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Environmental Advocates of New York
New York League of Conservation Voters
NY/NJ Baykeeper
New York Public Interest Research Group
Regional Plan Association
Reinvent Albany
Riverkeeper
Sierra Club Atlantic Chapter
Soundkeeper
Tri-State Transportation Campaign

July 9, 2014

VIA ELECTRONIC MAIL

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

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

Dear Regional Administrator Enck:

We write to request that you do not allow the New York State Environmental Facilities Corporation (“EFC”) to loan \$511 million from the Clean Water State Revolving Loan Fund (“CWSRF”) to the New York State Thruway Authority (“NYSTA”) for the New York Bridge (“Tappan Zee”) construction project.

EFC’s unprecedented plan to finance Tappan Zee bridge project construction activities with CWSRF funds is improper as a matter of law and public policy. Additionally, this plan has been crafted and executed without giving the public its due right to participate in the decision-making process required under the CWSRF. Finally, it would stand as a dangerous precedent that could place the future integrity of the CWSRF program in jeopardy.

Your [June 25, 2014 letter](#) to Commissioner Joseph Martens, chairman of the EFC Board of Directors, indicates that your agency has serious concerns about the eligibility of the Tappan Zee project for CWSRF funding, even after reading EFC President Matthew J. Driscoll’s May 28, 2014 letter attempting to justify this proposed loan. These concerns, which we share, include the following:

- *EPA remains unconvinced of the eligibility for CWSRF funding of core bridge construction and demolition-related elements, such as construction trench dredging and dredged material disposal; armoring the construction trench with stone that destroys benthic habitat; and, construction of a pedestrian path.*
- *EPA is also unconvinced that the Tappan Zee loan meets applicable standards for public participation, in that EFC added the proposed project four months after finalization of the eligible projects list, or Intended Use Plan (“IUP”), without following legal requirements for public notice and comment, which it circumvented by calling this unprecedented \$511 Million loan merely a “minor modification” of the IUP.*
- *EPA has challenged EFC’s claim that the Tappan Zee loan meets the applicable legal standard for basic project eligibility, which is that the work contemplated for funding must be “for implementation” of the NY-NJ Harbor and Estuary Management Plan. EPA observes, in this regard that the projects proposed for funding “appear to have, as a primary aim, the mitigation of problems created by an ongoing construction project.”*
- *EPA also questions the propriety of making the proposed loan to a bridge project located 15 miles north of New York City with funds designated for improving wastewater treatment plants within New York City.*

June 25 EPA letter at pages 2-3.

Each of these concerns, as well as the others you raise in your June 25th letter, require EPA not to allow EFC to make the Tappan Zee loan, as the loan is contrary to Sections 603, 605 and 606 of the Clean Water governing law and the December 2006 Amended and Restated Operating Agreement between EPA and EFC for the Organization and Administration of the New York State Revolving Loan Fund (“CWSRF Operating Agreement”).

* * *

Since its inception, the CWSRF program has served as the nation's largest water quality financing source, helping communities across the country meet the goals of the Clean Water Act by improving water quality, protecting aquatic wildlife, protecting and restoring drinking water sources, and preserving our nation's waters for recreational use. In recent years, the CWSRF programs provided, on average, more than \$5 billion annually to fund water quality protection projects for wastewater treatment, nonpoint source pollution control, and watershed and estuary management. Over the last two and a half decades, the CWSRFs have provided over \$100 billion, funding more than 33,320 low-interest loans.¹

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

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

Indeed, our organizations are not aware of any instance where CWSRF funding has been made available by EPA, EFC or any state to finance costs associated with transportation infrastructure construction activities, such as the pre-construction dredging or demolition of the current Tappan Zee Bridge, as contemplated by EFC in this case.

Based upon the limited information that has been made available to the public about this proposal, we understand that the vast majority of the \$511 million loan would be utilized by NYSTA, **not** for the types of genuine environmentally beneficial projects for which CWSRF funds are appropriately made available,² **but rather** to finance a portion of the core costs of a transportation project, *i.e.*, general bridge construction and demolition work. These costs would include over \$100 million for construction-related dredging and dredge disposal, \$30 million for "armoring" the 12-foot deep dredged trench with stone and gravel, \$65 million for demolition and removal of the existing Tappan Zee Bridge, and \$67 million for a shared-use path. Over \$170 million in indirect costs for the Tappan Zee bridge project also is sought to be funded from this loan.

Indeed, it appears that at most only a few million of the \$511 million proposed financing would be utilized for genuine environmentally beneficial projects, and each of those projects has been expressly required as mitigation for the unavoidable adverse environmental impacts associated with the bridge construction and demolition project.

It bears noting that NYSTA's initial pre-application for the loan in question misrepresents itself on this last point. On NYSTA's May 30, 2014 proposed "[Project Listing Form](#)", the project is defined as the "Water Quality Protection Elements of the New New York Bridge Project." An answer of "no" is given to the question whether NYSTA is "under an enforcement order, SPDES permit or other permit requiring construction of the project." In direct contravention of this claim, a [March 25, 2013 permit](#) issued by the New York State Department of Environmental Conservation **requires** that NYSTA implement almost all of the "Water Quality Protection Elements of the New New York Bridge Project" listed in the loan application.

* * *

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

The proposed Tappan Zee Bridge loan violates the Clean Water Act in several ways. The first is that it denies the public its due right to notice and comment on the proposed loan.

The Tappan Zee project loan was not on the list of eligible projects known as the 2014 IUP, when EFC finalized the IUP in February. Four months later, EFC attempted to insert the Tappan Zee project into the IUP, with absolutely no public notice or opportunity to comment, in direct contravention of Clean Water Act requirements found in EPA regulations codified at 40 C.F.R. §35.3150(c)], which require that the State's IUP contain a list of the "national estuary protection activities under sections . . . 320 of the Act that the State expects to fund from its SRF,"³ and that the IUP "must be subjected to public comment and review before being submitted to EPA."⁴

The need for public review and comment on such an enormous, unprecedented and fundamentally-suspect proposal should have been readily apparent to EFC. Yet, EFC completely disregarded this important consideration, by purporting to amend the IUP just two weeks ago to include the Tappan Zee project, providing no public notice or opportunity to comment whatsoever. The State's claim, in its June 11, 2014 Environmental Notice Bulletin⁵, that adding a \$511 million nontraditional transportation infrastructure project such as the Tappan Zee Bridge to the CWSRF IUP Annual List is a "minor modification to the IUP" which does not require public notice or comment is both incorrect as a matter of law and fundamentally disrespectful to the individuals and groups involved in working to protect the Harbor and the Hudson River and assure the integrity of state and federal government operations.

* * *

Additionally, NYSTA's proposal to utilize CWSRF financing for various project components associated with the construction of the new Tappan Zee Bridge and the demolition of the old bridge violates the substantive eligibility standard of federal law, because such projects are not among the "projects eligible for assistance" specified in Section 603(c) of the federal Clean Water Act.

The project components obviously do not fall within the first two categories set forth in the statute, *i.e.*, they are not "for construction of publicly owned treatment works," nor do they qualify as "implementation of a management program" established under CWA § 319.⁶

³ 40 C.F.R. § 35.3150(b)(1)(ii).

⁴ 40 C.F.R. § 35.3150(a).

⁵ DEC, Environmental Notice Bulletin, June 11, 2014, available at http://www.dec.ny.gov/enb/20140611_not0.html.

⁶ CWA § 1383(c)(1) & (2).

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

While a conservation and management plan exists for the New York/New Jersey Harbor Estuary—i.e., the Comprehensive Conservation and Management Plan (“CCMP”)⁷—the CCMP was developed and adopted in 1996, so it should go without saying that the NYSTA’s Tappan Zee Bridge construction and demolition projects are not intended for the CCMP’s “development.”

With respect to the “implementation” of the CCMP, the suggestion by NYSTA that an enormous transportation infrastructure project such as the Tappan Zee Bridge construction and demolition can be considered a project “for implementation” of that plan completely fails to pass muster. Not a single reference to the CCMP can be found in the Final Environmental Impact Statement (“FEIS”) for the Tappan Zee Bridge construction project that was finalized in July 2012.⁸ And, any suggestion that the components of the construction project for which financing is sought, which were all subject to review for their admittedly adverse impacts in the FEIS, are being done “for the . . . implementation” of the CCMP must be rejected.

Indeed, the vast majority of the Tappan Zee construction and demolition work now proposed for CWSRF funding, such as construction trench dredging, dredged material disposal and trench armoring, and demolition of the old bridge, are not part of any applicable estuary management plan. To the contrary, they were previously admitted by the state to be environmentally damaging activities, not beneficial ones.⁹ In fact, the amount of dredging being done for this project was cut in half from original estimates, in order to **reduce** the adverse impact associated with that dredging, a fact Governor Cuomo celebrated in his [December 19, 2012 Press release](#) announcing the selection of the winning bidder to construct the new Tappan Zee bridge.

We are aware that Chairman Martens wrote to you on July 2, 2014, attempting to justify the eligibility of the Tappan Zee project for CWSRF funding by claiming, for example, that “removal of [dredged] sediments will reduce the overall mass of

⁷ The CCMP is available at <http://www.harborestuary.org/about-planningdocs.htm>.

⁸ The FEIS is available at <http://www.newnybridge.com/documents/feis/index.html>.

⁹ The Tappan Zee bridge project [Environmental Impact Statement](#) says, in this regard:

In-water construction activities such as dredging, armoring of the dredged channel, installation of cofferdams and bulkhead, driving of piles, and demolition of the existing bridge have the potential to affect aquatic biota, including threatened or endangered species, and significant habitat areas of the Hudson River (e.g., Significant Coastal Fish and Wildlife Habitat, U.S. Fish and Wildlife Service [USFWS] Significant Habitats, and Essential Fish Habitat [EFH]) within the study area. [EIS, Page 18-85]

contamination in the estuary.” What Chairman Martens fails to point out is that the dredged material being removed to create the construction trench for the Tappan Zee bridge project is no different in contamination levels from surrounding areas in the Tappan Zee section of the Hudson; that this trench is not part of any remedial dredging plan; that the levels of contamination are not very high;¹⁰ and that such low-level background contamination only goes a foot or two beneath the surface, in stark distinction to the 14-foot deep construction trench which NYSTA created specifically to accommodate deep-draft bridge construction barges.

Basic bridge building activities like construction trench dredging, trench armoring, demolition of the current Tappan Zee bridge, erection of a shared use path, etc, simply do not “implement” the plan to improve the New York-New Jersey Harbor & Estuary, which is known as the Comprehensive Conservation and Management Plan (“CCMP”). As the Citizens Advisory Committee (CAC) of the New York New Jersey Harbor & Estuary Program, an official government advisory committee established to support and advocate for the harbor and estuary, put it, in a [June 25 letter](#) to EFC Board Chair Martens:

It is our understanding that New York State Thruway Authority (NYSTA) intends to rely upon CWA § 603(c)(3), claiming that the Tappan Zee Bridge project components for which it seeks financing qualify as being “for development and implementation of a conservation and management plan” under CWA § 320. This is untrue for nearly all of the funds proposed to be loaned to NYSTA.

For NYSTA to suggest construction activities such as new bridge construction, dredging and demolition of the current Tappan Zee Bridge are projects that advance the CCMP is the exact opposite of the intent of the SRL program, which was meant to be used for improvements to wastewater treatment infrastructure and habitat protection.

HEP CAC letter to Martens, dated June 25, 2014, at page 2.

In addition, the proposed EFC loan includes over \$170 million in “pro-rated project elements” - \$38.2 million in ancillary costs and \$132.1 million in development costs. None of the materials that we have seen from the EFC explain the justification for including a pro-rated portion of the overall Tappan Zee Bridge project costs in the CWSRF loan. Even if the \$340+ million in projects covered under the loan were eligible for the CWSRF – a position with which our groups strenuously disagree – we do not see how the EFC can possibly justify inflating this number by 50% by shoehorning an additional \$170 million in overall project costs into the loan.

¹⁰ See [Tappan Zee Bridge EIS](#), at Page 18-77.

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

The public policy implications of allowing CWSRF funds to be siphoned off for transportation and other non-clean water projects are dire. New York State admits that the lack of funding for water quality projects in our state has [reached “crisis” proportions](#). According to the 2013 Report Card for America’s Infrastructure, published by the American Society of Civil Engineers, the State of New York has reported \$27 billion in drinking water infrastructure needs and \$29.7 billion in wastewater infrastructure needs over the next 20 years.¹¹

Just last month, leaders in 126 Hudson Valley cities, towns and villages responded to a survey on infrastructure issues¹² by expressing significant concern over the state of their water infrastructure. In fact, 60% of them consider their water infrastructure as “needing work in the next three years” or “at risk of imminent failure.”¹³ Many of these leaders expressed concern that these limitations are constraining economic development opportunities and that new development would overtax already strained systems:

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

-Town of Coxsackie Supervisor Alex Betke. [Patterns Report at p.2]

¹¹ The 2013 Report Card for New York State is available at <http://www.infrastructurereportcard.org/a/#p/state-facts/new-york>.

¹² Hudson Valley Pattern for Progress, *Infrastructure Planning and Investment: A Widening Gap*, May 2014, available at <http://pattern-for-progress.org/sites/default/files/2014%20Infrastructure%20report%20FINAL.pdf>.

¹³ *Id.*, at 2.

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

* * *

Finally, we are very concerned that the use of CWSRF funds to pay for a transportation project could lead to continued attacks on the federal CWSRF program. It is no secret that many members of the current Congress wish to dramatically slash EPA's budget, and evidence of such misuse of CWSRF funding earmarked by Congress for genuine water quality projects could be just the ammunition clean water adversaries seek to more effectively attack the state revolving fund program. It also seems clear to us from the [June 23, 2014 memo](#) from Chairman Martens to EPA Administrator McCarthy that this will not be the last time New York seeks to use CWSRF funds for infrastructure projects like the Tappan Zee Bridge.

* * *

As recognized in your own June 25, 2014 letter, and by the torrent of criticism for the proposed Tappan Zee bridge loan emanating from editorial boards across the state,¹⁴ this is a matter of the utmost seriousness. New York State is claiming that the "broad mandate and inherent flexibility" of Clean Water Act funding authorizes it to make a loan for basic bridge construction activities that does not meet the letter or spirit of the Clean Water Act. This loan does not "tap the untapped potential" of the Clean Water Act loan program, as the state would have it. It would *degrade* that program, *rob* it of half a billion in funds needed to close a widening clean water infrastructure investment gap and stand as a *disastrous precedent* that will empower opposition to additional Clean Water Act funding.

¹⁴ Editorial criticism of the Tappan Zee bridge loan proposal has been withering. A [June 27 Journal News editorial](#) called it a "betrayal" of the public's right to know of and participate in the formation of plans for the financing of the new bridge, which "shames" the Governor's promise of transparency on this project. A [June 24 New York Times Editorial](#) characterized it as a "threat" to proper funding of water infrastructure needs which has been "unnecessarily rushed" without proper public notice. A [July 1 Times Union editorial](#) calls it a "questionable use" of Clean Water Act funds which "sets a bad precedent." A [July 8 Watertown Daily Times Editorial](#) calls it "bad governance" and a "raid" on the CWSRF.

Regional Administrator Judith A. Enck
United States Environmental Protection Agency
July 9, 2014
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EPA raised the right questions about the proposed Tappan Zee bridge CWSRF loan, in your June 25, 2014 letter to Chairman Joseph Martens, and it has received no satisfactory answer from the State. EPA should disallow the Tappan Zee bridge loan, as it violates both the letter and spirit of the Clean Water Act and would jeopardize the integrity of the CWSRF program. EPA must refuse to allow Clean Water Act funding to be misused in this way.

Respectfully yours,

/s/Adrienne Esposito
Citizens Campaign for the Environment

/s/Susan Lerner
Common Cause NY

/s/Peter Iwanowicz
Environmental Advocates of New York

/s/Marcia Bystryn
New York League of Conservation Voters

/s/Debbie Mans
NY/NJ Baykeeper

/s/Laura Haight
New York Public Interest Research Group

/s/Robert Yaro
Regional Plan Association

/s/John Kaehny
Reinvent Albany

/s/Paul Gallay
Riverkeeper

/s/Roger Downs
Sierra Club Atlantic Chapter

/s/Terry Backer
Soundkeeper

/s/Veronica Vanterpool
Tri-State Transportation Campaign

cc: (all via email)
A. Cuomo, NYS Governor
C. Schumer, U.S. Senate
K. Gillibrand, U.S. Senate
N. Lowey, U.S. House of Representatives
A. Stewart-Cousins, NYS Senate
D. Carlucci, NYS Senate
L. Krueger, NYS Senate
J. DeFrancisco, NYS Senate
S. Silver, NYS Assembly Speaker
J. Brennan, NYS Assembly
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