videoconference, including those when the NYSTA bridge project was discussed. Board members acknowledged that they have no personal interaction with each other and never discuss issues with each other outside of formal meetings. The Secretary of State and the Health Commissioner do not attend meetings and each have appointed a primary and secondary designee, either of whom could attend meetings as their official representatives. As a result, neither ex officio representative has continuity in representation. For example, based on the information available to the ABO, the primary designee of the Secretary of State who voted to authorize the loan on June 26, 2014 did not participate in either of the August 2013 meetings or the May 1, 2014 meeting which were the only meetings when the project was discussed by board members.

Based on information available to the ABO it appears that the board did exercise care in protecting the assets of the EFC. The mission of EFC is to provide low-cost financing to municipalities for eligible water quality protection projects. In doing so, the board has an

obligation to protect the assets of the CWSRF. The solvency of the CWSRF apparently was not an issue. EFC has argued that authorization of the loan to the NYSTA bridge project, as a qualified project, would not jeopardize funding available for other New York City water quality projects. The board understood that the Fund “had more than \$1 billion in unallocated funds” in the current year. If the NYSTA bridge project loan was authorized, the Fund could still roll over close to \$500 million for projects in 2015-16 after loans for all qualified projects were authorized. Moreover, since funding was in the form of a loan it would be repaid and the CWSRF would be made whole if the loan was executed.

The record indicates that the board heard presentations on the ability of NYSTA to repay a \$511.45 million CWSRF loan. The board understood that NYSTA had the capacity to issue bonds and to raise revenues through tolls sufficient to support the cost of the NYSTA bridge project, let alone repay the EFC loan.

**Terms of the Loan Repayment:** The board typically does not see a project loan application or the terms and conditions of a repayment agreement before authorizing a loan. That information is not necessary to assess the credit worthiness of the recipient. The obligation of board members is to determine “if” not “how” the loan will be repaid by a credit qualified loan recipient.

In this case, given the capacity of NYSTA to generate revenue across its system the board did not need to consider if the loan would be repaid through toll adjustments on the entire Thruway, toll adjustments only on the new bridge, or if other potential revenue sources would be tapped to repay the loan. Once the board established the credit worthiness and revenue capacity of NYSTA it had met its responsibility to protect the authority’s assets and the integrity of the loan fund.

**Engagement of the Board:** Based on interviews and documentation, it is clear that the EFC board is heavily reliant on and routinely defers to staff to determine if a project meets program eligibility requirements and has the financial capacity to repay the loan. At the same time, the board acknowledged this was not a routine loan application. Yet, other than two “preliminary” and “conceptual” discussions of the project in August 2013 and one meeting at which a quorum of board members was not present, the board did not meet to discuss or review details of the NYSTA bridge project or the application prior to convening a meeting on June 26, 2014 to authorize the CWSRF loan.

The board was aware of the reservations and questions raised by EPA prior to its vote, since it had received the Regional EPA Administrator’s June 25, 2014 letter. However, receipt of the Regional Administrator’s letter did not “raise a red flag” and alert the board that the EPA concerns were serious and needed the board’s attention. The board also made no independent effort to gather additional or clarifying information about EPA’s position.

Board members expressed little concern over the issues raised in that letter. Board members acknowledged that going into the June 26 board meeting they were prepared to authorize the loan.

At the June 26 meeting, board members again listened to a staff presentation and accepted the staff's position that the project met the requirements of the Clean Water Act and was eligible for a CWSRF loan. While one or more board members had private concerns after receiving the June 25 letter those concerns were not voiced publicly prior to the authorization vote.

The board did not consider or discuss delaying the authorization in light of the EPA letter, reaching out to the EPA to discuss its concerns, or consulting outside legal counsel for an independent opinion on the use of the CWSRF.

The board also did not question why the NYSTA bridge project was not subject to public comment as required by federal regulation before appearing on the IUP and in the Environmental Notice Bulletin.

### **Other Issue Identified During the Review**

**Ex Officio Board Members and Designees:** Section 1282(4) of Title 12 of the Public Authorities Law sets forth the structure of the EFC board of directors. The board comprises four appointees of the Governor, the commissioners of the Department of Environmental Conservation and the Health Department, and the Secretary of State. The three agency heads serve as ex officio voting directors. The three ex officio directors “may, by official proxy... designate an officer in their respective department to perform, in their absence, their respective duties” as a director.

This review discovered that the Health Commissioner and the Secretary of State both appointed a primary and a secondary designee. These designees were interchangeable and either could attend EFC board meetings with the full rights and duties of a board member. The use of designees impacts the continuity of meetings and representation on behalf of the ex officio director. We also believe these designations are inconsistent with statutory language that provides for the naming of “an officer” not multiple officers to serve as the ex officio’s designee.

We recommend that the board adhere to the statutory language of its governing statute and not accept the proxy of an ex officio director that names more than one designee.

The review also found that neither of these two ex officio directors attends any EFC board meetings and the board chair only attended one meeting in 2014 leading up to the June 26 board meeting at which the CWSRF loan was authorized. As this report notes, the designee of the Secretary of State who voted to authorize the loan had not attended any of the three prior meetings at which the legal and programmatic basis for authorizing the loan was discussed. This raises a legitimate question as to what purpose is served by having ex officio board members on public boards.

Of potentially more significant concern is the fact that Section 1282(4) states that four directors constitute a quorum and that the EFC board has the power to act by a majority of directors present at any meeting at which a quorum is present. This presents the very real, but unintended, scenario that the three designees – acting without the consent of any “official” board member – could bind the EFC to any decision they make.

**Citizens Campaign for the Environment • Common Cause/NY •  
Environmental Advocates of New York • Food & Water Watch •  
Hudson River Fisherman's Association • New York Public Interest  
Research Group • Reinvent Albany • Riverkeeper • Save the Sound •  
Sierra Club Atlantic Chapter • Soundkeeper •  
Tri-State Transportation Campaign**

**VIA EMAIL & EXPRESS MAIL**

July 16, 2014

David Kidera  
Director  
State of New York  
Authorities Budget Office  
PO Box 2076  
Albany, New York 12220-0076

Dear Mr. Kidera:

Please accept this letter as a formal complaint and request that the Independent Authorities Budget Office (“ABO”) launch an investigation of the State Environmental Facilities Corporation (“EFC”) for potential violations of the provisions of the Public Authorities Reform Act (“PARA”, Chapter 506 of the Laws of 2009<sup>1</sup>) and such other laws and standards of conduct as may apply.

The undersigned organizations believe that EFC Board members may have failed to exercise the level of care required of fiduciaries, in particular that they may not have acted with the degree of diligence, care and skill necessary to exercise independent judgment with respect to the recent consideration of a loan to the New York State Thruway Authority.<sup>2</sup> We believe this raises critically important issues of public accountability that go to the heart of public authority integrity in New York.

Under the law the ABO is authorized to:

“. . . receive and act upon complaints or recommendations from the public or other persons or entities regarding any authority covered by this title; initiate formal investigations in response to complaints

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<sup>1</sup> These reforms primarily are consolidated in Public Authorities Law Title 2, “Authorities Budget Office,” which includes establishment of the independent authorities budget office.

<sup>2</sup> The undersigned make these allegations based upon information and belief formed by reviewing the reports of reputable news gathering organizations and through observation of the EFC’s June 26, 2014 Board of Directors meeting, the subject of this letter.

or appearances of non-compliance by an authority; issue subpoenas pertaining to investigations which such office is authorized to conduct under this title, for the purposes of effectuating the powers and duties of this title; [and] compel any authority which is deemed to be in non-compliance with this title and title one of this article or article nine of this chapter to submit to the authorities budget office a detailed explanation of such failure to comply.”<sup>3</sup>

We draw your attention to actions taken by EFC and its Board members with respect to approval to provide a loan to the New York State Thruway Authority for up to \$ 511 million for purposes of construction of the New NY Bridge Project to replace the Tappan Zee Bridge.

We believe this action may have been taken in violation of the statutory duties and responsibilities imposed upon EFC Board members, and the oath required by the statute.<sup>4</sup> These are described as the legal duty to:

“ ...perform each of their duties as board members, including but not limited to those imposed by this section, in good faith and with that degree of diligence, care and skill which an ordinarily prudent person in like position would use under similar circumstances, and may take into consideration the views and policies of any elected official or body, or other person and ultimately apply independent judgment in the best interest of the authority, its mission and the public. . . .”<sup>5</sup>

We refer to these obligations, as do the statutes themselves, as the “fiduciary duty” of Board members.<sup>6</sup> ABO guidance documents for public authorities underscore the responsibilities of board members:

**Fiduciary Duty**

- The Board of Directors should be empowered to exercise its fiduciary duties of loyalty and care. Directors should always act in good faith and in the best interests of the public authority. . . .
- The Board of Directors should be responsible for protecting the assets of the authority and the interest of bond holders and the public.<sup>7</sup>

<sup>3</sup> PARA, Section 6 (2), (c), (d), (e) and (i)

<sup>4</sup> We are acting upon the belief that each EFC board member did, in fact, receive and sign the required oath. Irrespective of whether such oath was actually signed by board members, we believe the statutory and any common law obligations apply.

<sup>5</sup> PARA, Sections 10 (1)(g) and (h).

<sup>6</sup> Section 11 A of PARA in describing actions which render Board members liable to removal states” “...removable by the public officer or public body which is empowered by this chapter to appoint such authority or commission member, for inefficiency, breach of fiduciary duty,...” (emphasis added)

The actions and omissions by EFC Board members, which we believe may constitute a breach of their fiduciary duty, include but are not limited to how this loan was applied for and subsequently approved by the EFC board. Specifically we find:

1. The initial application for the loan was made months after the established deadline, board approval was scheduled just a few weeks after initial application materials were filed, and the loan did not go through the normal public notice and public comment procedures.
2. The Governor issued a news release to announce that “the New York State Environmental Facilities Corporation will make up to \$511.45 million in low-cost loans to the New York State Thruway Authority.”<sup>8</sup> This announcement was made ten days prior to when the EFC Board met to act on the motion to approve the loan and three days before the EFC Board received the meeting materials.<sup>9</sup>
3. The initial application for the loans was not made until May 30, 2014, in the form of New York State Thruway Authority’s submittal of a project listing form. By EFC’s stated procedures, project listing forms and all requisite application materials are supposed to be in EFC’s possession by February 3, 2014.<sup>10</sup>

It is, therefore unclear whether the EFC Board members reviewed a complete loan application from the New York State Thruway Authority, or whether a complete loan application even existed at the time of the EFC board’s vote on June 26, 2014.

We believe the ABO must undertake this review to ensure conformance with the basic principles of corporate governance embedded in PARA. We do not, however, seek an ABO investigation into or review of the wisdom or legal propriety of the EFC proposal to use Clean Water State Revolving Funds to support construction of the new New York Bridge. Those concerns will be raised in other appropriate forums. After careful examination of the evidence and the law we believe it will become clear that the specific provisions of PARA creating the statutory fiduciary obligation have been violated. That alone is the purpose for which we seek an ABO investigation and appropriate ABO action to remedy any violations.

We ask for an opportunity to meet with the ABO to present in greater detail the circumstances surrounding what we believe has been a clear breach of fiduciary duty and the areas for further and deeper investigation by the ABO.

If you have any questions about the information contained in this letter or to set up a meeting please contact Peter Iwanowicz of Environmental Advocates of New York (518) 462-5526.

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<sup>7</sup> Authority Budget Office Policy Guidance, No. 06-02, Issued October 1, 2006, *Understanding Corporate Governance Concepts*. Accessed at [www.abo.ny.gov/policyguidance/06-02UnderstandingCorporateGovernanceConcepts.pdf](http://www.abo.ny.gov/policyguidance/06-02UnderstandingCorporateGovernanceConcepts.pdf).

<sup>8</sup> See [www.governor.ny.gov/press/06162014-efc-loans-new-ny](http://www.governor.ny.gov/press/06162014-efc-loans-new-ny). Accessed July 9, 2014.

<sup>9</sup> Personal communication via email and telephone between Peter Iwanowicz and EFC President and CEO Matthew J. Driscoll.

<sup>10</sup> See [www.efc.ny.gov/Default.aspx?tabid=112](http://www.efc.ny.gov/Default.aspx?tabid=112). Accessed July 10, 2014.

Sincerely,



Peter Iwanowicz, Executive Director  
Environmental Advocates of New York

For:

Brian Smith, Associate Executive Director  
Citizens Campaign for the Environment

Susan Lerner, Executive Director  
Common Cause/NY

Alex Beauchamp, Northeast Region Director  
Food & Water Watch

Gil Hawkins, President  
Hudson River Fisherman's Association

Laura Haight, Senior Environmental Associate  
New York Public Interest Research Group

John Kaehny, Executive Director  
Reinvent Albany

Paul Gallay, Executive Director  
Riverkeeper

Curt Johnson, Executive Director  
Save the Sound

Roger Downs, Conservation Director  
Sierra Club Atlantic Chapter

Terry Backer, Executive Director  
Soundkeeper

Veronica Vanterpool, Executive Director  
Tri-State Transportation Campaign

**Base Questions for EFC Directors:**

1. When did you receive the bridge project for your consideration?
2. Was this received in the form of a comprehensive project application or summary form?
3. Does board typically review the applications submitted for CWSRF? If not, what is basis for decisions?
4. Is it typical for board to discuss applications for CWSRF in executive session? Why was it necessary or appropriate to hold these discussions in executive session?
5. When/if did you receive project, legal or financial analysis from EDC staff? In what form was this analysis provided?
6. Given that this was a unique and unprecedented use of the CWSRF, what discussions did the board have concerning the Fund as a funding source?
7. When and how frequently did those discussions occur?
8. What discussions did the board have concerning repayment of the loan by the NYSTA?
9. August 2013 Policy Committee Meeting – Why wasn't project put on IUP in September 2013, as planned?
10. May 1, 2014 Policy Committee meeting – Who was in attendance? What was discussed?
11. June 26, 2014 Board Meeting – Why did application (submitted 5/30/14) indicate \$515 million needed, Board Packet fact sheet indicate \$506 million needed, but approved for \$511 million?
12. Why did you proceed with the June 26 vote in light of questions raised by EPA Region 2 in its June 25 letter? When did the board receive this letter? Why did it not generate discussions or questions prior to vote?
13. With whom did you discuss this project outside of the public board meetings?
14. When did you decide to vote in favor of this project?

### Timeline of Events 2013-2014

Date	Event
8/14/13	Policy Committee met in executive session to discuss Thruway project. Presentations were made by EFC and Thruway staff indicating how the project qualified for CWSRF funding, credit strength of the Thruway, and the plan of finance and availability of funds to finance the project. The next steps and deadlines leading to closure of the loan were discussed. EFC's presentation indicates that the IUP will be amended 9/9/13, the loan will close 9/26/13, and that the targeted drawdown of funds will be Fall 2013 – 2018.
8/27/13	Policy Committee met in executive session to discuss Thruway project. Discussions included the project scope, risks, constraints, financing and timing of the release of the plan for the project. Also discussed what needed to take place prior to authorization, finalization of security structure, and allocation of funding. EFC board required the Thruway to provide the form of debt to be purchased by EFC, and an approving resolution from the Thruway board before EFC would authorize. EFC board directed staff to prepare and present all required information as soon as possible. Discussed that provisions could be included in the financing agreement due to time constraints to get approvals of the security structure and PACB approval. EFC staff again made a presentation as to how CWSRF funding is appropriate.
4/14/14	Notice of Policy Committee Meeting to be held 5/1/14
4/24/14	Agenda and packet distributed to EFC board members for 5/1/14 meeting
4/30/14	Notice that tour of project is postponed and discussion meeting to take place on 5/1/14. Confidential material distributed to select EFC board members for 5/1/14 meeting
5/1/14	EFC board members and others met with Thruway Authority to discuss project. (No minutes for this meeting provided.) EFC presentation was an update of the 8/14/13 presentation indicating the loan will close August 2014, and that the targeted drawdown of funds will be Fall 2014 – 2018. (Presentation does not indicate when project is planned to be included in IUP.)
5/20/14	Staff met with EPA in Washington for the first time
5/28/14	Letter from EFC staff indicates met the prior week with George Ames, Chief State Revolving Funds Branch of EPA
5/30/14	Thruway formally submits application for loan to EFC
6/11/14	EFC Public Notice that project is being added to IUP
6/16/14	Governor's Press Release – EFC will make \$511 million loan to Thruway for bridge project
6/19/14	Board packet distributed to EFC board. Includes Notice of meeting; Agenda; May 28, 2014 letter to EPA; Memo from Thruway consultant AKRF discussing how project fits CCMP; Project Fact Sheet; Proposed Board Resolution; and EFC Presentation on how project is eligible for CWSRF funds.
6/23/14	Memo to EPA Administrator McCarthy. Indicates DEC Commissioner Martens spoke with McCarthy the prior week regarding Thruway project and use of CWSRF funds. (Not clear if provided to board.)

6/24/14	Additional material provided to EFC board. Includes 6/24/14 letter from environmental groups; 6/19/14 letter from Assemblyman Brennan; EFC 6/24/14 Response to Assembly; EFC 6/24/14 Response to environmental groups; 6/25/14 letter from environmental groups.
6/25/14	Letter from EPA Region 2 responding to 5/28/14 letter and 6/23/14 memo. Letter expresses questions regarding the eligibility of using CWSRF funds for Thruway project.
6/26/14	EFC approves \$511 million loan of CWSRF funds for Thruway project. Detailed presentation by EFC staff, but little questions from EFC board members. (Note: board entered executive discussion to discuss personnel matters, and afterward approved the proposed salary increases for executive staff. However, this information was not included in the board package of 6/19/14.)

# **Governor Cuomo Announces \$500 Million in EFC Loans to NEW NY Bridge Project**

Low-Cost Loans Will Support Thruway Authority Efforts to Protect River Habitats and Wildlife in the Hudson River Estuary, Help Keep Bridge Tolls Low

[1]

Albany, NY (June 16, 2014)

Governor Andrew M. Cuomo announced today that the New York State Environmental Facilities Corp. (EFC) will make up to \$511.45 million in low-cost loans 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. Along with the \$1.6 billion Transportation Infrastructure Financing and Innovation Act (TIFIA) loan last year from the U.S. Department of Transportation, the EFC loans will help keep tolls on the new bridge as low as possible.

The loans will be made from EFC's Clean Water State Revolving Fund (CWSRF), which is used to support construction expenses that align with the environmental standards including those outlined in the New York-New Jersey Estuary's Comprehensive Conservation and Management Plan. The EFC loans will go toward environmental projects that will protect water quality and marine life in the Hudson River estuary, including protection of endangered sturgeon, oyster beds and other habitats, during and after construction of the New NY Bridge.

"As we continue to see progress on the New NY Bridge, it is essential that actions are taken to protect wildlife and address the project's environmental impacts – but in a way that doesn't overburden taxpayers and drivers," Governor Cuomo said. "This \$500 million low-cost loan will reduce the financial burden of these necessary environmental measures, and enable the Thruway Authority to continue moving full-steam ahead on this important project."

The \$511.45 million in EFC CWSRF financing – including a no-interest loan of up to \$256 million and a low-cost loan of up to \$256 million– will help the Thruway Authority fund

costs associated with stringent environmental measures that have been put in place during the construction of the new bridge and the demolition and removal of the existing bridge, and with the protection of the estuary environment throughout the entire project.

The EFC loans will help keep any potential future toll increases down by greatly reducing the interest rates and financing costs for a significant portion of project's overall \$3.9 billion estimated cost.

"Governor Cuomo tasked all of his infrastructure agencies to break down the silos that have prevented cooperation and cost savings in the past and, instead, go forward with innovative solutions to finance critical state infrastructure," said EFC President and CEO Matthew Driscoll. "I am delighted that EFC through the Clean Water State Revolving Fund can simultaneously protect the Hudson River Estuary and keep costs down for travelling motorists."

EFC is the financing arm of Governor Andrew Cuomo's administration that provides low-cost loans to local governments and agencies for drinking water, wastewater infrastructure and other clean-water projects. Last year, EFC financed close to \$2 billion in clean-water investments statewide and, as the operator of the nation's largest State Revolving Loan funds, EFC is known for administering one of the best and most-innovative clean-water loan funds in the nation.

Last year, EFC became the first State Revolving Fund in the nation to finance a clean energy program using its borrowing power under the Clean Water Act. By directly financing the environmental projects in the Hudson River Estuary, New York State will be undertaking the largest series of estuary protection and enhancement projects in the nation ever financed by the CWSRF. Never in the 25 year history of the CWSRF have projects of this magnitude been undertaken to benefit a federally designated Estuary of National Significance.

No other project or request for financing will be impacted by EFC's loans to the New NY Bridge project. This year, EFC is on target to finance more than 100 infrastructure projects across the state with loans worth more than \$1.3 billion.

EFC recently added five more CWSRF projects in New York City for a total of \$92,896,872 – part of the more than \$400 million in CWSRF financing for New York City in the current federal fiscal year.

The Thruway Authority is expected to draw funds from the EFC loan starting in August.

Environmental projects to be financed through EFC and the CWSRF include:

- Restoration of Piermont Marsh
- Oyster bed restoration
- River bottom armoring
- Stormwater treatment at landings
- Underwater noise protection (bubble curtains) during pile driving
- Dredging and mound removal
- Dredge material disposal
- Removal of the existing bridge
- Shared use path for pedestrians and bicycles
- Endangered Peregrine Falcon nest box relocation
- Net conservation benefit plan (Atlantic sturgeon)
- Channel Restoration of Gay's Point

Construction on the New NY Bridge began in October, 2013. Under Governor Cuomo's leadership and with the support of the U.S. Department of Transportation (USDOT) and other federal agencies, environmental review for the project was completed in just 11 months, much shorter than is typical for projects of this complexity and magnitude. Extensive measures will be in place throughout the duration of the project to protect the environment and to monitor the impact of construction on surrounding communities.

When completed, the New NY Bridge will mean less congestion for motorists, with eight traffic lanes, four breakdown/emergency lanes, and state-of-the-art traffic monitoring systems. Designed and constructed to be mass-transit-ready, the new crossing will be able to accommodate bus rapid transit, light rail or commuter rail. The twin-span bridge will also include a bike and pedestrian path.

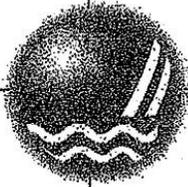
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New York State  
ENVIRONMENTAL FACILITIES CORPORATION

Appendix V

MATTHEW J. DRISCOLL, *President and CEO*

Mr. George Ames  
Chief, State Revolving Funds Branch  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
EPA East (4204M)  
Washington, D.C. 20460

May 28, 2014

Dear Mr. Ames,

I'd like to thank you and your colleagues for meeting with us last week to discuss our proposed estuary projects. We believe each project under consideration will assist in the development and implementation of the New York/New Jersey Harbor Estuary Program Comprehensive Conservation and Management Plan and, accordingly is an eligible Clean Water Act Section 320 project qualified for financial assistance from the Clean Water State Revolving Fund (CWSRF) under Section 1383(c)(3) of the Clean Water Act and the implementing federal guidelines governing the CWSRF.

The New York-New Jersey Harbor & Estuary Program (HEP) was accepted into the National Estuary Program in 1988 in order to protect the natural resources and diversity of the New York-New Jersey Harbor Estuary—one of the 28 Estuaries of National Significance in the United States. The HEP focuses on protecting and restoring healthy waterways and productive habitats, managing sediments, fostering community stewardship, educating the public, and improving safe access to waterways. The HEP's focus encompasses the tidal waters of the Hudson-Raritan Estuary from Piermont Marsh in New York State to an imaginary line connecting Sandy Hook, New Jersey, and Rockaway Point, New York, at the mouth of the Harbor. The HEP also focuses efforts on the New York Bight, the ocean area extending approximately 100 miles beyond Harbor waters. In 2011, the HEP updated its geographic footprint to include the Hudson River watershed up to the Troy Dam, as well as the watersheds of the Raritan, Passaic, and Hackensack Rivers in New Jersey.

The HEP's primary planning documents are the March 1996 Comprehensive Conservation and Management Plan (CCMP) approved by USEPA in March 1997 and the revised 2011 Action Plan developed to assist in the implementation of the CCMP. The components of the HEP as set forth in the CCMP are: management of habitat and living resources; management of toxic contamination; management of dredged material; management of pathogenic contamination; management of floatable debris; management of nutrients and organic enrichment; rainfall-induced discharges; and public involvement and education. The 2011 Action Plan highlights important environmental issues facing the New York-New Jersey Harbor Estuary and features five major human use and ecosystem impairments that participants in the HEP are striving to address. The 2011 Action Plan identifies the following actions to address such impairments: clean up pollution in the estuary; improve habitat and ecological

health; improve public access; support an economically and ecologically viable estuary and port; and allow for public education and community involvement.

The Hudson-Raritan Estuary (HRE) Comprehensive Restoration Plan (CRP) which is part of the HEP, is a master plan that was developed in 2009 by the US Army Corps of Engineers (USACE) and the Port Authority of New York and New Jersey in partnership with the HEP. The CRP is intended to be used by stakeholders (e.g., environmental and community groups, government agencies, etc.) throughout the region to work on a series of common restoration goals which benefit the estuary, and to develop a comprehensive strategy for habitat protection and restoration.

Each of the estuary projects identified below are being undertaken in connection with the replacement of the Tappan Zee Bridge with the New New York Bridge (NNYB).

### Gay's Point Restoration

The purpose of this project is to restore productivity, species diversity, and resiliency to the New York-New Jersey Hudson River Estuary ecosystem by recreating lost physical structures and their associated ecological functions. Gay's Point has been identified by NYSDEC as a potentially suitable location for secondary channel creation. Currently, Gay's Point consists of an artificially created tidal embayment (i.e., contiguous backwater) that is separated from the main river channel by dredge fill. Contiguous backwaters such as those observed at Gay's Point typically have lower current velocities, greater sediment deposition resulting in finer substrates, higher water temperatures, and lower dissolved oxygen levels than secondary river channels with relatively unimpeded flows. The embayment at Gay's Point would benefit from the introduction of flushing flows from the main river channel, which would be conveyed through the embayment's northern end by removing fill, thereby creating a secondary channel similar to those lost to dredge and fill activities.

Based upon our review, we believe this project assists in the development and implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically, secondary channel restoration will assist in the development and implementation of the following goals of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- To preserve and restore ecologically important habitat and open space.

This project element would also assist in the development and implementation of the Target Ecosystem Characteristics (TECs) as defined by the CRP:

*The Enclosed and Confined Waters TEC focuses on poorly flushed, enclosed, constricted, and over-excavated subtidal areas of the HRE study area that exhibit periodic or continuous poor water quality. Examples of enclosed and confined water bodies occurring in the HRE study area include modified tidal creeks, enclosed basins, and man-made bathymetric depressions with poor circulation....*

*The restoration targets for enclosed and confined waters aim to improve the condition of these water bodies to where they match state-defined designated uses (i.e., shellfishing, bathing, fishing, etc.).*

### Piermont Marsh

Piermont Marsh, in Rockland County, is the largest area of intertidal brackish marsh in the Hudson River south of the Tappan Zee Bridge. Piermont Marsh is designated as a Significant Coastal Fish and Wildlife Habitat by New York State Department of State (NYS DOS) for its extensive tidal marsh bordered by shallows and mudflats, all of which are habitats that support important biological resources. Furthermore, the tidal wetland habitat restoration being contemplated would assist in the development and implementation of with the Hudson-Raritan Estuary Comprehensive Restoration objectives for the Coastal Wetlands Target Ecosystem Characteristic—that is, the short-term objective to create or restore 1,200 acres of wetlands by 2015 and the long-term objective to create or restore a total of 32,000 acres by 2050.

A review of historical aerial maps has indicated a severe decline in native wetland plants and their replacement with the invasive reed, *Phragmites australis*, between 1991 and 2007. NYSDEC has indicated that native plants appear to be even further reduced since 2007, with *Phragmites* currently accounting for approximately 90% of the Piermont Marsh vegetation. Without management actions, the remaining native plant communities and important marsh functions will be lost. Therefore, a *Phragmites* Control Program will be developed to eradicate *Phragmites*, thereby allowing native plants the opportunity to return to the marsh, and restore important habitat functions associated with the restored marsh.

A second project at Piermont Marsh will restore an historic oxbow in the central area of Crumkill Creek to re-establish flow regimes within the creek channel. This restoration will be accomplished through the one-time placement of a small amount of fill in the existing by-pass, which will divert flow back into the historic oxbow.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically this project element will assist in the development and implementation of the following goals of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- To preserve and restore ecologically important habitat and open space.
- To encourage watershed planning to protect habitat.
- To foster public awareness and appreciation of the natural environment.
- To minimize erosion; to decrease soil and water loadings of sediment and pollutants to the Harbor/Bight.

### Oyster Bed Restoration

In collaboration with NYSDEC, an oyster restoration plan is currently proceeding in two phases. As part of the initial phase, shell material was taken from the 8-acre dredge area where the presence of oysters has been recorded and relocated to an identified area with documented shell material present further west in the bridge vicinity but outside the dredge prism.

The second phase of the restoration plan has yet to be developed. Details of this phase including the location of the restored habitat, identification of the sources for shell/non-shell material, and the location within the existing waterbody where broodstock will be cultured, are all being developed in collaboration with NYSDEC. A potential habitat increase of approximately 0.25-0.5 acres is anticipated.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically this project element will assist in the development and implementation of the following goals of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- To preserve and restore ecologically important habitat and open space.

This project element will also assist in the development and implementation of the Target Ecosystem Characteristics (TECs) as defined by the CRP, which states:

*The Oyster Reefs TEC aims to establish oyster reefs at several locations in the HRE study area. The short term objective for the oyster reefs TEC is to create 500 acres of self-sustaining and naturally expanding oyster reef habitat in the HRE study area across 10 to 20 sites by 2015.*

### Net Conservation Benefit Plan

NYSDEC is requiring the preparation of an Endangered and Threatened Species Mitigation Plan (the Plan) for the benefit of Hudson River sturgeon as part of its environmental permit for the NNYB. The purpose of the Plan is to outline a series of scientific studies that will result in a net conservation benefit to endangered shortnose and Atlantic sturgeon by providing new ecological information or promoting conservation measures for these species.

In order to ensure a net conservation benefit to shortnose and Atlantic sturgeon, a series of studies have been undertaken to attain a better understanding of sturgeon ecology within the Hudson River. These efforts, which aim to track the movement, foraging, and habitat use of the Hudson River sturgeon, include the following studies:

- Mapping of shallow-water benthic habitats throughout the unmapped portions of the Hudson River to determine which of these habitats are foraging areas for shortnose and Atlantic sturgeon.
- A foraging study to describe the diets of several life stages of shortnose and Atlantic sturgeon in the Hudson River.

- A tagging and tracking study to determine the localized movement patterns and use of benthic habitats by several life stages of shortnose and Atlantic sturgeon in the Hudson River.
- An outreach effort directed at the commercial fishing industry to reduce the impacts of commercial by-catch of Atlantic sturgeon in coastal fisheries.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically this project will assist in the development and implementation of the following goals and objectives of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- To preserve and restore ecologically important habitat and open space.
- To foster public awareness and appreciation of the natural environment.
- Minimize human disturbance of natural habitats.

#### Dredging and Mound Removal

Construction of the New NY Bridge requires the dredging of a construction access channel with a depth of 11 to 12 feet at MLLW (mean low level water) to allow access by construction barges and tugs. Results of laboratory analysis of sediment samples collected within the dredge prism indicate contamination with priority organics (DDT, DDD, DDE, and Dieldrin), and heavy metals (lead, arsenic, cadmium, and copper). Cadmium, Copper, Lead, and Total DDT, DDD, and DDE sediment concentrations in some portions of the dredge prism exceeded the Class B or C (moderate or high contamination) thresholds.

The processes of dredging and mound removal will improve the water quality of the Hudson River by removing this source of contamination from the river thereby removing any potential for resuspension into the water column or into the food chain. In addition, the top 3 feet of one of the sediment mounds that have formed behind existing bridge piers will be removed upon demolition of the existing bridge and it is anticipated that sediment from these mounds will be placed in an upland disposal facility permitted to receive such material. Removal of the upper few feet of the mound, and the elevated concentrations of lead that greatly exceeded the Class C threshold, and other contaminants, will remove approximately 42,000 cubic feet of bottom sediment containing pollutants that contribute to the WI/WPL Waterbody Segment Impairments, and have been identified as problem pollutants by the NY-NJ HEP.

Based upon our review, we believe this project assists in the implementation of the Management of Toxic Contamination component of the CCMP as well as the Management of Dredged Material component. Specifically, this project will assist in the development and implementation of the following goals of the CCMP and Action Plan:

- To have ongoing coordinated and integrated efforts with various state and federal groups and dredged material management task forces.
- To evaluate and implement, where practicable, alternative methods of dredged material disposal including those with beneficial uses, such as habitat restoration, landfill cover, etc.
- To restore and maintain healthy and productive Harbor/Bight ecosystem, with no adverse ecological effects due to toxic contamination.
- Action Plan Goal 1B: Eliminate toxicity or bioaccumulation impacts on living resources by reducing contaminated sites, and manage risk to humans from seafood consumption.
- Action Plan Goal 4: Support an Economically and Ecologically Viable Estuary and Port- The Port of New York and New Jersey will be an integral and complementary part of the world-class New York-New Jersey Harbor Estuary that is environmentally sustainable, economically sufficient, and safe for commercial and recreational navigation.
- Action Plan Goal 4A: Sediment Quality- Reduce sediment hot spots and point and non-point sources of contaminants entering the Harbor, such that levels of toxics in newly deposited sediments do not inhibit a healthy thriving ecosystem and can be dredged and beneficially reused.
- Action Plan Goal 4B: Sediment Quality- Achieve a quantity of sediments entering the Harbor system that supports the ecological health of the Estuary, including protection of shallow water habitats, such as oyster reefs, without excessively impairing navigational activities.

### **River Bottom Armoring**

Construction of the NNYB requires the dredging of a construction access channel with a depth of 11 to 12 feet at MLLW to allow access by construction barges and tugs. To develop this construction access channel, a total of approximately 0.95 million cubic yards (mcy)—0.84 mcy of which was dredged between August 2, 2013, and October 30, 2013—of bottom sediment will be dredged down to a depth of 14 feet below MLLW, allowing for the placement of two feet of armoring on the river bottom to prevent resuspension of sediment due to propeller (“prop”) wash from tugs operating in the channel during bridge construction.

The amount of sediment that would be resuspended due to prop wash in the absence of armoring would be very large, due to the highly erodible soft river sediment within the project area. Estimated sediment resuspension rates due to the movement of tugs within the construction channel (up to 8 tugs working simultaneous 8-hour shifts during more than 4 years of construction) if armoring would not be used ranges from 1,389,300 kg/sec at about 12 feet, to 8,279 kg/sec at a depth of about 33 feet for 1800 horsepower tugboats moving at one knot, although these rates would diminish over time, as the soft sediment became scoured and resuspended.

Common impacts to fishes can be classified as biological/physiological or behavioral. Among the biological/physiological impacts are: abrasion of gill membranes resulting in a reduction in the ability to absorb oxygen, decrease in dissolved oxygen concentrations in the surrounding waters and effects on growth rate. Behavioral responses by fishes to increased suspended sediment concentrations include impairment of feeding, impaired ability to locate predators and reduced breeding activity. Increased total suspended solids (TSS) can affect migratory movements as well, and can result in mortality at high concentrations.

Use of armoring to avoid large increases in TSS due to movement of vessels within the construction channel benefits water quality of the New York-New Jersey Hudson River Estuary by removing a source of material contributing to TSS.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically this project will assist in the development and implementation of the following goals of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- To preserve and restore ecologically important habitat and open space.

This project element will also assist in the development and implementation of the Target Ecosystem Characteristics as goal defined by the CRP, which states:

*Strengthen regional coordination and consistency on regulatory issues, watershed planning and dredged material management (e.g., dredging windows, beneficial uses, identification of upland placement sites, sedimentation control, etc.)*

#### Underwater Noise Attenuation Systems

Effects on fish associated with noise from pile driving can include damage to body tissue that may potentially result in death, and sub-lethal effects that could result in temporary decreases in fitness, or to temporary or long-term changes in behavior.

Bubble curtains were determined to be one of the most innovative and effective Noise Attenuation Systems explored in the Environmental Impact Statement and measured in a pile installation and demonstration program. A bubble curtain is a device that releases bubbles of air into water in a deliberate arrangement. The bubbles create a barrier in the water column, reducing pressure wave propagation and isolating contaminants. When the bubbles rise, they act as a curtain, breaking the propagation of waves or the spreading of particles and other contaminants.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically this project will assist in the development and implementation of the following goals and objectives of the CCMP:

- To restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.

- To preserve and restore ecologically important habitat and open space.
- Minimize human disturbance of natural habitats.

### Falcon Nest Box Relocation

Peregrine falcons, a New York State endangered species, have been nesting on the Tappan Zee Bridge in artificial nest boxes since 1988. To avoid the loss of this breeding pair from the local population and as a condition of the NYSDEC permit authorizing the project, the nest boxes on the existing bridge will be moved to the replacement bridge upon its completion for peregrine falcons to utilize in future breeding seasons.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically Falcon Nest Box Relocation will assist in the development and implementation of the following goals and objectives of the CCMP and the Action Plan:

- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Minimize human disturbance of natural habitats.
- Action Plan Goal 2: Habitat and Ecological Health- Preserve, manage, and enhance the Estuary's vital habitat, ecological function, and biodiversity so that the Harbor is a system of diverse natural communities.

### Removal of Existing Structures

Underwater structures such as bridge piers can have morphological effects by altering local hydrodynamic conditions. While the exact effects depend on pier configuration, piers typically both increase and decrease localized water velocities, resulting in scour or accretion of bed material at different locations. Once initial deposition occurs, the sediment may be subsequently resuspended as part of the natural sediment transport processes within the Hudson River Estuary.

The causeway and piers of the existing Tappan Zee Bridge cause river currents to locally scour the bottom sediments, resulting in depressions in the bottom of the river alongside the bridge. A large area near the existing bridge is subject to scour due to the small column spacing. The western causeway is dominated by contraction scour (i.e., bottom erosion due to increased water velocity and shear stress resulting from the narrow spacing between piers) with a moderate amount of local scour (i.e., bottom erosion around bridge piers and abutments due to the acceleration of water flow around these structures and vortices that occur when this flow is obstructed) occurring at the tips of the piers.

The demolition of the existing Tappan Zee Bridge will result in the removal of piers from the riverbed and will result in an overall decrease in sediment scour and deposition and will benefit habitat in the Hudson River.

Based upon our review, we believe this project assists in the implementation of the Management of Habitat and Living Resources component of the CCMP. Specifically, removal of the existing Tappan Zee Bridge will assist in the development and implementation of the following related goals of the CCMP and the Action Plan:

- Restore and maintain an ecosystem which supports an optimum diversity of living resources on a sustained basis.
- Preserve and restore ecologically important habitat and open space.
- Minimize erosion; decrease soil and water loadings of sediment and pollutants to the Harbor/Bight.
- Action Plan Goal 2: Habitat and Ecological Health- Preserve, manage, and enhance the Estuary's vital habitat, ecological function, and biodiversity so that the Harbor is a system of diverse natural communities.

In addition, removing the existing structure will benefit the estuary by removing a source of lead-based paint. Lead has historically been used in paint to enhance color, improve opacity, and increase longevity. Lead-based paint becomes a concern when it chips, turns into dust, or enters the sediment. The sediment in the vicinity of the Tappan Zee Bridge shows elevated concentrations of lead that greatly exceeded the Class C threshold defined by NYSDEC's Technical and Operational Guidance Series. Demolition and removal of the existing structure will remove a potential source of contamination from the Hudson River.

Based upon our review, we believe this project assists in the implementation of the Management of Toxic Contamination component of the CCMP. Specifically, removal of the existing Tappan Zee Bridge will assist in the development and implementation of the following related goals of the CCMP and Action Plan:

- Restore and maintain a healthy and productive Harbor/Bight ecosystem, with no adverse ecological effects due to toxic contamination.
- Action Plan Goal 1B: Eliminate toxicity or bioaccumulation impacts on living resources by reducing contaminated sites, and manage risk to humans from seafood consumption.
- Action Plan Goal 4: Support an Economically and Ecologically Viable Estuary and Port- The Port of New York and New Jersey will be an integral and complementary part of the world-class New York-New Jersey Harbor Estuary that is environmentally sustainable, economically sufficient, and safe for commercial and recreational navigation.
- Action Plan Goal 4A: Sediment Quality- Reduce sediment hot spots and point and non-point sources of contaminants entering

the Harbor, such that levels of toxics in newly deposited sediments do not inhibit a healthy thriving ecosystem and can be dredged and beneficially reused.

- Action Plan Goal 4B: Sediment Quality- Achieve a quantity of sediments entering the Harbor system that supports the ecological health of the Estuary, including protection of shallow water habitats, such as oyster reefs, without excessively impairing navigational activities.
- Action Plan Goal 4C: Navigation- Navigation related projects in the Harbor are designed and implemented in an environmentally beneficial manner.

In addition, removing the existing structure will benefit the estuary by removing a source of floatable debris. Floatable debris is buoyant waterborne waste material. Drift materials pose hazards to shipping and recreational boating. USACE conducts the New York Harbor Collection and Removal of Drift Project to "remove abandoned piers, wharves, derelict vessels and debris, and also for repairing in-use deteriorated shore structures throughout the Port of New York. The purpose is to reduce hazards and damages to navigation by removing potential sources of drift.

This project is upstream of the Port of New York and will dismantle and remove deteriorating structures containing significant quantities of floatable materials before they fall apart and become drift. Approximately 18,000 timber piles and floatable materials within the fender systems and maintenance docks will be removed. The demolition of the existing Tappan Zee Bridge will be accomplished piece by piece with the use of cranes, barges, and other waterborne construction vessels. All piers will be cut below the mudline. No blasting will be employed, and demolition will be conducted in a manner such that no debris would enter the waterway. Therefore we believe this project assists in the implementation of the Management of Floatable Debris component of the CCMP. Specifically, removal of the existing Tappan Zee Bridge will assist in the development and implementation of the following related goals of the CCMP and Action Plan:

- Prevent adverse impacts on coastal species resulting from floatables.
- Prevent adverse impacts on commercial and recreational boating resulting from floatables.
- Action Plan Goal 1: Clean up Pollution in the Estuary: All of the Harbor waters will meet the Fishable/Swimmable goal of the Clean Water Act, where attainable.
- Action Plan Goal 1D: All of the Harbor will be essentially free from floatable debris.

#### Stormwater Management Measures

The water quality volume or "first flush" stormwater runoff from the bridge landings in Rockland and Westchester Counties will be collected and conveyed to proposed water quality treatment facilities located in these two areas. Stormwater runoff discharges would be ultimately discharged into the Hudson River, a tidal water body. Post-construction stormwater quality treatment practices are required for runoff discharging to the Hudson River from the bridge landing portions of Interstate 87/287

in both Rockland and Westchester Counties. The water quality volume or "first flush" stormwater runoff from the bridge landings in Rockland and Westchester Counties will be collected and conveyed to proposed water quality treatment facilities located in these two areas. Stormwater runoff from the two bridge landings is currently collected and conveyed to the Hudson River without treatment.

We believe this project assists in the implementation of the Rainfall Induced Discharges component of the CCMP. Specifically, this project element will assist in the development and implementation of the following goals of the CCMP:

- To minimize the loads of pollutants entering the Harbor/Bight from combined sewer overflows, storm water discharges, and non-point source runoff.
- To eliminate the adverse environmental effects of combined sewer overflows, storm water discharges, and non-point source runoff on the Harbor/Bight.

#### Atlantic Sturgeon Outreach Program

One of the threats to the recovery of Atlantic sturgeon populations is by-catch mortality where sturgeon are caught in gill nets and trawls intended to harvest other commercial fishery species. The Atlantic Sturgeon Outreach Program will develop and implement an outreach program directed at the commercial fishing industry with the goal of educating and informing commercial and recreational fisherman of by-catch risks and ultimately reducing commercial by-catch of Atlantic sturgeon in coastal fisheries.

We believe this project assists in the implementation of the Public Involvement and Education component of the CCMP. Specifically, this project will assist in the development and implementation of the following goals of the CCMP:

- To provide for public input to program and policy decision-making on behalf of the diverse stakeholders in the Hudson/Raritan Estuary and the New York Bight.
  - Build community awareness, appreciation, and understanding of the ecosystem and its importance; and encourage action at the community level.
  - Increase communication and foster cooperation among stakeholders and others involved with ecosystem management, protection, and stewardship activities.
  - Enhance educational opportunities for all educational levels.
- To maximize public involvement in the implementation of the CCMP.

#### Shared Use Path

The Project includes a shared-use (bicycle and pedestrian) path (SUP) across its northern structure, allowing connection between the Esposito Trail in Rockland County and Route 9 in Westchester County. Currently, the nearest Hudson River crossings for cyclists and pedestrians are the George Washington Bridge, 15 miles to the south, and the Bear Mountain Bridge, 18 miles to the north.

The SUP will provide a scenic trans-Hudson bicycle and pedestrian connection from Rockland County to Westchester County. With transitions linking South Broadway and Piermont Avenue via Cornelison Avenue in South Nyack and South Broadway/Route 9 in Tarrytown, the 12-foot wide SUP will accommodate bicyclists, runners, inline skaters and pedestrians. Strategically located belvederes along the SUP will offer pedestrians a place to rest and observe the Hudson River estuary while learning about the region's rich history and natural resources through informative signage.

We believe this project will assist in the implementation of the Public Involvement and Education component of the CCMP. Specifically, this project element will assist in the development and implementation of the following goals of the CCMP or the CRP:

- To provide for public input to program and policy decision-making on behalf of the diverse stakeholders in the Hudson/Raritan Estuary and the New York Bight.
- To maximize public involvement in the implementation of the CCMP.
- Section 3.5.1 of the CRP, which seeks to provide public access to the estuary with accessible routes to natural areas, enabling them to enjoy local scenic, natural, cultural, historic, and recreational resources.

### Conclusion

In conclusion, we believe strong relationships exists between each of the projects described above and the provisions of the CCMP such that each project should be viewed as assisting in the development and implementation of the CCMP, the current Action Plan or the Comprehensive Restoration Plan and that such projects are therefore eligible for financial assistance from the CWSRF. We note in this connection, the SRF operating flexibility intended to be afforded to the States and the increasing emphasis on creative use of the CWSRF to meet its objectives. We request EPA's views on the analysis outlined herein and the adequacy of such relationship for purposes of determining whether CWSRF financial assistance can be provided to the projects described herein under Section 1383(c)(3) of the Clean Water Act.

We very much appreciate your willingness to consider our proposal. We're available to discuss questions or concerns with follow-up calls or in person. We would like an indication of your views before June 15. Thank you for your assistance as we consider these projects.

Sincerely,



James R. Levine  
Senior Vice President and  
General Counsel

ANDREW M. CUOMO  
GOVERNOR



STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION  
ALBANY, NEW YORK 12233-1010

JOE MARTENS  
COMMISSIONER

## MEMORANDUM

TO: Administrator McCarthy  
FROM: Commissioner Martens  
SUBJECT: SRF Financing  
DATE: June 23, 2014

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I appreciate the call last week regarding New York's proposed use of its State Revolving Fund (SRF) for various projects associated with the Tappan Zee Bridge project. As the Chairman of Board of the entity that will consider the financings this week, I wanted to respond to your concerns quickly.

The Clean Water Act authorizes states to use our CWSRFs to provide financial assistance for the development and implementation of a comprehensive conservation and management plan (CCMP). The relevant CCMP was written broadly by scores of interested parties and accepted by EPA. Its main objectives are managing habitat and living resources, toxic contamination, dredged material, pathogenic contamination, floatable debris, nutrients and organic enrichment, rainfall induced discharges and public involvement and education. Any project that develops or implements these objectives is eligible for financial assistance from the CWSRF.

The only relevant inquiry is whether each of the projects under consideration can be fairly characterized as implementing one or more objectives of the CCMP. While many of the proposed projects provide benefits to water quality, that is not the test for eligibility. Similarly, if a project is in mitigation of another activity or is mandated by a permit, the question remains whether it implements the CCMP. Congress clearly did not require water quality as a mandatory eligibility criterion or choose to impose such a limitation on projects covered by 33 USC 1383(c)(3).

Dedicated revolving funds have become an increasingly popular tool for sustainable infrastructure finance. The SRF, one of the earliest revolving funds, has been operating and gaining financial momentum since the 1980's. With constrained resources and urgent infrastructure needs, innovation in infrastructure finance is critical today. Reaching for more creative and efficient methods to use existing financial resources and existing programmatic authority to achieve environmental and infrastructure objectives is a necessity and one that EPA supports. Of the \$100 billion in financial assistance provided by the Nation's CWSRFs since inception, only \$6 million was originated in direct support of one of the 28 Estuaries of National Significance. That should change.

The Environmental Facilities Corporation General Counsel Jim Levine provided a detailed analysis to George Ames dated May 28<sup>th</sup> explaining how each of the proposed projects implements the CCMP. Jim's analysis is compelling and, I believe, supports the conclusion that these projects are eligible for SRF financing. I am grateful for the past support we have received from EPA staff to explore novel questions relating to the SRF that have allowed the program to work to achieve its intended scope. The EFC Board meets this week so I would appreciate your feedback and thoughts as soon as possible.

c: Bob Perciasepe



**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 28<sup>th</sup> letter. Rather, the EPA is carefully reviewing the request.

As set forth in the May 28<sup>th</sup> letter, and further referenced in your June 23<sup>rd</sup> 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 28<sup>th</sup> letter and the June 23<sup>rd</sup> 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.

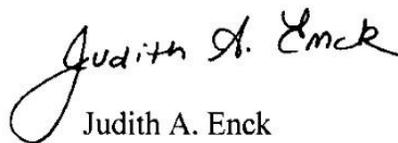
We further note that the EFC's 2014 Final CWSRF Intended Use Plan

(<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

## Board Member Record of Attendance

Member	Policy Committee		2014 Board Meetings								
	8/14/13	8/27/13	1/16	2/13	3/13	4/9	5/8	6/5	6/26	8/14	9/11
J. Martens, Chair	No	No	No	No	No	No	No	No	Yes	No	No
DEC Designee	No	Yes	Yes	Yes	Yes	No	Yes	Yes	N/A	Yes	Yes
C. Perales	No	No	No	No	No	No	No	No	No	No	No
DOS Designee	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
H. Zucker	No	No	No	No	No	No	No	No	No	No	No
DOH Designee	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
C. Kruzansky	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
F. Corcoran	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*	Yes*	No	Yes*
V. DeMarchi	Yes	Yes*	Yes	Yes*	Yes*	Yes	Yes	Yes	Yes	Yes	No
4 <sup>th</sup> Appointee			----	----	----	----	----	----	----	----	----
Length of Meeting (hrs)			0:25	1:09	0:35	0:20	0:20	0:15	1:35	0:40	0:50

Note: \* Attended board meeting via videoconference or teleconference

The Commissioner of the Department of Environmental Conservation, the Secretary of State, and the Commissioner of the Department of Health, by law, may appoint a designee to represent them on the board.

The EFC board is comprised of three ex officio members and four appointees of the Governor. The fourth appointed board member position is currently vacant.



## *Acknowledgement of Fiduciary Duties and Responsibilities*

As a member of the Authority's board of directors, I understand that I have a fiduciary obligation to perform my duties and responsibilities to the best of my abilities, in good faith and with proper diligence and care, consistent with the enabling statute, mission, and by-laws of the Authority and the laws of New York State. The requirements set forth in this acknowledgement are based on the provisions of New York State law, including but not limited to the Public Authorities Reform Act of 2009, Public Officers Law, and General Municipal Law. As a member of the board of directors:

### I. Mission Statement

I have read and understand the mission of the Authority; and the mission is designed to achieve a public purpose on behalf of the State of New York. I further understand that my fiduciary duty to this Authority is derived from and governed by its mission.

I agree that I have an obligation to become knowledgeable about the mission, purpose, functions, responsibilities, and statutory duties of the Authority and, when I believe it necessary, to make reasonable inquiry of management and others with knowledge and expertise so as to inform my decisions.

### II. Deliberation

I understand that my obligation is to act in the best interests of the Authority and the People of the State of New York whom the Authority serves.

I agree that I will exercise independent judgment on all matters before the board.

I understand that any interested party may comment on any matter or proposed resolution that comes before the board of directors consistent with the laws governing procurement policy and practice, be it the general public, an affected party, a party potentially impacted by such matter or an elected or appointed public official. However, I understand that the ultimate decision is mine and will be consistent with the mission of the Authority and my fiduciary duties as a member of the Authority's board of directors.

I will participate in training sessions, attend board and committee meetings, and engage fully in the board's and committee's decision-making process.

### III. Confidentiality

I agree that I will not divulge confidential discussions and confidential matters that come before the board for consideration or action.

### IV. Conflict of Interest

I agree to disclose to the board any conflicts, or the appearance of a conflict, of a personal, financial, ethical, or professional nature that could inhibit me from performing my duties in good faith and with due diligence and care.

I do not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of my duties in the public interest.

Signature: \_\_\_\_\_

Print Name: \_\_\_\_\_

Authority Name: \_\_\_\_\_

Date: \_\_\_\_\_