New York State
ENVIRONMENTAL FACILITIES CORPORATION

MATTHEW J. DRISCOLL, President and CEO

June 24, 2014

VIA ELECTRONIC MAIL

TO THE ADDRESSEES LISTED ON SCHEDULE A ATTACHED HERETO

Ladies and Gentlemen:

Given the importance of the proposed $511 Million loan by the New York State Environmental Facilities Corporation (EFC) to the New York State Thruway Authority (NYSTA) for certain projects related to the New New York Bridge (the Loan), I wanted to promptly respond to your June 24, 2014 letter. I also feel compelled to respond to some fundamental misconceptions about the broad mandate and inherent flexibility available under the Clean Water State Revolving Fund (CWSRF) program.

In your letter you call upon the EFC Board of Directors to reject the Loan or, in the alternative, postpone any decision. In support of your request you present three arguments. First, you argue that in your judgment some (but apparently not all) of the projects covered by the Loan provide insufficient environmental and/or water quality benefits. Second, you allege that the federal Environmental Impact Statement (EIS) prepared for the bridge replacement project fails to reference the New York/New Jersey Harbor Estuary Comprehensive Conservation and Management Plan ("CCMP") or establish how these projects directly benefit water quality. Finally, you express concern that the Loan will set a precedent which, in your estimation, is bad policy because in the future it might result in funds being diverted from traditional wastewater infrastructure projects that you view as more worthy. Whether or not there is any merit to these assertions, they miss the point. Under the controlling statutes and regulations, the relevant inquiry for EFC is whether each of the projects under consideration can be 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, whether an activity or project is in mitigation of another activity or is mandated by a permit, has no bearing on its eligibility for CWSRF financing.

For purposes of the Loan the relevant question is whether each of projects under consideration implements the CCMP. Congress knew how to require water quality as a mandatory CWSRF eligibility criterion. It did so in several places throughout the Clean Water Act. See e.g. 42 U.S.C. 1292 (2)(A) which defines treatment works so that land acquisition must be "an integral part of the treatment process" to be eligible for funding. However, when it elected to overhaul the narrow construction grants program in 1987, Congress chose to encourage states to finance projects which help protect, preserve or increase public access to estuaries. To advance this decision Congress elected not to require that such projects demonstrate a water quality benefit or even be integral to achieving such benefits. Rather, estuary projects are covered by 33 USC 1383(c)(3) and can be financed from the CWSRF program whenever they "implement" a comprehensive estuary management plan.

While your arguments question the advisability of the long-standing Congressional decision to allow funding for projects that simply advance the goals of the CCMP, they offer no reason to conclude that the proposed projects are not eligible for CWSRF financing pursuant to 33 USC 1383(c)(3). In this regard it is noteworthy that EPA has called upon the states to 'tap the untapped potential' of the CWSRF program. In recognition of the flexibility afforded by the CWSRF program, EPA has encouraged states to expand the use of their loan programs. Among the projects publicized by EPA was Maine's decision to use CWSRF funds to allow private foresters to buy logging equipment and funding the clean-up of brownfield sites. These activities, publically cited with approval by EPA, support a determination of eligibility for the projects being presented to EFC as part of the Loan.

You also question the process used to consider the Loan. Admittedly projects can be added to the Intended Use Plan (IUP) and move to a financing decision quickly. However, this is nothing new. EFC has amended its IUP many times in the past using this process without objection from EPA or any stakeholders. Indeed, most applicants see speed as beneficial. Moreover, Section 2.1.1.3 of New York's IUP fully discloses EFC's intent to consider projects that are eligible pursuant to 33 USC 1383(c)(3). Furthermore, no one can legitimately question the adequacy of the opportunity for public review and comment on these projects. As your letter notes, these projects were part of the EIS and were thoroughly reviewed and commented upon in that context. Accordingly, it is difficult to understand how delaying consideration of the Loan helps anyone.

Finally, you seem to allege that there are funding needs more pressing than the Loan which EFC is ignoring. Nothing could be further from the truth. Over the past several funding cycles, there has been a shortage of willing CWSRF borrowers. While EFC has taken aggressive steps to increase the demand for funding, I am confident that the Loan will not materially impact EFC's ability to discharge its other important responsibilities.

EFC is being called upon to consider a novel financing that may indeed stimulate new thinking about uses of the CWSRF. However, now and in the future, EFC will be guided by the clear mandates of the applicable law and available guidance.

Thank you for your input and I look forward to working with you on this important project.

Sincerely

Joe Martens

Joseph J. Martens
Commissioner

JJM/amh
Attachment

SCHEDULE A

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